No._____

IN THE

SUPREME COURT OF THE UNITED STATES

CLIFTON RAYE (Pro se)

Petitioner-Appellant

VERSUS

WARDEN, TIM HOOPER
LOUISIANA STATE PENITENTIARY

Respondent-Appellee

EXHIBIT[S] IN SUPPORT OF
PETITION FOR CERTIORARI

EXHIBIT "A"	Judgment of the Louisiana Fifth Circuit Court of Appeal
EXHIBIT "B"	Judgment of the Louisiana Supreme Court
EXHIBIT "C"	Writ of Habeas Corpus
EXHIBIT "D"	Magistrate Judge's Report & Recommendation
EXHIBIT "E"	Petitioner's Objection to Magistrate Judge's Report & Recommendation
EXHIBIT "F"	U.S. District Judge's Order and Reasons
EXHIBIT "G"	COA to the United States Fifth Circuit Court of Appeal
EXHIBIT "H"	United States Fifth Circuit Court of Appeal's Order Denying COA

EXHIBIT "H"

United States Court of Appeals for the Fifth Circuit

No. 22-30140

CLIFTON RAYE,

Petitioner—Appellant,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary*,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Louisiana
USDC No. 2:21-CV-354

ORDER:

Clifton Raye, Louisiana prisoner # 708973, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application, which challenged his conviction and sentence for two counts of aggravated rape of a victim under the age of 13 years; one count of sexual battery upon a juvenile under the age of 13 years; one count of sexual battery upon a juvenile under the age of 15 years; and one count of oral sexual battery upon a juvenile under the age of 15 years. Raye raises claims that his trial counsel was unlicensed to practice law in Louisiana and that his counsel was ineffective for failing to object to the sufficiency of the evidence, prosecutorial misconduct, and a fatally defective indictment. He also

contends that the evidence was insufficient to sustain his conviction and that the prosecution engaged in misconduct.

Raye does not meaningfully address the district court's dismissal of his claims that the prosecution engaged in misconduct by eliciting other-crimes testimony from a witness and his counsel was ineffective for failing to object to hearsay testimony and to the prosecution's offer of perjured testimony. Those claims are abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). Because Raye otherwise fails to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling," a COA is DENIED. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see* 28 U.S.C. § 2253(c)(2).

CORY T. WILSON
United States Circuit Judge

22-30140

Mr. Clifton Raye
#708973
Louisiana State Penitentiary
General Delivery
Angola, LA 70712-0000

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 04, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-30140 Raye v. Hooper
USDC No. 2:21-CV-354

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Whitney M. Jett, Deputy Clerk
504-310-7772

Ms. Andrea F. Long
Ms. Carol L. Michel
Mr. Clifton Raye

EXHIBIT "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CLIFTON RAYE	**CIVIL ACTION**
VERSUS	**NO. 21-354**
DARREL VANNOY, WARDEN	**SECTION: "E"(5)**

REPORT AND RECOMMENDATION

This matter was referred to the undersigned United States Magistrate Judge to conduct a hearing, including an evidentiary hearing, if necessary, and to submit proposed findings and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), and as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Upon review of the entire record, the Court has determined that this matter can be disposed of without an evidentiary hearing. *See* 28 U.S.C. § 2254(e)(2). For the following reasons, **IT IS RECOMMENDED** that the petition for habeas corpus relief be **DISMISSED WITH PREJUDICE**.

Procedural History

Petitioner, Clifton Raye, is a convicted inmate currently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. On September 26, 2013, Raye was charged with five different counts involving the juvenile victim (DOB 7/6/1999), including two counts of aggravated rape (victim under 13), two counts of sexual battery (one count - victim under 13 years of age), and one count of oral sexual battery.[1] He elected a bench trial and was found guilty as charged on all counts on March 1, 2016.[2] On March 10, 2016, he was

[1] State Rec., Vol. 1 of 10, Grand Jury Indictment, Jefferson Parish.

[2] State Rec., Vol. 1 of 10, Trial Minute Entry, 3/1/2016.

sentenced to life imprisonment on counts one and two, 25 years on count three, and 10 years on counts four and five, all without benefit of parole, probation or suspension of sentence, to be served concurrently.[3]

In December 2016, he filed an application for post-conviction relief, alleging that he was denied the right to appeal and seeking an out-of-time appeal.[4] On December 20, 2016, the district court granted him an out-of-time appeal.[5] In his one assignment of error on direct appeal, he argued that there was insufficient evidence to support the convictions. On October 25, 2017, the Louisiana Fifth Circuit Court of Appeal affirmed his convictions and sentences.[6] On June 15, 2018, the Louisiana Supreme Court denied his application for writ of certiorari.[7]

On or about August 15, 2019, Raye submitted a second application for post-conviction relief to the state district court.[8] In that application, he raised nine claims alleging ineffective assistance of trial counsel for the following acts or omissions: (1) generally

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[3] State Rec., Vol. 1 of 10, Sentencing Minute Entry, 3/10/2016.

[4] State Rec., Vol. 1 of 10, Uniform Application for Post-Conviction Relief.

[5] State Rec., Vol. 1 of 10, State District Court PCR Judgment, 12/20/2016.

[6] *State v. Raye*, 2017-KA-136 (La. App. 5 Cir. 10/25/17), 230 So.3d 659; State Rec., Vol. 5 of 10. On error patent review, the court of appeal remanded for the statutorily required written notifications to defendant and correction of the commitment order. *See* State Rec., Vol. 1 of 10, Minute Entries 1/9/2018 and 3/1/2018.

[7] *State v. Raye*, 2017-KO-1966 (La. 2018), 257 So.3d 674; State Rec., Vol. 5 of 10.

[8] State Rec., Vol. 6, 9 of 10, Uniform Application for Post-Conviction Relief and Memorandum in Support. His request to amend was granted and claim eight was added. State Rec., Vol. 2 of 10, Petitioner's Motion to Amend and District Court's Amended Order dated Oct. 11, 2019.

prior to and during trial; (2) failure to object to evidence insufficient to sustain convictions; (3) failure to object to prosecutorial misconduct; (4) failure to secure expert testimony; (5) failure to object to perjured testimony at trial; (6) failure to file various pretrial and post-trial motions; (7) failure to object when the prosecution violated the witness sequestration order; (8) failure to object to a defective indictment; and (9) cumulative error. On February 12, 2020, the state district court denied his application for post-conviction relief.[9] He filed a supervisory writ application raising five claims of error with various subclaims concerning ineffective assistance of counsel. On April 23, 2020, the Louisiana Fifth Circuit denied his supervisory writ application.[10] On January 20, 2021, the Louisiana Supreme Court likewise denied relief finding that he failed to show that he received ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984).[11]

On February 18, 2021, Raye filed the instant federal application for habeas corpus relief.[12] In that application, he raises five claims for federal relief: (1) he was denied effective assistance of counsel before and during trial; (2) trial counsel was ineffective for failing to object to evidence that was insufficient to sustain the convictions; (3) trial counsel was ineffective for failing to object to prosecutorial misconduct; (4) trial counsel was ineffective for failing to object to perjured testimony at trial; and (5) trial counsel was ineffective for failing to object to a defective indictment. The State does not argue that the

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[9] State Rec., Vol. 3 of 10, State District Court Order Denying PCR, 2/12/2020.

[10] State Rec., Vol. 3 of 10, *Raye v. Cain*, 20-KH-114 (La. App. 5 Cir. Apr. 23, 2020).

[11] *Raye v. Cain*, 2020-KH-0665 (La. 1/20/2021), 308 So.3d 1148; State Rec., Vol. 8 of 10.

[12] Rec. Docs. 1, 5, Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus.

federal petition is untimely, and concedes that the claims, for the most part, have been exhausted in the state courts.[13] Raye filed a traverse to the State's response.[14]

Facts

On direct appeal, the Louisiana Fifth Circuit summarized the facts adduced at trial:

> At trial, the victim, C.R.,[15] testified that when she was eleven or twelve years old, the defendant, her biological father, forced her to begin a sexual relationship with him. More than once a week, when her mother was at work, defendant would bring C.R. into his bedroom, lock the door, and make her perform oral sex on him. C.R. described several incidents at her home where defendant penetrated her vagina with his penis, massaged her breasts, performed oral sex on her, and digitally penetrated her anus. C.R. also testified that, on one occasion, defendant attempted to restrain her with a belt while he attempted to have anal sex with her, but she broke free.
>
> C.R. stated that she did not report the abuse because she was scared and did not want to get her father into trouble. C.R. testified that she denied that any abuse had taken place when she was first asked about it by her step-sisters, but later disclosed what had happened to her after her stepsister, S.D., told her about a similar personal experience she had previously with defendant.[16]
>
> S.W., C.R.'s step-sister, testified that, in late March or early April of 2013, she lived with C.R., defendant, and her mother in Jefferson Parish. She recalled that, during that time, one afternoon she arrived home and saw C.R.'s school bag, but could not find C.R. S.W. knocked on defendant's bedroom door, which was locked. S.W. knocked on the door to hand defendant a telephone. A short time later, defendant and C.R. both exited the bedroom.[17] S.W. testified that,

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[13] Rec. Doc. 14, pp. 3, 7.

[14] Rec. Doc. 20. Petitioner's traverse with attached exhibits that included confidential medical records pertaining to the juvenile victim were sealed by order of the Court. Rec. Doc. 19.

[15] Testimony established C.R.'s birthdate as July 6, 1999, and she was 16 at the time of trial. To preserve the confidentiality of the minor victim's identity in this case, the victim, the victim's family members, and other related witnesses will be referred to by their initials, pursuant to La. R.S. 46:1844(W).

[16] S.D. testified at trial that defendant had sexually abused her.

[17] C.R. testified that during this incident, defendant had forced her to perform oral

in another incident, she woke up in the early morning hours to use the restroom and saw defendant in C.R.'s bed. Because she suspected that something inappropriate may have been happening between defendant and C.R., S.W. called her sister S.D. to discuss her concerns. S.W. and S.D. decided to discuss the suspicions at their grandparents' home in Lafayette during the upcoming Easter holiday.

Several days later, while in Lafayette, C.R. was asked by S.W. and S.D. about the suspected sexual abuse by defendant. C.R. initially denied any abuse, but eventually disclosed to S.W. and S.D. that defendant had performed oral sex on her and that she had performed oral sex on defendant. This information was relayed to C.R.'s mother, E.R., who confronted defendant with the allegations. Defendant denied having any sexual contact with C.R.

Tracey Jackson, an investigator for the Department of Children and Family Services (DCFS), testified that she was notified of C.R.'s complaint against defendant on April 9, 2013, and she interviewed C.R. on April 10, 2013. During the interview, C.R. told Ms. Jackson that defendant had sexually abused her numerous times over the preceding two-year period, specifically that defendant had "fondle[d] her," "touch[ed] her chest," "touched her vaginal area" penetrating her with his fingers as well as his penis, penetrated her anus with his fingers, performed oral sex on her, and that she performed oral sex on defendant. Ms. Jackson relayed this information to the Jefferson Parish Sheriff's Office (JPSO) following the interview with C.R.

Detective Ronald Raye, of the JPSO Personal Violence Unit, testified that he went to C.R.'s home[18] and brought her to Children's Hospital for a physical examination. Detective Raye prepared defendant's arrest warrant after speaking to Ms. Jackson, watching C.R.'s interview at the Children's Advocacy Center and reviewing C.R.'s hospital records.

Ann Troy testified that she is a forensic nurse practitioner who works with child victims of sexual abuse at the Audrey Hepburn Care Center in New Orleans. Ms. Troy recounted that she interviewed C.R. on April 27, 2013, and C.R. recounted a "detailed history of sexual abuse" by defendant over a two-year period that included oral sex, vaginal and anal penetration with his penis, and forcing C.R. to masturbate him. Ms. Troy found C.R.'s statements to be consistent with the way in which children disclose sexual abuse. She further noted that the physical findings from her examination of C.R. were normal.

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sex on him.

[18] JPSO Deputy Brent Baldassaro testified that he was the first officer to respond to C.R.'s home after the complaint was made. At that time, Deputy Baldassaro determined that the JPSO Personal Violence Unit needed to be notified.

However, Ms. Troy testified that it is not uncommon for a child with a history of vaginal penetration to present with normal physical findings. Ms. Troy further explained that delayed reporting is very common amongst children who have been sexually abused as they tend to blame themselves for what has happened to them.

The trial judge was shown the video of an interview between former forensic interviewer, Erika Dupepe, and C.R., which took place in April of 2013[19] at the Children's Advocacy Center in Jefferson Parish. During that interview, C.R. described defendant's sexual abuse of her in detail. C.R. stated that, at age 11, defendant would go to her bedroom while she was sleeping and touch her chest and buttocks. Defendant also touched her "privates" and made her touch his "privates" while her mother was at work or asleep. Beginning at age 12, defendant vaginally penetrated C.R. with his penis twice, and digitally penetrated her anus three times. C.R. described one incident when defendant forced her to perform oral sex on him. She was 12 at the time and in seventh grade. Defendant forced C.R. to perform oral sex on him on more than one occasion. The last incident of sexual abuse took place in March of 2013, when defendant forced C.R. to masturbate him and perform oral sex on him. During that particular time, C.R.'s sister knocked on the defendant's bedroom door to give him the phone, and defendant told C.R. to hide in his bathroom.

Defendant testified at trial and denied that any sexual contact had taken place between himself and C.R. He further testified that he believed the accusations against him were made out of anger by C.R. and S.W.[20]

Standards of Review on the Merits

Title 28 U.S.C. § 2254(d)(1) and (2), as amended by The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides the applicable standards of review for pure questions of fact, pure questions of law, and mixed questions of both. A state court's purely factual determinations are presumed to be correct and a federal court will give deference to

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[19] The exact date of the interview is not clear from the record. Prior to when the tape was shown to the trial judge, Ms. Dupepe testified as to the general procedure of making a recorded interview with a victim at the Children's Advocacy Center. At the conclusion of the video, Ms. Dupepe testified that the video was an accurate representation of the interview that she conducted with C.R.

[20] *State v. Raye*, 230 So.3d at 662-64 (footnotes in original).

the state court's decision unless it "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also* 28 U.S.C. § 2254(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."). With respect to a state court's determination of pure questions of law or mixed questions of law and fact, a federal court must defer to the decision on the merits of such a claim unless that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The "'contrary to' and 'unreasonable application' clauses [of § 2254(d)(1)] have independent meaning." *Bell v. Cone*, 535 U.S. 685, 694 (2002). A state court decision is "contrary to" clearly established precedent if the state court applies a rule that contradicts the governing law set forth in the United States Supreme Court's cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of the United States Supreme Court and nevertheless arrives at a result different from United States Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000); *Wooten v. Thaler*, 598 F.3d 215, 218 (5th Cir.), *cert. denied*, 131 S.Ct. 294 (2010). An "unreasonable application" of [United States Supreme Court] precedent occurs when a state court "identifies the correct governing legal rule... but unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 407-08; *White v. Woodall*, 572 U.S. 415, 426 (2014).

It is well-established that "an unreasonable application is different from an incorrect one." *Bell*, 535 U.S. at 694. A state court's merely incorrect application of Supreme Court precedent simply does not warrant habeas relief. *Puckett v. Epps*, 641 F.3d 657, 663 (5th Cir. 2011) ("Importantly, 'unreasonable' is not the same as 'erroneous' or 'incorrect'; an incorrect application of the law by a state court will nonetheless be affirmed if it is not simultaneously unreasonable."). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable" under the AEDPA. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Section 2254(d) preserves authority to issue the writ in cases where there is "*no possibility* fairminded jurists could disagree that the state court's decision conflicts with [United States Supreme Court] precedents." *Id.* (emphasis added); *see also Renico v. Lett*, 559 U.S. 766, 779 (2010) ("AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.").

Analysis

Raye was represented throughout his proceedings by Mr. Wayne E. Walker and Mr. William Doyle. His federal application raises multiple claims of ineffective assistance of counsel involving one or both counsel of record. Claim one alleges generally that counsel rendered ineffective assistance prior to and during trial. As grounds for relief, he argues that he was denied counsel entirely because lead counsel of record, Wayne E. Walker, "impermissibly proceeded to represent petitioner in pre-trial and trial proceedings without first being registered and authorized to practice law in the State of Louisiana."[21] He also

[21] Rec. Doc. 5-3, p. 12.

cites several alleged deficiencies pertaining to Mr. Doyle individually. He lists ten additional subclaims, with no supporting argument, as part of claim one, wherein he alleges:

> Petitioner further claims that his trial defense counsel failed to: Investigate and obtain all evidence in possession of the State; 2) Adequately confront and cross-examine state witnesses Mrs. S.D., S.W. and C.R.; 3) Failure to put forth a defense; 4) Cross-examine witness for impeachment purposes; 5) to make timely objections to hearsay; 6) Fail to investigate and present mitigating evidence; 7) to object to trial courts finding of guilt without first excluding every reasonable hypothesis of innocence; 8) to object to evidence insufficient to sustain conviction; 9) to put the States case to any meaningful adversarial testing; 10) to recall S.D. for re-cross examination to impeach her to her prior trial testimony.
>
> Petitioner contends that, had counsel performed the above listed functions of a reasonable trial strategy he would have met the reasonable doubt required to change the outcome of the trial.[22]

Claim two alleges that counsel was ineffective for allowing evidence insufficient to sustain the conviction. He argues that counsel should have objected on various grounds to the improper evidence presented by the State and filed appropriate motions for mistrial, new trial and post-verdict judgment of acquittal. Claim three alleges that trial counsel failed to object to prosecutorial misconduct that resulted in an unfair trial and violated his due process rights. Claim four alleges that trial counsel allowed the State to offer perjured testimony from S.D. at trial. Finally, claim five alleges that counsel should have objected to a defective indictment. These claims were rejected on the merits by the state courts during post-conviction review.[23]

In order to prove ineffective assistance of counsel, a petitioner must demonstrate

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[22] Rec. Doc. 5-3, pp. 12-13. Initials will be used in reference to the victim and her family members who testified at trial.

[23] State Rec., Vol. 3 of 10, Order denying PCR (Feb. 12, 2020); Fifth Circuit Order 20-KH-114 (Apr. 23, 2020); and Louisiana Supreme Court Order 2020-KH-665 (Jan. 20, 2021).

both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). If a court finds that a petitioner has made an insufficient showing as to either of the two prongs of inquiry, *i.e*, deficient performance or actual prejudice, it may dispose of the ineffective assistance claim without addressing the other prong. *Strickland*, 466 U.S. at 697.

To prevail on the deficiency prong of the *Strickland* test, a petitioner must demonstrate that counsel's conduct fails to meet the constitutional minimum guaranteed by the Sixth Amendment. *See Styron v. Johnson*, 262 F.3d 438, 450 (5th Cir. 2001). "Counsel's performance is deficient if it falls below an objective standard of reasonableness." *Little v. Johnson*, 162 F.3d 855, 860 (5th Cir. 1998). Analysis of counsel's performance must take into account the reasonableness of counsel's actions in light of all the circumstances. *See Strickland*, 466 U.S. at 689. "[I]t is necessary to 'judge ... counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993) (quoting *Strickland*, 466 U.S. at 690). A petitioner must overcome a strong presumption that the conduct of his counsel falls within a wide range of reasonable representation. *See Crockett v. McCotter*, 796 F.2d 787, 791 (5th Cir. 1986); *Mattheson v. King*, 751 F.2d 1432, 1441 (5th Cir. 1985).

To prevail on the prejudice prong of the *Strickland* test, 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." *Strickland*, 466 U.S. at 694. In this context, a reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

Because the claims were adjudicated on the merits in state court, habeas relief is

available only if that adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86 (2011). "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (citations omitted). The Supreme Court has stressed, in no uncertain terms, that "a federal court may grant relief only if *every* " 'fairminded juris[t]' " would agree that *every* reasonable lawyer would have made a different decision. *Dunn v. Reeves*, 141 S.Ct. 2405 (2021) (citing *Richter*, 562 U.S. at 101, 131 S.Ct. 770).

Claim 1 – Denial of Right to Effective Assistance of Counsel Prior to and During Trial

As part of his first claim for relief, Raye argues that he was denied counsel entirely because lead counsel, Wayne Walker, was ineligible to practice law in the State of Louisiana and could not provide him constitutionally effective assistance either pretrial or during trial. As the state courts correctly found, his factual contention underlying the claim is not supported by the record in this case. Raye insists that counsel was ineligible to practice throughout his representation of Raye, even though the evidence shows otherwise. He continues to misconstrue the certificate from the Louisiana State Bar Association.[24] The state courts denied the claim post-conviction, citing the State's exhibit from the Louisiana State Bar Association, which was attached to its response and showed the brief period of time in September 2013 during which Mr. Walker was ineligible because of nonpayment of

[24] Rec. Doc. 20, Traverse, p. 7 and Exhibit D, Response to Public Records Request – LSBA Certificate. Raye also attaches documents to his traverse reflecting unsuccessful disciplinary proceedings he instituted against Mr. Walker.

his disciplinary assessment and bar membership dues (namely 9/09/2013 – 9/25/2013).[25] As of September 9, 2016, the certificate signed by the Director of Finance and Membership for the state bar reflects that he was ineligible for nonpayment of dues, fees and noncompliance with the Trust Account Disclosure Form. By this time, however, Raye's trial and sentencing (March 2016) had concluded. Raye has offered nothing to show that Mr. Walker was ineligible or otherwise not in good standing when he represented Raye pretrial and during trial.[26] Arguably, even if this brief period of ineligibility for nonpayment of dues had overlapped his representation, that would not constitute ineffective assistance *per se*. *See, e.g., McKinsey v. Cain*, 09-7729, 2011 WL 2945812, at *2 (E.D. La. July 15, 2011) (attorney's ineligibility was not a *per se* violation of the Sixth Amendment, as it resulted from a failure to meet the technical requirements of bar membership). In this case, however, Mr. Walker was eligible to practice when he filed several preliminary motions on Raye's behalf in June 2013 (prior to Raye's indictment and involving bond reduction and preliminary hearing). Similarly, after Raye's indictment on September 26, 2013, Mr. Walker remained eligible to practice and was properly serving as lead counsel in jointly representing Raye along with co-counsel of record, William Doyle.[27] Raye has not shown

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[25] State Rec., Vol. 2 of 10, State's PCR Response with attached Certificate (Exhibit 1).

[26] To the contrary, Raye attaches a letter to his traverse dated January 13, 2020 from the Louisiana State Bar Association that confirms on the relevant dates in question Wayne Walker was eligible and in good standing and had no disciplinary actions taken against him. Rec. Doc. 20.

[27] While no allegation was ever made concerning post-trial representation, the Court notes that Mr. Walker did not file a motion to withdraw; nor did he file a motion for appeal on Raye's behalf. Only Mr. Doyle filed a motion to withdraw as attorney of record post-trial (State Rec., Vol. 1 of 10, Motion to Withdraw filed and order signed April 2016). In any event, no prejudice resulted as Raye was subsequently granted an out-of-time appeal and was appointed counsel to represent him on appeal. Even though no post-trial motions

that he is entitled to relief on this claim.

The second part of this claim broadly encompasses subclaims 1-6 and 9, and involves alleged inadequate pretrial preparation, investigation and discovery, presentation of a meaningful defense and inferior handling of objections and cross-examination during trial by his counsel of record such that counsel purportedly failed to subject the case to meaningful adversarial testing. In particular, he argues that counsel failed to obtain Detective Ronald Raye, Jr.'s arrest affidavit, evidence surrounding the victim's school records, attendance, academic and social life, and the CAC videotape. He contends the inadequate investigation and preparation led to ineffective cross-examination of the State's witnesses and his conviction based on hearsay and false testimony.

The state courts rejected the 10 vague subclaims as speculative and conclusory because Raye failed to set out the claims with any specificity or to support them. Generally, a habeas petitioner cannot establish a *Strickland* claim based on speculative and factually unsupported assertions. *Ochoa v. Davis*, 750 F. App'x 365, 371 (5th Cir. 2018) (quoting *Sawyer v. Butler*, 848 F.2d 582, 589 (5th Cir. 1988)) ("Indeed, '[u]nsupported allegations and pleas for presumptive prejudice are not the stuff that *Strickland* is made of.' "). For this reason alone, his subclaims that lack any factual support or argument fail, and the state-court ruling was proper. However, even if liberally considered, to the extent possible, the claims lack merit.

With respect to an attorney's duty to investigate, the controlling law provides:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made

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were filed, appellate counsel raised a sufficiency-of-the-evidence claim on his behalf and that claim was fully considered and denied on the merits.

> after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Newbury v. Stephens, 756 F.3d 850, 873 (5th Cir. 2014) (quoting *Strickland v. Washington*, 466 U.S. at 690-91). As for the arrest affidavit, there is no record evidence that the State failed to provide the information to the defense as part of open file discovery or that defense counsel was unaware of the affidavit. In fact, the State countered Raye's allegation by providing a copy of the defense's discovery receipt, which confirms the documents were given to defense counsel.[28] Regardless, Raye's argument is that, had defense counsel reviewed the arrest affidavit and been aware it reported the "initial disclosure" by the victim as being made at a different place and time and to a different sibling, then the defense could have fully cross-examined S.D. and S.W. and impeached them because the affidavit "contradicts the state's theory of the case" as to "whom, what and where, if any was disclosed by [the] victim."[29] Presumably, Raye believes that the trial court would have rejected all of their testimony as having been discredited.

The State filed a notice of intent to introduce the testimony of S.D., regarding what the victim told her, under the initial disclosure exception to hearsay.[30] S.W. was part of the

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[28] State Rec. Vol. 2 of 10, State's PCR Response, Exhibit 2. *See also* State Rec., Vol. 3 of 10, State District Court PCR Order, 2/12/2020 (Claim 3).

[29] Rec. Doc. 5-3, pp. 16, 18.

[30] State Rec., Vol. 1 of 10, Notice of Intent to Introduce Statement of Initial Complaint of Sexually Assaultive Behavior.

conversation, along with her sister S.D. and the victim, during which the victim admitted to S.D. that her father had touched her inappropriately. Both siblings, and the victim, testified consistently at trial to this conversation taking place at their grandmother's house in Lafayette on Easter weekend and the details of the discussion. The defense objected to S.D.'s testimony about what the victim told her, but the trial court overruled the objection because it was the initial disclosure.[31] Nothing detailed in the arrest affidavit would have changed this course of events. The affidavit plainly states that it is based upon the victim's statements made during the forensic interview, which Detective Raye was present for (in a different room), and received a copy of, as part of the investigation.[32] Defense counsel acknowledged reviewing a copy of the victim's videotaped forensic interview and stipulated at trial to its authenticity.[33] The videotaped interview was played for the trial court during the forensic interviewer's testimony. The trial judge, as the trier of fact at the bench trial, was able to weigh and reconcile any internal inconsistencies between the victim's forensic interview and her testimony at trial and any conflicts in the trial testimony offered by the victim and her siblings, S.D. and S.W.

The extent to which counsel chooses to emphasize inconsistencies in witness testimony is strategic in nature and subject to counsel's professional judgment. *Ford v. Cockrell*, 315 F. Supp.2d 831, 859 (W.D. Tex. 2004), *aff'd*, 135 F. App'x 769 (5th Cir. 2005); *Peters v. Vannoy*, Civ. Action 17-2598, 2018 WL 7917923, at *22 (E.D. La. July 19, 2018),

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[31] State Rec., Vol. 5 of 10, Transcript of Trial, p. 38.

[32] State Rec., Vol. 7 of 10, Arrest Affidavit.

[33] State Rec., Vol. 5 of 10, Trial Transcript, p. 110.

adopted 2019 WL 1469438 (E.D. La. Apr. 3, 2019). Reviewing courts should employ a strong presumption that counsel's conduct falls within a wide range of reasonable assistance and, under the circumstances, might be considered sound trial strategy. *Strickland*, 466 U.S. at 689. The best evidence of the victim's actual statements made during the CAC interview was the videotaped recording itself, not the arrest affidavit of a detective containing his report of details gleaned from that interview. Here, even if the affidavit had not been disclosed, the inconsistency contained in an arrest affidavit by a detective would not have been proper to use on cross-examination of S.D. or S.W., and in addition to being objectionable, would have served no purpose other than to badger the witnesses, including the young rape victim.

Next, Raye asserts that counsel should have investigated and introduced mitigating evidence surrounding the victim's exceptional school records, attendance, academic and social life, all of which purportedly contradicts state expert and forensic pediatric nurse practitioner, Anne Troy's, opinion that the victim's disclosures in this case were consistent with sexual abuse.[34] Evidently, he believes that the victim not experiencing social or academic difficulties contradicts her account of sexual abuse and thus Nurse Troy's expert opinion. The record shows that at the start of the victim's testimony the State prosecutor questioned the victim about her academic record and participation in activities. The victim testified that she received high grades, excelled in math and science, had lofty aspirations to be a surgeon and participated in activities outside of school.[35] The court was aware of

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[34] Rec. Doc. 5-3, p. 17.

[35] State Rec., Vol. 5 of 10, Trial Transcript, pp. 114-15.

these factors when weighing the medical evidence and Nurse Troy's expert opinion and still found Raye guilty of all charges. Raye fails to show that additional investigation and introduction of school records by the defense would have altered the outcome.

Raye suggests that attorney Doyle's conduct was substandard because he denied Raye the right to discover the videotaped forensic interview and failed to correct co-counsel's statement at trial that the defense had seen it. He offers no support for his conclusory assertion that the defense did not have access to the video or any rational reason co-counsel Doyle should have objected to Mr. Walker informing the trial court that they had seen a copy of the video when the State sought to introduce it into evidence.[36] Obviously, whether or not Raye was aware or chooses to credit his counsel's affirmative statement, his counsel had access to the victim's recorded interview. Raye has not shown that he is entitled to relief on this claim.

Raye also asserts that counsel failed to make timely hearsay objections. As the state courts noted, he failed to support the claim and has not identified any instances in the record where this allegedly occurred. In reviewing the transcripts from trial, however, the undersigned found instances where hearsay objections made by Mr. Doyle were slightly belated and made after the witness had already provided a full response to the question. One instance occurred during S.W.'s testimony where she related statements made by S.D. and the victim during their conversation at their grandmother's house, and then statements made by her mom and the victim when the siblings confronted their mom with the information. The trial court sustained the objection to hearsay but noted that the question

[36] State Rec., Vol. 5 of 10, Trial Transcript, p. 110 (stipulation).

had already been answered.[37] Another instance occurred when Tracey Jackson with the Department of Children and Family Services began testifying to what the victim told her at their first meeting. Counsel objected to hearsay, albeit belatedly, as he acknowledged. The trial court did not make a ruling and just told counsel to proceed.[38]

The untimely objections did not prejudice Raye. Because this was a bench trial, the trial court had the expertise to consider the testimony in light of the belated hearsay objections and give it the proper weight. Furthermore, S.D. testified similarly to S.W. that the victim told her she was being touched inappropriately by her father, and S.D's testimony was allowed as an exception to hearsay over the defense's objection.[39] Additionally, the victim in this case provided credible, convincing testimony at trial regarding what she told her siblings and her mother, and related in extensive detail the incidents that occurred with her father. Defense counsel had ample opportunity to cross-examine the victim. The outcome of the proceedings would have been no different had counsel objected sooner to S.W. or Jackson's testimony given the victim's direct testimony, which the trial judge found to be "extremely credible."[40] The claim is meritless.

Although Raye cites to *United States v. Cronic*, 466 U.S. 648 (1984), and suggests generally that prejudice should be presumed due to a complete denial of counsel and failure to subject his case to meaningful adversarial testing, his reliance on *Cronic* is unsupported

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[37] State Rec., Vol. 5 of 10, Trial Transcript, pp. 20-22.

[38] State Rec., Vol. 5 of 10, Trial Transcript, pp. 65-66.

[39] State Rec., Vol. 5 of 10, Trial Transcript, p. 38.

[40] State Rec., Vol. 5 of 10, Trial Transcript, p. 157.

and misplaced.[41] *Cronic* has limited applicability to a narrow and specific set of circumstances, which do not apply here. The *Cronic* presumption of prejudice arises only when (1) there exists a "complete denial of counsel" or a denial of counsel "at a critical stage" of defendant's trial; (2) defense counsel fails to "subject the prosecution's case to meaningful adversarial testing;" or (3) counsel "is called upon to render assistance where competent counsel very likely could not." *Cronic*, 466 U.S. at 658-59 (citations omitted). Only in these "circumstances of magnitude" may "the likelihood that the verdict is unreliable [be] so high" that a constitutional violation may be found. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). "As *Cronic* suggests—and we have stressed—prejudice is not presumed unless an attorney *entirely* fails to defend his client." *Thomas v Davis*, 968 F.3d 352, 355 (5th Cir. 2020) (citing *Bell v. Cone*, 535 U.S. 685, 695 (2002)). "It is not enough for the defendant to show mere 'shoddy representation' or to prove the existence of 'errors, omissions, or strategic blunders' by counsel. [B]ad lawyering, regardless of how bad, does not support the per se presumption of prejudice." *Johnson v. Cockrell*, 301 F.3d 234, 238-39 (5th Cir. 2002) (citing *Jackson v. Johnson*, 150 F.3d 520, 525 (5th Cir. 1998) (quoting *Childress*, 103 F.3d at 1228-29).

Here, contrary to Raye's assertions, the state-court record demonstrates that defense counsel conducted adequate discovery, effectively litigated pretrial motions, and actively engaged in his defense by consulting with Raye, challenging evidence and examining witnesses at trial. Raye had two appointed counsel of record throughout pretrial and trial

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[41] Raye appears to rely on *Cronic* for his claim that he was denied counsel because his attorney, Mr. Walker, was not eligible to practice law in Louisiana. See Rec. Doc. 5-3, pp. 14-15 and Rec. Doc. 20, Traverse.

proceedings. His claim that one attorney was ineligible to practice law was contradicted by the record evidence in this case. Raye has not established that he was constructively denied counsel under the *Cronic* standard.[42]

Claim 2 – Failure to Object to Insufficient Evidence to Sustain Conviction

Raye argues that counsel failed to "object to evidence insufficient to sustain his conviction, and to file appropriate motion for mistrial, new trial and post verdict judgment of acquittal, which prejudice him at trial."[43] He also alleges that he was convicted on hearsay introduced by the State through virtually every witness "where each testified on one or more accounts to, inconsistent with out-of-court statements, to 'other crimes', as well as to other evidence which violates the exclusion to hearsay Rules."[44] Essentially, Raye attempts to label everything else as hearsay and minimize the impact of the victim's direct persuasive testimony by arguing that her account of sexual assault was entirely unsupported and uncorroborated, and, therefore, it was unworthy of belief and insufficient to prove the elements of the crimes. The state court of appeal issued the last reasoned decision finding no merit to Raye's claim for relief. The appellate court noted that the sufficiency argument, upon which Raye's ineffectiveness claim was based, was soundly rejected on direct appeal, and the trial testimony by S.D. and S.W. was not hearsay; thus, objections would not have been warranted and no ineffectiveness was established under *Strickland*.

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[42] To the extent any of the subclaims (7, 8, 10) overlap with his remaining claims for relief, they will be considered in that section later in this report.

[43] Rec. Doc. 5-3, p. 26. He frames the claim here in the same context he did during post-conviction review proceedings in the state courts and raises only an ineffective-assistance-of-counsel claim on federal habeas review.

[44] Rec.Doc. 5-3, p. 19.

On direct appeal, the Louisiana Fifth Circuit rejected Raye's sufficiency-of-the-evidence claim where he argued the same grounds underlying his ineffectiveness-of-counsel claim.[45] The court of appeal held that "C.R.'s testimony, coupled with her statements made in the CAC interview, established each element of the five offenses... [and] the trial judge clearly chose to believe the testimony of C.R. over defendant's testimony."[46] The trial judge's ruling and the ruling on direct appeal were both based on the direct and "extremely credible" testimony of the victim, C.R. The resolution of whether other testimony offered by witnesses constituted hearsay in no way alters or negates C.R.'s credibility as a witness as determined by the trier-of-fact. As the state court held, in reviewing the claim under *Jackson v. Virginia*, 443 U.S. 307 (1979), a court may not second-guess the credibility determinations made by the trier-of-fact. Thus, Raye's counsel had no legal grounds to base a motion for mistrial, new trial or a motion for post-verdict judgment of acquittal on the credibility determinations made by the trier-of-fact, who in this case, was the trial judge. Counsel does not perform deficiently in failing to lodge a meritless objection. *See Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) (counsel is not required to make futile motions or objections); *see also Smith v. Puckett*, 907 F.2d 581, 585 n. 6 (5th Cir. 1990) ("Counsel is not deficient for, and prejudice does not issue from, failure to raise a legally meritless claim."). The failure to raise a meritless objection or motion cannot form the basis of a successful ineffective-assistance-of-counsel claim because the result of the proceeding would have been no different had counsel raised the issue. *Odis v. Vannoy*, Civ. Action 18-9877, 2019

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[45] *State v. Raye*, 230 So.3d at 666-67.

[46] *Id.* at 667.

WL 6716956, at *11 (E.D. La. Dec. 10, 2019). Raye does not allege, nor does the record show, that he was prejudiced in any manner on direct appeal by the omitted motions since the appellate court fully considered the sufficiency argument on the merits. This claim does not warrant federal habeas relief.

Claim 3 – Failure to Object to Prosecutorial Misconduct

Raye alleges that counsel should have objected to prosecutorial misconduct when the state prosecutor elicited "other crimes" evidence through S.D. and C.R., made prejudicial remarks concerning "other crimes" evidence/hearsay alleged against Raye, and withheld evidence of Detective Raye's arrest warrant affidavit.[47] The claim was considered and denied in a well-reasoned ruling by the Louisiana Fifth Circuit on post-conviction review. The Louisiana Supreme Court subsequently denied the claim for relief without citing additional reasons.

As previously discussed, the record evidence shows that the State provided the police report and arrest warrant to defense counsel during discovery and the discovery receipt reflects that the affidavit and warrant of arrest were included and received by the defense. Obviously, no objection was needed because the defense was in receipt of the documents Raye mentions. Furthermore, the defense's lack of concern over any misstatement included in Detective Raye's arrest warrant affidavit was entirely reasonable and proper under the circumstances. The CAC videotape itself, which was what Detective Raye based his narrative upon, was played at trial. Thus, the trial court heard the victim's direct statement regarding her initial disclosure, including the circumstances surrounding it and to

[47] Rec. Doc. 5-3, pp. 26-27.

whom it was made. Detective Raye testified at trial that he never spoke to the victim and merely observed her CAC interview. The victim and her siblings all testified consistently regarding when the initial disclosure was made. Defense counsel plainly had no grounds for a meritless prosecutorial misconduct objection for either a failure to disclose or for any inconsistency in Detective Raye's arrest warrant affidavit.

His other two assertions involve "other crimes" evidence concerning Raye's inappropriate interaction with another sibling, S.D. He argues that defense counsel failed to object when the prosecution improperly elicited this information from S.D. and questioned Raye about it at trial. However, as the Louisiana Fifth Circuit reasoned in rejecting these claims for relief, there was no misconduct on the part of the prosecution in mentioning the issue on redirect only *after* defense counsel himself first questioned S.D. on cross-examination if there had been any prior accusations against Raye. Indeed, the record reflects that defense counsel consulted with Raye before he asked the question. S.D. tried to plead the Fifth Amendment, indicating she did not want to answer it, but then ultimately denied that there were any accusations before this incident. Subsequently, on redirect, when the prosecutor asked S.D. if that was the truth, and the trial judge reminded her that she was sworn to tell the truth, she stated reluctantly that it had happened to her.[48] Raye subsequently testified in his own defense. The prosecution asked Raye on cross-examination about S.D.'s earlier testimony and if he had an explanation for her account. He indicated that she was lying and that he had no idea why she would lie about it.[49] Raye

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[48] State Rec., Vol. 5 of 10, Trial Transcript, pp. 42-45.

[49] State Rec., Vol. 5 of 10, Trial Transcript, pp. 147-48.

testified that S.D. was an open person and she would have no problem speaking her mind and telling her mom or someone if something had occurred.[50] Given that it was defense counsel who opened the door to the testimony, perhaps in the hopes of strengthening the defense's case, and, in particular, supporting Raye's testimony regarding the lack of any reported incidents or accusations where he had acted inappropriately with his daughters or their friends,[51] the prosecution's subsequent questions were proper and any misguided objection based on prosecutorial misconduct would have been overruled. The state court correctly determined that counsel's failure to raise a meritless objection based on purported prosecutorial misconduct in connection with "other crimes" evidence was not constitutionally deficient performance under *Strickland*.

Claim 4 - Failure to Object to Perjured Testimony

Raye asserts that counsel was constitutionally ineffective for failing to object when the prosecution knowingly offered perjured testimony by S.D. that Raye had done this to her in the past. The Louisiana Fifth Circuit likewise denied this claim because the defense opened the door to the issue by first questioning the witness about it, and Raye failed to show any perjured testimony to which an objection would have been proper or any resultant prejudice. The Louisiana Supreme Court denied relief citing no additional reasons.

Considering that S.D.'s testimony was elicited by the defense in the first instance, the defense hardly had grounds to object if S.D. clarified that testimony later during questioning by the prosecution. Additionally, Raye offers no support for his conclusory assertion that

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[50] State Rec., Vol. 5 of 10, Trial Transcript, p. 153.

[51] State Rec., Vol. 5 of 10, Trial Transcript, pp. 134, 141-42, 145.

her testimony was false. At trial, he offered no basis for why she would fabricate allegations against him. The record itself contains no objective evidence to support his assertion. The mere fact that she denied an incident because she admittedly did not want to talk about it, but then later, upon further questioning and admonition to tell the truth, reluctantly conceded something had happened to her, does not prove the testimony false. The inconsistency simply presents a credibility issue for the trier of fact. *See Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002); *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990) (holding that conflicting testimony does not prove perjury but instead establishes a credibility question for the jury). The decision not to object based on perjury or to belabor the issue and subject S.D. to further re-cross on the matter was reasonably and objectively sound.[52]

Under the circumstances, the state court reasonably determined that counsel did not perform deficiently by not objecting to perjury. Furthermore, the trial court, as the trier of fact, listened to her testimony in its entirety and was able to weigh the inconsistencies, along with Raye's testimony, and make its own determination as to her believability and the ultimate weight to accord it. Thus, as the state court correctly found, no prejudice resulted from the defense not raising an objection in this instance.

Claim 5 – Failure to Object to a Defective Indictment

Finally, Raye maintains that defense counsel should have moved to quash the alleged defective indictment. The state court of appeal on direct review found no error patent

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[52] Raye alleged an unsupported subclaim number ten, as part of claim one, that counsel should have recalled S.D. for re-cross examination to impeach her prior trial testimony. Rec.Doc. 5-3, p. 13.

related to the indictment, and, likewise on collateral review in the last reasoned decision, found that Raye "failed to demonstrate, factually or legally, why his counsel should have filed such a motion, that he would have been successful, or how the filing of the motion would have affected the outcome of his trial."[53]

Raye argues that the grand jury indictment "fails to factually and distinguishably set forth all essential elements which constitute the offense charged against him whether by statute or by plain language."[54] He alleges the indictment failed to provide the victim's name, age, gender, the statutory subsection, and specific acts. He also asserts that the vagueness associated with count three (La. R.S. 14:43.1) subjected him to duplicity of the charged offense and the potential for future double jeopardy. Here, the state courts, including the Louisiana Supreme Court, found no objection was warranted because the indictment sufficed under state law. This Court on federal habeas review need not and will not weigh in or second-guess a sufficiency determination for a state indictment under Louisiana law. *See Lee v. Vannoy*, Civ. Action 19-12280, 2020 WL 3513743, at *12 (E.D. La. June 1, 2020), *adopted* 2020 WL 3512709 (E.D. La. June 29, 2020).

Under controlling federal law, an indictment is sufficient if it both informs the defendant of the accusation against him, thereby allowing him to prepare his defense, and affords him protection against double jeopardy. *United States v. Debrow*, 346 U.S. 374 (1953). The indictment in this case set forth in sufficient detail the statutory offenses charged, against the "known juvenile" victim identified by date of birth, and the relevant time

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[53] State Rec., Vol. 3 of 10, *Raye v. N. Burl Cain, Warden*, 20-KH-114 (La. App 5 Cir. Apr. 23, 2020), p. 7 (Claim 5).

[54] Rec. Doc. 5-3, p. 39.

frames for the offenses.[55] As part of the discovery process, the defense filed a motion for bill of particulars and requested a preliminary examination at which the State presented facts detailing and supporting the elements of each charged offense.[56] Raye cannot seriously dispute that he had sufficient information regarding the alleged victim, who was identified only by birthdate, but was his biological daughter. Under the circumstances, a decision by counsel not to challenge the indictment on grounds that it prevented Raye from defending against the charges would have been objectively reasonable.

He also failed to allege any valid grounds to support his claim of potential future jeopardy based on the offense charged in count three of the indictment. The statutory criminal provision for sexual battery is specified, as well as the relevant subsections that would be implicated for a child not only under 15, but under 13 years of age, during the time frame alleged for the incident (between July 6, 2010 and July 5, 2012). Count four also charges sexual battery, but plainly alleges a distinct time frame and poses no threat of double jeopardy.

As the state courts properly determined, Raye has not established any basis for his counsel to have filed a motion to quash the indictment. Counsel does not provide ineffective assistance by failing to assert a meritless motion. *Evans v. Davis*, 875 F.3d 210, 218 (5th Cir. 2017) ("Obviously, counsel is not deficient for failing to make meritless ... motions."). Under this scenario, he cannot show prejudice. This claim does not warrant federal habeas relief.

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[55] State Rec., Vol. 1 of 10, Grand Jury Indictment.

[56] State Rec., Vol. 1 of 10, Motion for Bill of Particulars and Discovery and Inspection; State Rec., Vol. 5 of 10, Preliminary Hearing held July 2, 2013.

In summary, Raye has not shown that the state-court decision rejecting his ineffective assistance of counsel claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Accordingly, under the AEDPA's doubly deferential standards of review applicable to such claims, this Court should likewise deny relief.

RECOMMENDATION

For the foregoing reasons, it is **RECOMMENDED** that Raye's application for federal habeas corpus relief be **DISMISSED WITH PREJUDICE.**

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. 28 U.S.C. § 636(b)(1); *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).[57]

New Orleans, Louisiana, this 29th day of September, 2021.

MICHAEL B. NORTH
UNITED STATES MAGISTRATE JUDGE

[57] *Douglass* referenced the previously applicable 10-day period for the filing of objections. Effective December 1, 2009, 28 U.S.C. § 636(b)(1) was amended to extend that period to 14 days.

EXHIBIT "F"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CLIFTON RAYE	**CIVIL ACTION**
VERSUS	**NO. 21-354**
DARREL VANNOY, WARDEN	**SECTION: "E"(5)**

JUDGMENT

The Court having approved the Report and Recommendation of the United States Magistrate Judge and having adopted it as its opinion herein;

Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment against petitioner, Clifton Raye, dismissing with prejudice his petition for issuance of a writ of habeas corpus under 28 U.S.C. 2254.

New Orleans, Louisiana, this 7th day of March, 2022.

Susie Morgan

SUSIE MORGAN
UNITED STATES DISTRICT JUDGE

1st

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CLIFTON RAYE **CIVIL ACTION**

VERSUS **NO. 21-354**

DARREL VANNOY, WARDEN **SECTION "E"(5)**

ORDER AND REASONS

Before the Court is a Report and Recommendation issued by the Magistrate Judge recommending Petitioner Clifton Raye's petition for federal habeas corpus relief be dismissed with prejudice.[1] Petitioner filed objections to portions of the Magistrate Judge's Report and Recommendation.[2] For the reasons that follow, the Court **ADOPTS** the Report and Recommendation as its own, and hereby **DISMISSES** Petitioner's petition for relief.

BACKGROUND

I. Procedural Background

On September 26, 2013, a Jefferson Parish Grand Jury returned a true bill of indictment charging Petitioner with the following crimes: one count of aggravated rape, of a victim under the age of thirteen years, involving oral sexual intercourse, in violation of La. R.S. 14:42 (count one); one count of aggravated rape of a victim under the age of thirteen years, involving penile-vaginal and/or penile-anal sexual intercourse, in violation of La. R.S. 14:42 (count two); one count of sexual battery upon a juvenile under the age of thirteen years, in violation of La. R.S. 14:43.1 (count three);

[1] R. Doc. 21. Documents filed in the federal habeas action before this Court, case no. 21-354, are cited as "R. Doc. #" whereas documents from the state court record are cited as "State Rec., Vol. # of #."
[2] R. Doc. 22.

one count of sexual battery upon a juvenile under the age of fifteen years, in violation of La. R.S. 14:43.1 (count four); and one count of oral sexual battery upon a juvenile under the age of fifteen years, in violation of La. R.S. 14:43.3 (count five).[3]

Petitioner pled not guilty at his arraignment and waived his right to a jury trial, electing to proceed instead with a bench trial.[4] On March 1, 2016, at the conclusion of the bench trial, Petitioner was found guilty as charged on all five counts.[5] On March 16, 2016, the trial court sentenced Petitioner as follows: for both counts one and two, life imprisonment at hard labor; twenty-five years imprisonment at hard labor on count three; and as to each of counts four and five, ten years imprisonment at hard labor.[6] The trial court further ordered that all sentences were to run concurrently, without the benefit of probation, parole, or suspension of sentence.[7]

On December 9, 2016, Petitioner filed a Uniform Application for Post-Conviction Relief in the Louisiana Fifth Circuit Court of Appeal, seeking an out of time appeal, which was granted on December 20, 2016.[8] On direct appeal, Petitioner argued the evidence was insufficient to sustain his conviction because it was based only on the testimony of the victim ("C.R."), because C.R. did not provide testimony as to the specific dates on which the alleged sexual abuses took place, and because there was no corroborating evidence presented at trial to support C.R.'s testimony.[9] In rejecting Petitioner's contentions, the Louisiana Fifth Circuit explained that that it

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[3] *State v. Raye*, 17-136 (La. App. 5 Cir. 10/25/17), 230 So. 3d 659, 662, *writ denied*, 2017-1966 (La. 6/15/18), 257 So. 3d 674.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 664, 666.

has previously recognized that "in sexual abuse cases that continue over time, exact dates often cannot be supplied," and that "convictions of aggravated rape and other sexual abuse offenses have been upheld by this Court in the absence of medical evidence or other corroborating evidence."[10] The Louisiana Fifth Circuit, applying the *Jackson v. Virginia* standard for review of a criminal conviction record for sufficiency of the evidence, found that

> C.R.'s testimony, coupled with her statements made in the CAC interview, established each element of the five offenses for which defendant was convicted. Moreover, although defendant testified that he never sexually abused C.R. and suggested that C.R. was lying, having been coerced into making the accusations against him by his step-daughters who were angry with him, the trial judge clearly chose to believe the testimony of C.R. over defendant's testimony. It is not this Court's function to second-guess the credibility determinations of the trier-of-fact.[11]

The Louisiana Fifth Circuit thus affirmed Petitioner's conviction and sentence.[12]

Petitioner thereafter filed a writ application with the Louisiana Supreme Court, and on June 15, 2018, the Louisiana Supreme Court summarily denied writs.[13]

On August 15, 2019, Petitioner filed an application for post-conviction relief in the state district court.[14] The State filed a response in opposition,[15] and Petitioner filed a traverse.[16] The state trial court denied Petitioner's application for post-conviction relief. Petitioner alleged nine grounds for relief, to wit:

1. Ineffective assistance of counsel prior to and during trial.
2. Ineffective assistance of trial counsel for failing to object to sufficiency of evidence.

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[10] *Id.* at 666–67.
[11] *Id.* at 667.
[12] *Id.* at 662.
[13] *State v. Raye*, 2017-1966 (La. 6/15/18), 257 So. 3d 674.
[14] State Rec. Vol. 9–10 of 10, pp. 1647–2037
[15] State Rec. Vol. 2 of 10, pp. 380–411.
[16] State Rec. Vol. 2–3 of 10, pp. 426–483.

3. Ineffective assistance of trial counsel for failing to object to prosecutorial misconduct.
4. Ineffective assistance of trial counsel for failing to secure expert testimony.
5. Ineffective assistance of trial counsel for failing to object to perjury testimony at trial.
6. Ineffective assistance of trial counsel for failing to file a Motion to Quash, Motion for Mistrial, Motion for Post-Verdict Judgment of Acquittal, and Motion for New Trial.
7. Ineffective assistance of trial counsel for failing to object to witness sequestration order.
8. Ineffective assistance of trial counsel for failing to object to defective indictment.
9. Cumulative effect of trial counsel orders.

On February 12, 2020, the state trial court issued its order denying Petitioner's application for post-conviction relief.[17]

On March 3, 2020, Petitioner filed with the state trial court a Notice of Intent to seek writs to challenge the state trial court's February 12, 2020 order denying Petitioner's application for post-conviction relief.[18] The state trial court set a return date of April 27, 2020.[19] On March 10, 2020, Petitioner filed a writ application with the Louisiana Fifth Circuit, challenging the state trial court's denial of his application for post-conviction relief.[20] On April 23, 2020, the Louisiana Fifth Circuit, after considering the merits and determining Petitioner was not entitled to the relief sought, denied the writ.[21] Petitioner then filed an application for supervisory writ with the Louisiana Supreme Court, which was denied on January 20, 2021 on the basis that Petitioner "fail[ed] to show that he received ineffective assistance of counsel under the

[17] *See* R. Doc. 5-1 at pp. 16–19.
[18] State Rec. Vol. 3 of 10, pp. 545-547, 605.
[19] R. Doc. 5-1 at p. 4.
[20] State Rec. Vol. 6–7 of 10, pp. 1210-1550.
[21] *Raye v. Cain*, 20-114 (La.App. 5 Cir. 4/23/20) (unpublished writ disposition). *See* R. Doc. 5-1 at pp. 5–11.

standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, L.Ed.2d 674 (1984)."[22]

On February 17, 2021,[23] Petitioner filed, in this Court, a petition for writ of habeas corpus under 28 U.S.C. § 2254.[24] On May 21, 2021, the District Attorney for Jefferson Parish, Louisiana ("the State") filed a response to the petition for writ of habeas corpus.[25] Petitioner filed a traverse.[26]

Petitioner seeks habeas corpus relief under 28 U.S.C. § 2254, asserting the following claims (1) he was denied effective assistance of counsel before and during trial; (2) trial counsel was ineffective for failing to object to evidence that was insufficient to sustain the convictions; (3) trial counsel was ineffective for failing to object to prosecutorial misconduct; (4) trial counsel was ineffective for failing to object to perjured testimony at trial; and (5) trial counsel was ineffective for failing to object to a defective indictment.[27] The State filed a response in opposition to the petition, arguing each of Petitioner's claims are meritless.[28] Plaintiff filed a traverse to the State's response.[29]

Upon review of the record, the Magistrate Judge determined this matter could be disposed of without an evidentiary hearing.[30] On September 30, 2021, the

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[22] *Raye v. Cain*, 2020-00665 (La. 1/20/21), 308 So.3d 1148. *See* R. Doc. 5-1 at pp. 12–13.
[23] "A prisoner's habeas application is considered 'filed' when delivered to the prison authorities for mailing to the district court." *Roberts v. Cockrell*, 319 F.3d 690, 691 n.2 (5th Cir. 2003). Petitioner signed his petition and certified that he placed it in the prison mailing system on February 17, 2021. R. Doc. 5 at 10.
[24] R. Doc. 5.
[25] R. Doc. 14.
[26] R. Doc. 20.
[27] R. Doc. 5.
[28] R. Doc. 14.
[29] R. Doc. 20.
[30] R. Doc. 21.

Magistrate Judge issued a Report and Recommendation finding each of Petitioner's claims to be without merit and recommending the petition be dismissed with prejudice.[31] On October 13, 2021, Petitioner's Objections to the Report and Recommendation were filed into the record.[32]

II. Factual Background

The following facts are derived from the opinion of the Louisiana Fifth Circuit Court of Appeal's opinion denying Petitioner's direct appeal of his conviction on insufficient evidence grounds:

> At trial, the victim, C.R., testified that when she was eleven or twelve years old, the defendant, her biological father, forced her to begin a sexual relationship with him. More than once a week, when her mother was at work, defendant would bring C.R. into his bedroom, lock the door, and make her perform oral sex on him. C.R. described several incidents at her home where defendant penetrated her vagina with his penis, massaged her breasts, performed oral sex on her, and digitally penetrated her anus. C.R. also testified that, on one occasion, defendant attempted to restrain her with a belt while he attempted to have anal sex with her, but she broke free.
>
> C.R. stated that she did not report the abuse because she was scared and did not want to get her father into trouble. C.R. testified that she denied that any abuse had taken place when she was first asked about it by her step-sisters, but later disclosed what had happened to her after her stepsister, S.D., told her about a similar personal experience she had previously with defendant.
>
> S.W., C.R.'s step-sister, testified that, in late March or early April of 2013, she lived with C.R., defendant, and her mother in Jefferson Parish. She recalled that, during that time, one afternoon she arrived home and saw C.R.'s school bag, but could not find C.R. S.W. knocked on defendant's bedroom door, which was locked. S.W. knocked on the door to hand defendant a telephone. A short time later, defendant and C.R. both exited the bedroom. S.W. testified that, in another incident, she woke up in the early morning hours to use the restroom and saw defendant in C.R.'s bed. Because she suspected that something inappropriate may have been

[31] *Id.*
[32] R. Doc. 22.

happening between defendant and C.R., S.W. called her sister S.D. to discuss her concerns. S.W. and S.D. decided to discuss the suspicions at their grandparents' home in Lafayette during the upcoming Easter holiday.

Several days later, while in Lafayette, C.R. was asked by S.W. and S.D. about the suspected sexual abuse by defendant. C.R. initially denied any abuse, but eventually disclosed to S.W. and S.D. that defendant had performed oral sex on her and that she had performed oral sex on defendant. This information was relayed to C.R.'s mother, E.R., who confronted defendant with the allegations. Defendant denied having any sexual contact with C.R.

Tracey Jackson, an investigator for the Department of Children and Family Services (DCFS), testified that she was notified of C.R.'s complaint against defendant on April 9, 2013, and she interviewed C.R. on April 10, 2013. During the interview, C.R. told Ms. Jackson that defendant had sexually abused her numerous times over the preceding two-year period, specifically that defendant had "fondle[d] her," "touch[ed] her chest," "touched her vaginal area" penetrating her with his fingers as well as his penis, penetrated her anus with his fingers, performed oral sex on her, and that she performed oral sex on defendant. Ms. Jackson relayed this information to the Jefferson Parish Sheriff's Office (JPSO) following the interview with C.R.

Detective Ronald Raye, of the JPSO Personal Violence Unit, testified that he went to C.R.'s home and brought her to Children's Hospital for a physical examination. Detective Raye prepared defendant's arrest warrant after speaking to Ms. Jackson, watching C.R.'s interview at the Children's Advocacy Center and reviewing C.R.'s hospital records.

Ann Troy testified that she is a forensic nurse practitioner who works with child victims of sexual abuse at the Audrey Hepburn Care Center in New Orleans. Ms. Troy recounted that she interviewed C.R. on April 27, 2013, and C.R. recounted a "detailed history of sexual abuse" by defendant over a two-year period that included oral sex, vaginal and anal penetration with his penis, and forcing C.R. to masturbate him. Ms. Troy found C.R.'s statements to be consistent with the way in which children disclose sexual abuse. She further noted that the physical findings from her examination of C.R. were normal. However, Ms. Troy testified that it is not uncommon for a child with a history of vaginal penetration to present with normal physical findings. Ms. Troy further explained that delayed reporting is very common amongst children who have been sexually abused as they tend to blame themselves for what has happened to them.

> The trial judge was shown the video of an interview between former forensic interviewer, Erika Dupepe, and C.R., which took place in April of 2013 at the Children's Advocacy Center in Jefferson Parish. During that interview, C.R. described defendant's sexual abuse of her in detail. C.R. stated that, at age 11, defendant would go to her bedroom while she was sleeping and touch her chest and buttocks. Defendant also touched her "privates" and made her touch his "privates" while her mother was at work or asleep. Beginning at age 12, defendant vaginally penetrated C.R. with his penis twice, and digitally penetrated her anus three times. C.R. described one incident when defendant forced her to perform oral sex on him. She was 12 at the time and in seventh grade. Defendant forced C.R. to perform oral sex on him on more than one occasion. The last incident of sexual abuse took place in March of 2013, when defendant forced C.R. to masturbate him and perform oral sex on him. During that particular time, C.R.'s sister knocked on the defendant's bedroom door to give him the phone, and defendant told C.R. to hide in his bathroom.
>
> Defendant testified at trial and denied that any sexual contact had taken place between himself and C.R. He further testified that he believed the accusations against him were made out of anger by C.R. and S.W.[33]

STANDARD OF REVIEW

In reviewing the Magistrate Judge's Report and Recommendation, the Court must conduct a de novo review of any of the magistrate judge's conclusions to which a party has specifically objected.[34] As to the portions of the report that are not objected to, the Court needs only review those portions to determine whether they are clearly erroneous or contrary to law.[35]

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state court's purely factual determinations are presumed to be correct and a federal court will give deference to the state court's decision unless it "was based on an

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[33] *State v. Raye*, 17-136 (La. App. 5 Cir. 10/25/17), 230 So. 3d 659, 662–64, *writ denied*, 2017-1966 (La. 6/15/18), 257 So. 3d 674.
[34] *See* 28 U.S.C. § 636(b)(1) ("[A] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which an objection is made.").
[35] *Id.*

unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[36] A federal court must defer to the decision of the state court on the merits of a pure question of law or a mixed question of law and fact unless that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[37] A state court's decision is contrary to clearly established federal law if: "(1) the state court applies a rule that contradicts the governing law announced in Supreme Court cases, or (2) the state court decides a case differently than the Supreme Court did on a set of materially indistinguishable facts."[38]

The AEDPA requires that a federal court "accord the state trial court substantial deference."[39] However, the AEDPA's deferential standards of review apply only to claims adjudicated on the merits by the state courts.[40] For unexhausted claims that were not considered on the merits in the state courts, the pre-AEDPA standard of review applies.[41]

LAW AND ANALYSIS[42]

I. Petitioner is not entitled to relief on his claims that the evidence presented at trial was "misrepresented" by the Louisiana Fifth Circuit Court of Appeals.

Petitioner's first objection is based the Louisiana Fifth Circuit's alleged

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[36] 28 U.S.C. § 2254(d)(2).
[37] *Id.* § 2254(d)(1).
[38] *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000).
[39] *Brumfield v. Cain*, 135 S. Ct. 2269 (2015).
[40] 28 U.S.C. § 2254(d); *Henderson v. Cockrell*, 333 F.3d 592, 597 (5th Cir. 2003).
[41] *Id.* at 598 (citing *Jones v. Jones*, 163 F.3d 285, 299-300 (5th Cir. 1998) (applying de novo standard of review to ineffective assistance of counsel claims that were raised in state court, but not adjudicated on the merits)); *see also Carty v. Thaler*, 583 F.3d 244, 253 (5th Cir. 2009).
[42] The Court notes the Government concedes Petitioner's application was timely filed within the one-year period established by the AEDPA. R. Doc. 17 at 4.

misrepresentation of the testimony at trial in the factual summary of its opinion denying Petitioner's direct appeal based on sufficiency of the evidence,[43] and the Magistrate Judge's adoption of the allegedly misrepresentative summary.[44] Petitioner argues the misrepresentations in the Louisiana Fifth Circuit's summary, adopted by the Magistrate Judge, violated his constitutional right to due process of law as the misrepresentations deny Petitioner meaningful review of the facts in the trial court record.[45] Petitioner argues the following statements of fact by the Louisiana Fifth Circuit are misrepresentations of the trial court record:

> That C.R. testified at trial that "[w]hen she was eleven or twelve, the defendant . . . penetrated her vagina with his penis, massage[d] her breast, . . . digitally penetrated her anus, and attempted to restrain her with a belt, while he attempted anal sex with CR."[46]
>
> That C.R.'s sister, S.D., testified at trial "to '[b]eing sexually abused."[47]
>
> That "the alleged victim (C.R.) disclosed to her sisters, S.D. and S.W., that Petitioner performed oral sex on her and she on defendant."[48]
>
> That Detective Ronald Ray testified "he went to C.R.'s home and brought her to the hospital for an examination, when, in fact, the detective did not become physically involved in the case until May 29, 2013, during the time of C.R.'s interview at the New Orleans Child Advocacy Center, where he only observed, through closed caption television, the interview of C.R. with the expert examiner."[49]

Under 28 U.S.C. §2254(e)(1), the state court's findings of fact are entitled to a presumption of correctness, and the petitioner bears the burden of rebutting the

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[43] *State v. Raye*, 17-136 (La. App. 5 Cir. 10/25/17), 230 So. 3d 659, 662–64, *writ denied*, 2017-1966 (La. 6/15/18), 257 So. 3d 674.
[44] R. Doc. 22 at pp. 2–3.
[45] *Id.* at p. 4.
[46] *Id.* at p. 2.
[47] *Id.* at p. 3.
[48] *Id.*
[49] *Id.* at p. 4.

presumption of correctness by clear and convincing evidence. Under AEDPA, federal courts may not grant habeas relief unless the relevant state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[50] "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."[51] AEDPA also requires federal courts to presume the correctness of the state courts' factual findings unless the federal habeas petitioner rebuts this presumption of correctness with "clear and convincing evidence."[52]

Petitioner's objection that portions of the testimony presented at trial were misrepresented by the Louisiana Fifth Circuit on direct appeal was raised for the first time in his objection to the Magistrate Judge's Report and Recommendation.[53] "New claims and issues may not, however, be raised for the first time in objections to a Report and Recommendation."[54] Petitioner may not present this new claims for the

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[50] 28 U.S.C. § 2254(d)(2).

[51] *Schriro v. Landrigan*, 550 U.S. 465, 473–74 (2007) (citing *Williams v. Taylor*, 529 U.S. 362, 410 (2000)).

[52] *Id.* at 473–74 (quoting 28 U.S.C. § 2254(e)(1)).

[53] *See* R. Doc. 22 at pp. 2–4.

[54] *Sivertson v. Citibank, N.A. as Tr. for Registered Holders of WAMU Asset-Back Certificates WAMU Series No. 2007-HE2 Tr.*, 390 F. Supp. 3d 769, 779 (E.D. Tex. 2019). *See United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992) (issues not raised in the petition, which were first raised in petitioner's objection to magistrate's report and recommendations, were not properly before the district court); *see also Stangel v. Sparkman*, No. CIV.A. 6:07CV317, 2007 WL 2725382, at *1 (E.D. Tex. Sept. 18, 2007) ("It is noted that the Plaintiff is trying to raise new claims in his objections, but issues raised for the first time in objections to a Report and Recommendation are not properly before the Court.") (citing *Cupit v. Whitley*, 28 F.3d 532, 535 n. 5 (5th Cir. 1994) and *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992)); *Anna Ready Mix, Inc. v. N.E. Pierson Construction Co.*, 747 F.Supp. 1299, 1302–1303 (S.D.Ill.1990) (thoroughly analyzing the federal Magistrate Judge Act, 28 U.S.C. § 631, et seq., and discerning therefrom that when a matter is assigned to a Magistrate Judge, Congress intended that the Magistrate Judge hear all arguments of the parties and take all evidence; and, accordingly, holding that while the Act provides for de novo review by the district court if timely objections are filed, it does not allow the parties to raise at the district court stage new evidence, argument, and issues that were not presented to the Magistrate Judge—"absent compelling reasons").

first time in his objection to the magistrate's Report and Recommendation. In addition, the trial court record directly contradicts Petitioner's claim that the Louisiana Fifth Circuit misrepresented the trial testimony.[55] Petitioner's claim is unsupported and meritless. Accordingly, Petitioner's claim that the alleged misrepresentations in the Louisiana Fifth Circuit's factual summary, adopted by the Magistrate Judge, violated his constitutional right to due process of law is not properly before this Court. The Court will not consider this objection presenting a new claim. Even if the Court did consider the claim, however, the claim would be denied.

II. Petitioner is not entitled to relief on his second objection, titled "Review of the Merits."

In his second objection, Petitioner asserts the Magistrate Judge "has erroneously adopted the State Court's determination that Petitioner's claims were rejected on the merits in State Courts."[56] Petitioner does not explain in what way the Magistrate Judge acted erroneously by concluding Petitioner's claims were rejected on the merits by the state courts. Petitioner's challenge to the insufficiency of the evidence was denied by the Louisiana Fifth Circuit on direct appeal, and the Louisiana Supreme Court denied writs. Additionally, the state trial court denied Petitioner's application for postconviction relief, and writs were denied by the Louisiana Fifth Circuit and by the Louisiana Supreme Court. Therefore, Petitioner's claims were, indeed, rejected on the merits by each state court that considered his claims. The

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[55] For example, contrary to Petitioner's assertion, C.R. did testify at trial that she believed the sexual abuse began when she had just turned twelve. *See* State Rec. Vol. 5 of 10, p. 1116. C. R. also testified at trial the first people she told about the sexual abuse were her sisters, S.W. and S.D. *See id.* at p. 1118–1119. Finally, on redirect examination, S.D. was asked whether "anything like this had happened before with Clifton Raye," and S.D. responded: "Yes. . . . To me." *See id.* at p. 1037.

[56] R. Doc. 22 at p. 5.

Magistrate Judge did not err in this regard.

Petitioner also argues the Magistrate Judge erred in not considering the "Newly Discovered Medical Evidence." In his traverse, Petitioner states that on February 18, 2022 he obtained C.R.'s medical records, attached to Petitioner's traverse as exhibits B and C, and that these medical records were withheld from the defense and recently discovered by Petitioner.[57] Petitioner contends "the undisclosed medical records proves (sic) that the prosecution knew of S.D. (sic) allegations against Petitioner . . . and that it (sic) was used effectively to coerce C.R. into disclosure."[58] Petitioner further contends that the state's failure to disclose these medical records denied him of his rights under the Sixth and Fourteenth Amendments to the United States Constitution.[59] Petitioner's contentions in this regard are without merit for several reasons. First, these medical records were not withheld. They were turned over to defense counsel during discovery and were introduced at trial as State exhibit S-1.[60] Second, at trial, Ann Troy, a forensic nurse practitioner who works with child victims of sexual abuse at the Audrey Hepburn Care Center in New Orleans, testified that she interviewed C.R. on April 27, 2013. Ann Troy testified that, during the interview, C.R. recounted a "detailed history of sexual abuse" over a two-year period by Petitioner. Ann Troy also testified that the physical findings from her examination of C.R.—as demonstrated in the medical records—were normal, but that it is not uncommon for a child with a history of vaginal penetration to present with normal physical findings.

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[57] R. Doc. 20 at pp. 2–3.
[58] *Id.* at p. 3.
[59] *Id.*
[60] *See* State Rec. Vol. 5 of 10, p. 1079.

The medical records are, at best, indeterminate and inconsequential. This is particularly true in light of the state trial judge's finding at the conclusion of Petitioner's trial, when the trial judge stated in part that he

> finds the testimony of the victim in this matter to be extremely credible. Her testimony has been consistent from the first report to the CAC tape and throughout her testimony here in Court. The Court also finds the defendant's testimony to be incredible. As such, the Court finds the defendant guilty of counts one, two, three, four and five.[61]

Contrary to Petitioner's assertions, the medical records do not rebut or even marginally undermine any factual finding made by the state court. Petitioner is incorrect in stating that the Magistrate Judge erred because he "failed to consider" this evidence. In reality, this evidence does not have any material impact on Petitioner's request for federal habeas review and does not merit thorough consideration. The Magistrate Judge was correct not to give considerable attention to these records.

Finally, Petitioner argues the Magistrate Judge erred by failing to consider the correspondence between himself and the Louisiana Attorney Disciplinary Board. The Magistrate Judge did consider this attachment and concluded Petitioner's interpretation of the correspondence was incorrect. Petitioner argued the correspondence shows that his trial counsel, Wayne Welker, was not authorized to practice law in the State of Louisiana when he represented Petitioner during the pendency of Petitioner's case at the state trial court level. However, the correspondence clearly shows Wayne Welker was authorized to practice law during

[61] *Id.* at p. 1149.

the period in which he represented Petitioner, and the Magistrate Judge thoroughly explained this in his Report and Recommendations. The Magistrate Judge did not fail to consider this evidence.

III. Petitioner is Not Entitled to Relief on his Ineffective Assistance of Counsel Claims

In *Strickland v. Washington*, the Supreme Court established a two-pronged test for evaluating claims of ineffective assistance of counsel. Specifically, a petitioner seeking relief must demonstrate *both*: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced his defense.[62] A petitioner bears the burden of proof on such a claim and "must demonstrate, by a preponderance of the evidence, that his counsel was ineffective."[63] "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."[64]

To prevail on the deficiency prong of the *Strickland* test, a petitioner must demonstrate that counsel's conduct fails to meet the constitutional minimum guaranteed by the Sixth Amendment.[65] "Counsel's performance is deficient if it falls below an objective standard of reasonableness."[66] Analysis of counsel's performance must consider the reasonableness of counsel's actions in light of all the circumstances.[67] "[I]t is necessary to 'judge . . . counsel's challenged conduct on the

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[62] *Strickland v. Washington*, 466 U.S. 668, 697 (1984).
[63] *Jernigan v. Collins*, 980 F.2d 292, 296 (5th Cir. 1993); *see also Clark v. Johnson*, 227 F.3d 273, 284 (5th Cir. 2000).
[64] *Strickland*, 466 U.S. at 689.
[65] *See Styron v. Johnson*, 262 F.3d 438, 450 (5th Cir. 2001).
[66] *Little v. Johnson*, 162 F.3d 855, 860 (5th Cir. 1998).
[67] *See Strickland*, 466 U.S. at 689.

facts of the particular case, viewed as of the time of counsel's conduct.'"[68] A petitioner must overcome a strong presumption that the conduct of his counsel falls within a wide range of reasonable representation.[69]

To prevail on the prejudice prong of the *Strickland* test, 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."[70] In this context, a reasonable probability is "a probability sufficient to undermine confidence in the outcome."[71] In making a determination as to whether prejudice occurred, courts must review the record to determine "the relative role that the alleged trial errors played in the total context of [the] trial."[72] If a court finds that a petitioner has made an insufficient showing as to either of the two prongs of inquiry—deficient performance or actual prejudice—it may dispose of the ineffective assistance claim without addressing the other prong.[73]

For purposes of federal habeas review, the issue of ineffective assistance of counsel presents a mixed question of law and fact.[74] As such, the question is whether the state court's denial of relief was contrary to or an unreasonable application of United States Supreme Court precedent, namely *Strickland*.[75] "The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in

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[68] *Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993) (quoting *Strickland*, 466 U.S. at 690).
[69] *See Crockett v. McCotter*, 796 F.2d 787, 791 (5th Cir. 1986); *Mattheson v. King*, 751 F.2d 1432, 1441 (5th Cir. 1985).
[70] *Strickland*, 466 U.S. at 694.
[71] *Id.*
[72] *Crockett*, 796 F.2d at 793.
[73] *Strickland*, 466 U.S. at 697.
[74] *Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir. 1994).
[75] *Murphy v. Johnson*, 205 F.3d 809, 813 (5th Cir. 2000).

tandem, review is doubly [deferential]."[76] The Supreme Court has stressed, in no uncertain terms, that "a federal court may grant relief only if every "'fairminded juris[t]'" would agree that every reasonable lawyer would have made a different decision.[77]

Petitioner's federal habeas petition raises several claims of ineffective assistance of counsel. Each of the Petitioner's claims was rejected on the merits by the state courts on postconviction review. Additionally, the Magistrate Judge recommended that each of Petitioner's claims for federal habeas relief be denied. The Court considers each of the several claims in turn.

1. *Claim 1:*

Claim one alleges generally that Petitioner's defense counsel rendered ineffective assistance prior to and during trial. Petitioner argues that he was denied counsel entirely because lead counsel of record, Wayne E. Walker, "impermissibly proceeded to represent petitioner in pre-trial and trial proceedings without first being registered and authorized to practice law in the State of Louisiana."[78] He lists ten additional subclaims, with no supporting argument, as part of claim one, wherein he alleges his trial defense counsel failed to:

> 1) Investigate and obtain all evidence in possession of the State; 2) Adequately confront and cross-examine state witnesses Mrs. S.D., S.W. and C.R.; 3) Failure to put forth a defense; 4) Cross-examine witness for impeachment purposes; 5) to make timely objections to hearsay; 6) Fail to investigate and present mitigating evidence; 7) to object to trial courts finding of guilt without first excluding every reasonable hypothesis of innocence; 8) to object to evidence insufficient to sustain conviction; 9) to put the States case to any meaningful adversarial testing; 10) to recall

[76] *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal citations omitted).
[77] *Dunn v. Reeves*, 141 S. Ct. 2405 (2021) (citing *Richter*, 562 U.S. at 101).
[78] R. Doc. 5-3 at p. 12.

S.D. for re-cross examination to impeach her to her prior trial testimony.

Petitioner contends that, had counsel performed the above listed functions of a reasonable trial strategy he would have met the reasonable doubt required to change the outcome of the trial.[79]

In considering Petitioner's application for postconviction relief, the state trial court concluded that the petitioner was incorrect in his assertion regarding Mr. Walker's eligibility to practice law in the state of Louisiana, and that Petitioner's ten subclaims to Claim One were speculative, conclusory, and failed to prove any deficiency in counsel's performance or any resulting prejudice.[80] Thereafter, in denying writs, the Louisiana Fifth Circuit Court of Appeal concluded that the "record provides documentation from the Louisiana State Bar Association evidencing that counsel was eligible to practice law at the time of defendant's trial and sentencing," and that Petitioner's ten subclaims lacked merit because Petitioner "failed to show with any particularity how counsel's performance before and during the trial proceedings was deficient or that any prejudice resulted."[81]

In his Report and Recommendation, the Magistrate Judge concluded the state courts correctly found the record in this case did not support the factual contention underlying Petitioner's claim that he was denied effective assistance of counsel because Mr. Walker was ineligible to practice law in the State of Louisiana during the pendency of Petitioner's case.[82] The Magistrate Judge pointed out that a letter from the Louisiana State Bar Association showed Mr. Walker was ineligible for nonpayment

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[79] *Id.* at pp. 12-13.
[80] R. Doc. 5-1 at p. 17.
[81] R. Doc. 5-1 at p. 8.
[82] R. Doc. 21 at p. 11.

of dues from September 9, 2013 to September 25, 2013, and that Mr. Walker became ineligible again in September 2016 for nonpayment of dues, fees and noncompliance with the Trust Account Disclosure Form.[83] The Magistrate Judge further concluded Petitioner had not shown Mr. Walker was ineligible when he represented Petitioner during pretrial proceedings, during trial, and during Petitioner's sentencing.[84]

In his objection, Petitioner contends the Magistrate Judge failed to consider the attachment from the Louisiana State Bar Association.[85] Petitioner contends the record confirms Mr. Walker was ineligible to practice law during the period when he represented Petitioner.[86]

The Court finds Petitioner's objection to be without merit. Attached to Petitioner's traverse is correspondence from the Louisiana State Bar Association showing thestatusof Edwin Wayne Walker's membership.[87] This correspondence shows that Edwin Wayne Walker was ineligible from September 9, 2013 to September 25, 2013 for nonpayment of bar dues.[88] The correspondence further shows that Edwin Wayne Walker became ineligible again on September 9, 2016 for nonpayment of bar dues and for noncompliance with trust account disclosure requirements.[89] According to the record in this case, Petitioner was indicted on September 26, 2013 and was sentenced in March of 2016.[90] Throughout this entire period, Edwin Wayne Walker was eligible to practice law in the State of Louisiana. Additionally, Edwin Wayne

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[83] *Id.* at 11-12.
[84] *Id.* at 12.
[85] R. Doc. 22 at p. 8.
[86] *Id.*
[87] R. Doc. 20-1 at pp. 57–58.
[88] R. Doc. 20-1 at p. 58.
[89] *Id.*
[90] *State v. Raye*, 17-136 (La.App. 5 Cir. 10/25/17); 230 So. 3d 659, 661.

Walker was not ineligible in June of 2013 when he filed several preliminary motions on Petitioner's behalf prior to Petitioner's indictment. Thus, the Magistrate Judge correctly concluded that the factual record in this case does not support the factual contention underlying Petitioner's claim.

The Court further finds that, even if Petitioner's factual contention was supported by the record, Edwin Wayne Walker's ineligibility would not amount to ineffective assistance of counsel. In *McKinsey v. Cain*, the petitioner contended he was denied the right to effective assistance of counsel because his attorney was ineligible to practice law at the time of the petitioner's trial.[91] The court rejected the petitioner's contention, explaining that defense counsel's ineligibility was "not a per se violation of the Sixth Amendment, as it resulted from a failure to meet the technical requirements of bar membership."[92] Furthermore, while Mr. Walker served as lead counsel, Petitioner was at all times also represented by Mr. William Doyle, who served as co-counsel. Therefore, Petitioner was represented by eligible counsel during pretrial proceedings, during trial, and during sentencing. Accordingly, the state courts' denial of Petitioner's request for relief on the grounds that his counsel was ineligible to practice law was a reasonable application of *Strickland*. As a result, the Court concludes Petitioner is not entitled to federal habeas relief on this claim.

Turning now to Petitioner's ten subclaims to claim one, Petitioner did not object to the Magistrate Judge's resolution of his ten subclaims. Therefore, the Court need only review the resolution of these ten subclaims for clear error. As mentioned

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[91] No. CIV.A. 09-7729, 2011 WL 2945812, at *2 (E.D. La. July 15, 2011).
[92] *Id.*

above, the state habeas courts rejected Petitioner's ten subclaims as speculative and conclusory because Petitioner failed to set out the claims with specificity or to support them with evidence or argument. Citing to Fifth Circuit precedent, the Magistrate Judge noted that "a habeas petitioner cannot establish a *Strickland* claim based on speculative and factually unsupported assertions."[93] The Magistrate Judge went on to conclude that the state courts properly dismissed Petitioner's subclaims as unsupported. This Court finds no clear error in the Magistrate Judge's conclusion.

2. *Claim 2:*

Claim two alleges counsel was ineffective for allowing the introduction of evidence insufficient to sustain the conviction. Petitioner argues counsel should have objected on various grounds to the improper evidence presented by the State and filed appropriate motions for mistrial, new trial, and post-verdict judgment of acquittal.[94] Petitioner further argues his "trial defense counsel was ineffective for failing to object to evidence insufficient to convict" him because he was allegedly "tried and convicted upon hearsay evidence."[95]

The state trial court denied Petitioner's claim that his counsel rendered ineffective assistance by failing to object to evidence insufficient to sustain a conviction.[96] As part of claim two, Petitioner's application for postconviction relief filed in state court contested "hearsay testimony" given by the state's witnesses, and contested "other crimes" evidence which was introduced at trial.[97] The state trial court

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[93] R. Doc. 21 at p. 13 (citing *Ochoa v. Davis*, 750 F. App'x 365, 371 (5th Cir. 2018)).
[94] R. Doc. 5-3 at p. 26.
[95] *Id.* at p. 19.
[96] R. Doc. 5-1 at p. 17.
[97] *Id.*

concluded Petitioner failed to state with any particularity why or how this "other crimes" evidence and alleged hearsay testimony rendered the evidence against him insufficient.[98] The court concluded Petitioner failed to show with any particularity how counsel was deficient in this regard, or that any prejudice resulted from counsel's allegedly deficient performance.[99]

The Louisiana Fifth Circuit, on Petitioner's writ application from the state trial court's denial of his application for postconviction relief, after reviewing claim two of Petitioner's application for postconviction relief, stated that claim two "is merely a re-assertion of his prior claim of insufficiency of the evidence, which claim was previously considered by this Court on direct review under the *Jackson* [*v. Virginia*] standard of review."[100] On direct review, the Louisiana Fifth Circuit considered Petitioner's argument that the evidence used to convict him was insufficient because of C.R.'s lack of specificity with regard to the dates of the alleged instances of sexual abuse, and the fact that there was no corroborating evidence, either physical or otherwise. The Louisiana Fifth Circuit denied Petitioner's contention that the evidence was insufficient to convict him, and explained as follows:

> This Court has recognized that in sexual abuse cases that continue over time, exact dates often cannot be supplied. *State v. Mazique*, 09-845, p. 12 (La. App. 5 Cir. 4/27/10), 40 So.3d 224, 234 n.10, writ denied, 10-1198 (La. 12/17/10), 51 So.3d 19 (citing *State v. Bolden*, 03-0266 (La. App. 5 Cir. 7/29/03), 852 So.2d 1050). Additionally, the credibility of a witness, including the victim, is within the sound discretion of the trier of fact, who may accept or reject, in whole or in part, the testimony of any witness. *State v. Gonzalez*, 15-26 (La. App. 5 Cir. 8/25/15), 173 So.3d 1227, 1233, writ denied, 15–1771 (La. 9/23/16), 2016 La. LEXIS 1955. In sex offense cases, the testimony of the victim alone can be sufficient to

[98] *Id.*
[99] *Id.*
[100] R. Doc. 5-1 at p. 8.

> establish the elements of a sexual offense, even when the State does not introduce medical, scientific or physical evidence to prove the commission of the offense. *State v. Hernandez*, 14-863 (La. App. 5 Cir. 9/23/15), 177 So.3d 342, 351, writ denied, 15-2111 (La. 12/5/16), 210 So.3d 810. It is the role of the fact-finder to weigh the respective credibility of the witnesses; thus, the appellate court should not second-guess the credibility determinations of the trier of fact beyond the sufficiency evaluations under the *Jackson* standard of review. *State v. Alfaro*, 13-39 (La. App. 5 Cir 10/30/13), 128 So.3d 515, 525, writ denied, 13-2793 (La. 5/16/14), 139 So.3d 1024.
>
> Defendant does not argue there are any internal contradictions in C.R.'s testimony, but rather argues that she should not be believed without any supporting evidence. However, convictions of aggravated rape and other sexual abuse offenses have been upheld by this Court in the absence of medical evidence or other corroborating evidence. *See State v. Hernandez*, 177 So.3d at 352; *State v. Roca*, 03-1076 (La. App. 5 Cir. 1/13/04), 866 So.2d 867, writ denied, 04-583 (La. 7/2/04), 877 So.2d 143; *Gonzalez, supra.*
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> We find C.R.'s testimony, coupled with her statements made in the CAC interview, established each element of the five offenses for which defendant was convicted. Moreover, although defendant testified that he never sexually abused C.R. and suggested that C.R. was lying, having been coerced into making the accusations against him by his step-daughters who were angry with him, the trial judge clearly chose to believe the testimony of C.R. over defendant's testimony. It is not this Court's function to second-guess the credibility determinations of the trier-of-fact.[101]

In addition, on Petitioner's writ application from the state trial court's denial of his application for postconviction relief, the Louisiana Fifth Circuit held the trial testimony of C.R.'s sisters, to whom C.R. made the initial disclosure of sexual abuse, was not hearsay, and the victim's sisters were subject to cross examination by defense counsel during trial.[102] The Louisiana Fifth Circuit concluded Petitioner's claim that his counsel was ineffective for failing to object to the sufficiency of the evidence was

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[101] *State v. Raye*, 17-136 (La. App. 5 Cir. 10/25/17), 230 So. 3d 659, 666–67, *writ denied*, 17-1966 (La. 6/15/18), 257 So. 3d 674.
[102] R. Doc. 5-1 at p. 9.

without merit.[103]

In the Report and Recommendation, the Magistrate Judge noted that the Louisiana Fifth Circuit soundly rejected Petitioner's sufficiency of the evidence argument, and that the trial testimony of C.R.'s sisters was not hearsay.[104] Therefore, the Magistrate Judge concluded any objection based on insufficiency of the evidence would have been unwarranted, and that no ineffectiveness was established under *Strickland*.[105] The Magistrate Judge further concluded that

> The trial judge's ruling and the ruling on direct appeal were both based on the direct and extremely credible testimony of the victim, C.R. The resolution of whether other testimony offered by witnesses constituted hearsay in no way alters or negates C.R.'s credibility as a witness as determined by the trier-of-fact. As the state court held, in reviewing the claim under *Jackson v. Virginia*, 433 U.S. 307 (1979), a court may not second-guess the credibility determinations made by the trier-of-fact. Thus, Raye's counsel had no legal grounds to base a motion for mistrial, new trial or a motion for post-verdict judgment of acquittal on the credibility determinations made by the trier-of-fact, who in this case, was the trial judge. Counsel does not perform deficiency for failing to lodge a meritless objection. *See Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) (counsel is not required to make futile motions or objections); *see also Smith v. Puckett*, 907 F.2d 981, 585 n.6 (5th Cir. 1990) ("[c]ounsel is not deficient for, and prejudice does not issue from, failure to raise a legally meritless claim.").[106]

Petitioner objects to the Magistrate Judge's conclusion with respect to claim two. However, Petitioner's arguments in support of his objection are misplaced, frivolous, and irrelevant to resolution of claim two. For example, Petitioner again argues the trial testimony of S.W., C.R.'s sister, was hearsay. Petitioner also argues C.R.'s trial testimony regarding her initial disclosure of abuse to her sisters was

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[103] *Id.*
[104] R. Doc. 21 at p. 20.
[105] *Id.*
[106] *Id.* at p. 21.

hearsay. As previously mentioned, and as decided by the state courts, the trial testimony of C.R. and C.R.'s sisters was not hearsay. The Court will not entertain, on federal habeas review, Petitioner's arguments regarding what trial testimony was or was not inadmissible as hearsay under the Louisiana Code of Evidence. An objection to insufficiency of the evidence premised on the misguided belief that Petitioner was convicted solely upon hearsay would have been meritless and would have made no difference at trial.[107] Thus, Petitioner did not suffer any prejudice by counsel's failure to file such meritless motions and challenges. Petitioner cannot prevail on his ineffective assistance of counsel claim under *Strickland.*

In further support of his objection to claim two, Petitioner argues his counsel was ineffective for failing to obtain the arrest affidavit of Detective Ronald Ray. Petitioner argues that, had his counsel obtained Detective Ray's affidavit, it would have "provided for effective cross-examination of S.W. for impeachment purposes" which, Petitioner argues, would have further supported his claim that the evidence was insufficient to sustain his conviction.[108] However, the factual contention on which this claim is based is not supported by the record, as the record demonstrates the State provided the arrest warrant and police report to defense counsel during discovery, as reflected in the discovery receipt.[109] Furthermore, Petitioner appears to argue the arrest report and affidavit prepared by Detective Ray would have "impeached" the trial

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[107] *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999) ("An attorney's failure to raise a meritless argument thus cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue.") (citing *Williams v. Collins*, 16 F.3d 626, 634–35 (5th Cir.1994)).

[108] R. Doc. 22 at p. 10.

[109] State Rec. Vol. 6 of 10, p. 1271.

testimony of C.R. and C.R.'s sisters regarding the date of the initial disclosure and to whom the initial disclosure was made—whether one or both of C.R.'s sisters—because the affidavit reflects a different disclosure date and states the disclosure was made to only one, not both, of C.R.'s sisters. Detective Ray prepared the affidavit for the arrest warrant after watching C.R.'s interview which took place at the Child Advocacy Center ("CAC"). A videotape of the CAC interview was played at trial for the fact finder's viewing. In addition, C.R. and both of her sisters all testified consistently regarding the date of the initial disclosure and to whom it was made. The fact finder was entitled to conclude Detective Ray's affidavit was based upon Detective Ray's misinterpretation of the CAC interview, rather than concluding C.R. and her sisters gave false testimony at trial regarding the initial disclosure. Furthermore, defense counsel was not ineffective for failing to emphasize the inconsistency between Detective Ray's affidavit and the trial testimony of C.R. and her sisters. It was well within the professional judgment of counsel to choose not to emphasize the inconsistency in the arrest affidavit as this is a matter involving strategic considerations left to the discretion of counsel.[110] The decision of how vigorously to cross examine a witness, and whether to press every conceivable inconsistency in that testimony involves "a quintessential exercise of professional judgment."[111] There is a strong presumption that counsel has exercised his professional judgment reasonably.

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[110] *See Ford v. Cockrell*, 315 F. Supp. 2d 831, 859 (W.D. Tex. 2004), *aff'd sub nom.* Ford v. Dretke, 135 F. App'x 769 (5th Cir. 2005).

[111] *Strickland v. Washington*, 466 U.S. 668, 689 (1984) "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy.").

Petitioner has not overcome this presumption. Therefore, Petitioner cannot prevail on his ineffective assistance of counsel claim under the two-prong *Strickland* test.

Petitioner also contends the Magistrate Judge erred in finding his ineffective assistance of counsel claim based on counsel's alleged failure to object to the sufficiency of the evidence was raised and decided on direct appeal in the state courts.[112] Petitioner's challenge is meritless. Petitioner's insufficiency of the evidence claim was denied on direct appeal by the Louisiana Fifth Circuit.[113] The Magistrate Judge's Report and Recommendation correctly states that Petitioner's ineffective assistance of counsel claim is based upon the sufficiency of the evidence argument which was, indeed, rejected by the Louisiana Fifth Circuit on direct review.[114] Petitioner's contention has no merit, and this objection is denied.

The state courts reasonably concluded that Petitioner's claim for ineffective assistance of counsel based upon insufficiency of the evidence did not meet the standards set forth in *Strickland* and that Petitioner was not entitled to relief on such claim. Because the conclusion involved a reasonable application of federal law as set forth in *Strickland*, Petitioner is not entitled to federal habeas relief for ineffective assistance of counsel on the grounds raised in claim two.

3. *Claim 3:*

In claim three, Petitioner argues his trial counsel failed to object to prosecutorial misconduct that resulted in an unfair trial and violated his due process

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[112] R. Doc. 22 at p. 9.
[113] *See State v. Raye*, 17-136 (La. App. 5 Cir. 10/25/17), 230 So. 3d 659, *writ denied*, 17-1966 (La. 6/15/18), 257 So. 3d 674.
[114] *See id; see also* R. Doc. 21 at p. 20.

rights. Petitioner claims there was prosecutorial misconduct when the state withheld Detective Ray's arrest warrant affidavit.[115] As previously discussed, Detective Ray's arrest warrant affidavit was not withheld by the state, and the court will not consider this contention any further. It suffices to state that defense counsel was not deficient for not objecting to an arrest warrant affidavit being withheld by the prosecution, as no arrest affidavit was withheld. As a result, no objection could properly be lodged on this basis.

Petitioner also argues there was prosecutorial misconduct at trial when the prosecutor elicited testimony from S.D. which amounted to "other crimes" evidence, and that his counsel was ineffective for failing to object to this alleged misconduct.[116] Petitioner's contention is based on the following series of events at trial. When S.D. was on the witness stand at trial, defense counsel cross examined her and asked whether there had ever been any similar accusations against Petitioner.[117] S.D. indicated she did not want to answer the question, even attempting to invoke the Fifth Amendment, however she was told she had to answer and eventually said "no."[118] On redirect examination, the prosecutor followed up on the same question, and admonished S.D. about being under oath.[119] S.D. then indicated that Petitioner had done something similar to her.[120]

On Petitioner's application for postconviction relief, the state trial court

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[115] R. Doc. 5-3 at pp. 26–27.
[116] *Id.*
[117] State Rec. Vol. 5 of 10, pp. 1034-1035. The record reflects defense counsel consulted with Petitioner before asking this question.
[118] *Id.*
[119] *Id.* at 1036–37.
[120] *Id.*

rejected this claim on the grounds that there was no prosecutorial misconduct as defense counsel opened the door to the testimony in question when he asked about it on cross examination.[121] On Petitioner's writ application, the Louisiana Fifth Circuit agreed defense counsel opened the door to this testimony, and there was no merit to Petitioner's claim of prosecutorial misconduct regarding testimony allegedly elicited of "other crimes" evidence.[122]

On Petitioner's application for postconviction relief, the state trial court rejected this claim on the grounds there was no prosecutorial misconduct as defense counsel opened the door to the testimony in question when he asked about it on cross examination.[123] Similarly, the Magistrate Judge concluded the prosecution's question was proper in light of defense counsel opening the door when he asked S.D. about prior sexual abuse, and the state courts were correct in finding that "counsel's failure to raise a meritless objection based on purported prosecutorial misconduct in connection with 'other crimes' evidence was not constitutionally deficient performance under *Strickland*."[124]

Petitioner objects to the Magistrate Judge's conclusion with respect to claim three. The Court agrees defense counsel opened the door by asking S.D. whether anything similar had ever happened with Petitioner on prior occasions. The prosecution was therefore well within its right to ask a follow-up question of S.D. on redirect examination. Accordingly, there was no prosecutorial misconduct by the

[121] R. Doc. 5-1 at p. 17.
[122] *Id.* at p. 10.
[123] *Id.* at p. 17.
[124] R. Doc. 21 at p. 24.

prosecution as the prosecution did not improperly elicit other crimes testimony.[125] Had defense counsel objected on the grounds of prosecutorial misconduct because of wrongfully elicited other crimes testimony, the objection would have been overruled as meritless.[126] Accordingly, counsel's performance in this regard was not objectively unreasonable, and Petitioner suffered no prejudice as a result thereof. It follows that Petitioner is not entitled to relief on this claim as Petitioner has failed to establish either prong of *Strickland*. The state courts' conclusion that Petitioner was not entitled to relief under *Strickland* on claim three was reasonable.

4. *Claim 4:*

In claim four, Petitioner argues his counsel was ineffective because counsel allowed the State to offer perjured testimony from S.D. at trial, and because his counsel failed to object to the perjured testimony of S.D..[127] Petitioner asserts S.D. committed perjury at trial when, on cross examination, she denied that similar accusations had previously been made against Petitioner, and then on redirect examination, S.D. testified Petitioner had done something inappropriate to her in the past.[128] Petitioner argues the trial testimony of S.D., regarding her statement that Petitioner had sexually abused her in the past, constituted perjury.

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[125] *See, e.g., United States v. Pruitt*, 839 F. App'x 90, 93 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 503 (2021) (government did not engage in prosecutorial misconduct by use of cell-phone evidence because defendant opened door to use of cell phone evidence); *United States v. Caballero*, 277 F.3d 1235, 1249–50 (10th Cir.2002) (no prosecutorial misconduct where defense questioning invited prosecutors to elicit testimony characterizing defendant in an unfavorable light).

[126] *See Wood v. Quarterman*, 503 F.3d 408, 413 (5th Cir. 2007) ("'[F]ailure to raise meritless objections is not ineffective lawyering; it is the very opposite.'")(quoting *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir.1994); *see also Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir.1990) ("This Court has made clear that counsel is not required to make futile motions or objections.").

[127] R. Doc. 5-3 at pp. 34–38.

[128] State Rec. Vol. 5 of 10, pp. 1036–37.

The state trial court denied Petitioner's ineffective assistance of counsel claim based on an alleged failure to object to perjured testimony.[129] The state trial court stated that petitioner failed to "show any perjured testimony," failed to explain how this affected the outcome of his trial," and failed to "state with any particularity the factual basis for his relief.[130] On writ application, the Louisiana Fifth Circuit agreed with the state trial that Petitioner failed to show any perjured testimony or how this testimony affected the outcome of his trial, and that Petitioner failed to show he was prejudiced by his counsel's performance in this regard.[131] The Louisiana Fifth Circuit also pointed out, again, that defense counsel opened the door to this testimony.[132] The Magistrate Judge concluded the state courts were correct in concluding defense counsel did not perform deficiently by not objecting to perjured testimony, and no prejudice resulted from defense not objecting to perjured testimony.[133] Petitioner objects to the Magistrate Judge's conclusion with respect to claim four.[134] Petitioner reasserts that at trial, "S.D. testified inconsistent with earlier testimony," and that "the prosecution pounced upon the opportunity to use S.D.'s allegations against Petitioner, picturing him as a person" with a proclivity for engaging in sexually assaultive behavior.[135]

The Court concludes the state courts' determination that this claim lacked merit was not contrary to or an unreasonable application of *Strickland*. First, the state

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[129] R. Doc. 5-1 at p. 17.
[130] *Id.*
[131] *Id.* at p. 10.
[132] *Id.*
[133] R. Doc. 21 at p. 25.
[134] R. Doc. 22 at p. 12.
[135] *Id.* at 13.

courts were correct in finding defense counsel opened the door to S.D.'s testimony that Petitioner had sexually abused her in the past. Defense counsel would have had no valid grounds upon which to object when the prosecutor followed up on this line of questioning on redirect examination of S.D. Second, Petitioner has not shown S.D.'s testimony was perjured. The mere fact that S.D.'s testimony on cross examination was inconsistent with her later testimony on redirect examination does not, ipso facto, prove that S.D. perjured herself on the witness stand. As stated by the United States Fifth Circuit Court of Appeals, "contradictory trial testimony" does not prove perjury but "merely establishes a credibility question" for the trier of fact.[136] This is particularly true in this case, when, given the subject matter of the questioning, it is understandable that S.D. would be reluctant to discuss such a delicate subject. In addition, Petitioner has pointed to nothing in the state court record to support his assertion that S.D.'s testimony that Petitioner sexually abused her in the past was untruthful. The state courts reasonably concluded defense counsel did not perform deficiently by not objecting to the testimony as perjured, and Petitioner suffered no prejudice in this regard. Petitioner is not entitled to federal habeas relief relative his fourth claim of ineffective assistance of counsel.

5. *Claim 5:*

Finally, in claim five, Petitioner argues his counsel was ineffective for failing to object to a defective indictment.[137] Petitioner argues defense counsel should have moved to quash the indictment as defective.[138] Petitioner argues the indictment was

[136] *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990).
[137] R. Doc. 5-3 at pp. 38–44.
[138] *See id.*

defective because it "fails to factually and distinguishably set forth all essential elements which constitute the offense charged against him whether by statute or by plaintiff language."[139] Petitioner argues the charge in count 3 of the indictment fails to protect him from double jeopardy in the future.[140] Petitioner also argues that, with respect to each of counts one through five, the indictment was deficient because it did not specify the victim's name, gender, or the specific acts committed by the defendant which constitute the criminal offense charged.[141]

The state trial court denied Petitioner's request for relief on this claim.[142] The state trial court found Petitioner's claim that the indictment was defective lacked merit, and Petitioner failed to prove any motion challenging the indictment would have affected the outcome of his trial.[143] On direct appeal, the Louisiana Fifth Circuit reviewed the court record for errors patent and found no error regarding the indictment.[144] Moreover, the Louisiana Fifth Circuit found that Petitioner "failed to demonstrate, factually or legally, why his counsel should have filed such a motion, that he would have been successful, or how the filing of the motion would have affected the outcome of his trial."[145] Petitioner applied for a supervisory writ with the Louisiana Supreme Court, and the Louisiana Supreme Court denied the writ application, stating Petitioner "failed to show that he received ineffective assistance of counsel under the standard of *Strickland v. Washington*."[146] When the Louisiana Fifth Circuit and the

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[139] *Id.* at p. 39.
[140] *Id.* at p. 41.
[141] *Id.* at pp. 39-44.
[142] R. Do. 5-2 at p. 18.
[143] *Id.*
[144] *Id.* at p. 11.
[145] *Id.*
[146] R. Doc. 5-1 at p. 12.

Louisiana Supreme Court affirmed Petitioner's conviction on direct appeal and denied Petitioner's application for writs on his state habeas petition, they necessarily, even if not expressly, held the indictment was sufficient under Louisiana law to confer jurisdiction on the Louisiana courts.[147]

The Magistrate Judge, in his Report and Recommendations, concluded the state courts properly determined Petitioner's counsel was not ineffective under the standard set forth in *Strickland* for failing to file a motion to quash the indictment because the indictment was valid, and any such motion would have been meritless.[148] Petitioner filed an objection to the Magistrate Judge's conclusion with respect to the recommendation that Petitioner's ineffective assistance of counsel claim based on a defective indictment be dismissed.[149] In support of his objection, Petitioner essentially advances the same grounds urged in his petition filed with this Court. As recognized by the Magistrate Judge in his Report and Recommendation, this Court, on federal habeas review of a state prisoner's conviction, need not and should not "weigh in on or second guess a sufficiency determination for a state indictment under Louisiana law."[150] Under applicable federal law, an indictment is constitutionally sufficient if it

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[147] *See Rose v. Johnson*, 141 F. Supp. 2d 661, 693–97 (S.D. Tex. 2001); *see also Lee v. Vannoy*, No. CV 19-12280, 2020 WL 3513743, at *12 (E.D. La. June 1, 2020), *report and recommendation adopted*, No. CV 19-12280, 2020 WL 3512709 (E.D. La. June 29, 2020) (the petitioner asserted his claim challenging the form and sufficiency of his indictment in the Louisiana Supreme Court on post-conviction review, and the Louisiana Supreme Court, in denying the petitioner's claim, "necessarily concluded, as did the lower courts, that the indictment was sufficient in content and form under Louisiana state law. . . . The Louisiana Supreme Court has, therefore, had the opportunity to address Lee's challenge to his indictment and has by clear inference determined that the indictment was proper. For this reason, federal review of this claim is prohibited.").

[148] R. Doc. 21 at p. 27.

[149] R. Doc. 22 at pp. 14—18. *Compare* R. Doc. 5-3.

[150] R. Doc. 21 at p. 26. *Lee*, 2020 WL 3513743, at *12 (quoting *Alexander v. McCotter*, 775 F.2d 595, 598 (5th Cir. 1985) ("The United States Fifth Circuit Court of Appeals, however, has declined to review claims alleging insufficient indictment forms because the sufficiency of a state indictment is not a matter for federal habeas corpus relief.") (internal quotations omitted)).

informs the defendant of the accusation against him so as to allow him to prepare his defense, and if it affords him protection against double jeopardy.[151] In this case, for each of counts one through five, the indictment set forth the specific statutory subsection charged, against a known juvenile identified by her date of birth (7/6/1999), lists a date range for each of the five charged offense, and provides a general description of the act charged. For example, count 1 specifies Petitioner is charged with aggravated rape of a known victim (DOB 7/6/1999) under thirteen years of age, involving oral sexual intercourse occurring on or between July 6, 2010, and July 5, 2012, in violation of La. R.S. 14:42.[152] As further example, count three specifies Petitioner is charged with committing sexual battery upon a known victim (DOB 7/6/1999) under thirteen years of age, occurring on or between July 6, 2010, and July 5, 2012, in violation of La. R.S. 14:43.1, and where the victim is not the spouse of the defendant and is more than three years younger than the defendant.[153] A plain reading of the indictment demonstrates it informed Petitioner of the elements of the charges against him and provided sufficient detail to enable him to rely upon the indictment for a double jeopardy bar in the event of a subsequent prosecution. Therefore, the indictment satisfies the requirements of the United States Constitution. Furthermore, given that Petitioner was the biological father of the victim, and lived with the victim at the time of the abuse, any contention Petitioner was not apprised of the identity, age, or gender of the victim is unworthy of belief.

Petitioner has not shown his indictment was constitutionally invalid.

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[151] *United States v. Debrow*, 346 U.S. 374 (1953).
[152] State Rec. Vol 1 of 10, p. 6.
[153] *Id.* The charges in counts two, four, and five are set forth in similar fashion. *See id.*

Accordingly, Petitioner was not prejudiced by his counsel's failure to file a motion to quash or to otherwise challenge the indictment, and Petitioner cannot show his counsel was ineffective by failing to file a motion to quash the indictment. As repeatedly mentioned, "counsel is not deficient for failing to make meritless" motions.[154] The state courts reasonably concluded Raye's ineffective assistance of counsel claim based on his counsel's failure to file motions challenging the indictment failed under the standards set forth in *Strickland*.

CONCLUSION

IT IS ORDERED that Petitioner Clifton Raye's application for federal habeas corpus relief is **DISMISSED WITH PREJUDICE.**

New Orleans, Louisiana, this 7th day of March, 2022.

SUSIE MORGAN
UNITED STATES DISTRICT JUDGE

[154] *Evans v. Davis*, 875 F.3d 210, 218 (5th Cir. 2017).

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