No. 23-

IN THE

SUPREME COURT OF THE UNITED STATES

JASON DANIEL SEWELL,
Petitioner,

v.

BOBBY LUMPKIN,
Director, Texas Department of Criminal Justice, Institutional Division
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1) Was Petitioner entitled to a certificate of appealability on four claims following the denial of his petition, where each issue presented non-frivolous claims for review?

PARTIES

Petitioner:	Jason Daniel Sewell
Respondent:	Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division

RELATED PROCEEDINGS

Sewell v. Lumpkin, No. 4:19-CV-059-ALM-KPJ, United States District Court for the Eastern District of Texas, Sherman Division

Sewell v. Lumpkin, No. 22-40101, United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Daniel Sewell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's order denying a certificate of appealability was unpublished, but is provided in the Appendix. *See* Appendix A.

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 253 (1998) ("We hold this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge.") The court of appeals below denied Petitioner's request for a certificate of appealability on October 20, 2022. *See* Appendix A. This petition has been filed within 90 days of this Court and is therefore timely. *See* Sup. Ct. R. 13.1; Sup. Ct. R. 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Section 2253(c) of Title 28 of the United States Code provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of the process issued by a State court; or
>
> (B) the final order in a proceeding under 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Section 2254(d) of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

This petition follows the Fifth Circuit's refusal to afford Petitioner a certificate of appealability (COA) on any issue arising from the denial of his § 2254 federal petition for habeas corpus. In his habeas petition, Petitioner collaterally challenged convictions and sentences he received in the State of Texas. Petitioner seeks a more thorough and meaningful appellate review of four claims raised in that Petition, each of which presented colorable if not meritorious claims of ineffective assistance of counsel under the Sixth Amendment. Petitioner is currently incarcerated under 10 and 52-year sentences of imprisonment.

Relevant Facts

Petitioner was found guilty in a trial of continuous sexual abuse of a child under 14 and indecency with a child by contact. The federal magistrate court borrowed the factual summary from the state appellate court on direct appeal, which was as follows:

> A jury convicted Jason Daniel Sewell and sentenced him to fifty-two years' imprisonment for continuous sexual abuse of a child and to ten years for indecency with a child. In four issues, Sewell argues the trial court erred by failing to grant a mistrial and by sustaining an objection to his counsel's closing argument, and asserts he received ineffective assistance of counsel. We affirm the trial court's judgment.
>
> The complainant, A.S., is Sewell's daughter. When she was approximately seven years old, Sewell told A.S. to go into his bedroom and take her clothes off. He then told her to lie down on the bed, covered her eyes "because he didn't want [her] to be scared," and touched her vagina with his hand. He did not touch her again for "a long period of time." When he did start touching her again, it became more frequent and consistent.
>
> On several occasions, Sewell performed oral sex on A.S. and had her perform oral sex on him. Sewell tried to put his penis in A.S.'s vagina but

never did because he did not want her to bleed. This type of abuse continued for several years, as the family moved from house to house.

A.S. and her three siblings had regular visitations with Sewell. A.S. slept on the couch in the living room, and Sewell came in at night to have her perform oral sex on him. By this time, she no longer needed to be told what to do because it was "routine," and she knew what he wanted her to do based on his gestures. Sometimes Sewell took her into his bedroom and used sex toys on her. *The sexual abuse in McKinney lasted from approximately the summer of 2012 until spring break of 2013.*

Before 2013, A.S. did not tell her mother about the abuse because Sewell made her think that her mother would be jealous and "come after [her]." In 2013, when A.S. was fourteen, Sewell stopped picking up the children for visitations. Several months later, A.S. started to feel "secure" and told her mother about the sexual abuse. A.S.'s mother called the police. As part of their investigation, the police arranged a forensic interview with an investigator from Child Protective Services (CPS) and a nurse to perform a Sexual Assault Nurse Examination.

The CPS investigator interviewed A.S. and testified that A.S. explained what happened to her in a narrative fashion and provided sensory details, describing how things tasted or felt, and used her hands and body to describe what happened to her. The CPS investigator did not see signs that A.S. had been coached.

The nurse who examined A.S. testified that A.S. told her that her father "was touching me and making me give him oral and doing the same thing to me." A.S. also said that Sewell tried to put his penis inside her vagina, put sex toys in her vagina, and showed her "nasty movies." A.S. described one of the sex toys as "long and purple and it was fuzzy." A.S. also said that Sewell had put his finger inside her vagina and "butt," licked her vagina and breast, and French kissed her. A.S. said that the abuse began at age seven and continued until March 2013. Although, the nurse did not detect any physical signs of trauma during the exam, she did not expect to because several months had passed since A.S. had been abused.

When the police arrested Sewell they found sex toys matching A.S.'s descriptions. Sewell denied the allegations against him and asserted that he and A.S. had a "great" relationship until the divorce. He also said A.S. acquired her sexual knowledge by watching pornography and seeing a sex tape that he recorded.

(ROA. 124-125) (emphasis added) (quoting *Sewell v. State*, 2016 Tex. App. LEXIS 3644 (Tex. App.—Dallas Apr. 7, 2016, pet. ref'd) (mem. op., not designated for publication).

COA Claims

Petitioner requested a certificate of appealability in order to review the denial of four claims which had been raised in his federal petition for habeas corpus. Those claims each alleged a form of ineffective assistance of counsel. Specifically, Petitioner alleged that trial counsel was ineffective for:

1) allowing in evidence that Petitioner had refused a polygraph during a custodial interview;

2) allowing in evidence statements from the case detective that he believed the victim;

3) failing to move for a directed verdict;

4) failing to narrow the date range in the application paragraph of the jury charge to a time period falling within the ambit of the statute.

1) Polygraph

The State offered Petitioner's videotaped interview with law enforcement into evidence. (ROA. 667.) The defense raised no objection to admission of the unredacted interview. (ROA. 667.) During the interview, a detective asked Petitioner whether he would agree to take a polygraph. (ROA. 783.) Petitioner refused, stating "I don't believe in polygraphs." (ROA. 783.)

Prior to introducing the interview, the State had been willing to redact the polygraph colloquy. (ROA. 433.) Trial counsel stated that "for strategic reasons I don't

want the State to edit that out." (ROA. 433.) Petitioner advised he understood and agreed with the decision. (ROA. 434.)

2) Detective vouches for complainant's credibility.

During the unredacted interrogation provided to the jury, one of the interviewing detectives repeatedly offered his opinion on the child complainant's truthfulness. Those statements included, *inter alia*:

Because I believe your daughter;

I believe you sexually abused your daughter;

I'm telling you I know this happened;

When I tell you I think you're a child molester, what comes to mind?;

I believe you sexually abused your daughter and that you're a child molestor;

I know you raped your daughter.

(ROA. 720, 726, 768, 770, 772.) Trial counsel raised no objection to this line of inquiry. (ROA. 720, 726, 768, 770, 772.)

3) Directed Verdict

A.S. provided her birth date as May 30, 1998. (ROA. 1127.) She would have been 14 on May 30, 2012. Petitioner had moved to McKinney after he had separated from her mother, in 2012 or 2013. (ROA. 1135.) She testified that Petitioner did not begin to abuse her in Collin County until he moved into his second apartment in McKinney. (ROA. 1153.) According to her testimony, the abuse lasted "almost a year," from the

"summertime" of 2012 through "spring break of 2013." (ROA. 1153.); *see Sewell*, 2016 Tex. App. 3644 at * 2 ("[t]he sexual abuse in McKinney lasted from approximately the summer of 2012 until spring break of 2013").

Admidst leading questions from the prosecutor, A.S. subsequently testified without any further detail that "it" had started in McKinney when she "turned 13." (ROA. 1162-1163.) Defense counsel did not move for a directed verdict on the continuous count after the State or the defense rested. (ROA. 1205, 1243.)

4) Narrowing application paragraph

The application paragraph of the trial court's charge instructed the jury to "find [Petitioner] guilty of continuous sexual abuse of a young child" if it found beyond a reasonable doubt he had committed two acts of sexual abuse during a period exceeding 30 days between " the *1st day of April 2011 through the 30th day of September, 2013* in Collin County, Texas." (ROA. 371, 368.) Any acts committed subsequent to May 29, 2012 would have been after the child complainant had turned 14. (ROA. 1127.) In the definitions section, the court instructed the jury that it could not convict Petitioner of Count I for acts committed after May 29, 2012. (ROA. 367.)

The State had offered to amend its indictment to narrow the dates and "then reflect the jury charge throughout the charge to match that." (ROA. 1245.) The defense would not agree to an amendment and the entire 2011 to 2013 date range was included in the application paragraph. (ROA. 368, 1245.)

Fifth Circuit Denial of COA

The Fifth Circuit denied Petitioner's request for a COA in a brief, perfunctory order. *See* Appendix A at 1-2. It denied the first three claims (polygraph, truth vouching, directed verdict) without explanation, stating only the conclusion that Petitioner "otherwise fails to 'demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) and citing 28 U.S.C. ?1 2253(c)(2)).

On the fourth claim, the date-range claim, the court of appeals refused to even consider the request for COA. The Court claimed, incorrectly, that Petitioner "raised the claim for the first time in his COA motion." Appendix A at 2.

Petitioner's Earlier Preservation and Exhaustion of Date-Range Claim

Petitioner had in fact raised this issue in both his state and federal habeas petitions.

In his state writ, state habeas counsel framed the claim as follows:

> Applicant's conviction and sentence were obtained in violation of his right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments because his trial counsel allowed Applicant to be convicted of continuous sexual abuse of a child for acts that occurred after the alleged victim turned fourteen.

(ROA. 2018.)

In his federal writ, Petitioner similarly raised issue with the date range.

> Petitioner's conviction and sentence were obtained in violation of his right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments because his trial counsel allowed Applicant to be convicted of continuous sexual abuse of a child for acts that occurred after the alleged victim turned fourteen,

(ROA. 11.)

In both writs, Petitioner discussed the fact that the prosecutor had agreed to amend the indictment to a narrower date range so as to prevent conviction for any alleged acts committed after the victim was 14. (ROA. 12, 2019.) Petitioner also noted how defense counsel had objected to this amendment, (ROA. 12, 2018.) And Petitioner further noted how the application paragraph in the jury charge authorized conviction for the broader date range. (ROA. 12, 2019.) Finally, in both his state and federal memorandum, Petitioner specifically discussed that trial counsel should have objected to the application paragraph in the jury charge. (ROA. 86-87, 91-92, 2071, 2075.)

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit habitually denies COAs, even in cases where the underlying claims are not only debatable but meritorious.

The certificate of appealability hurdle is low. This Court has held that a petitioner need only present "something more than the absence of frivolity" to be entitled to a COA. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "[A] COA does not require a showing that the appeal will succeed." *Id.* Rather, Petitioner need only show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal citations omitted).

Petitioner need not even demonstrate that "some jurists would grant the petition." *Miller-El*, 537 U.S. at 338. If this were the required showing, a court would have to conduct a complete merits analysis, which "[i]n fact, the statute forbids." *Id.* at 336; *see Buck v. Davis*, 137 S. Ct. 759, 773 (2017) ("[t]he COA inquiry, we have emphasized, is not coextensive with a merits analysis"). Petitioner must only show that jurists of reason would find the claim "*debatable*." *Slack*, 529 U.S. at 484. And in this process which countenances only a limited review—"a claim can be *debatable* even though every jurist might agree after the COA has been granted and the case has received full consideration, that the petitioner will not prevail." *Miller-El,* 537 U.S. at 338 (emphasis added).

The Fifth Circuit has demonstrated that it has been far too reluctant to issue

COAs in light of the standards set forth by the Court in *Slack* and *Miller-El*. The Court has made clear, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El v. Cockrell*, 537 U.S. 342. If reasonable jurists can debate the outcome, a COA should issue—even if every jurist ultimately agrees after full review that Petitioner should not prevail. *Id.* at 337-38. But the Fifth Circuit has continued its myopic approach to COAs, as evidenced by the repeated intervention (or attempted intervention) of this Court. *See Banks v. Dretke*, 540 U.S. 668, 705 (reversing Fifth Circuit denial of COA); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004) (same); *see also Jordan v. Fisher*, 135 S. Ct. 2647. 2648-2651 (2015) (Sotomayor, J., dissenting, joined by Ginsburg, J., and Kagan, J.) (dissenting from denial of certiorari on the basis that the Fifth Circuit "clearly misapplied our precedents regarding the issuance of a COA" and should have issued a COA).

The Fifth Circuit has even denied COAs in cases where this Court found the court of appeals had ultimately been wrong on the merits of the underlying issue. *See Buck*, 137 S. Ct. at775-780(reversing on the merits where the Fifth Circuit had denied even a COA); *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009) (same); *see also Ibarra v. Thaler* (*Ibarra I)*, 687 F.3d 222, 224-227 (5th Cir. 2012) & *Ibarra v. Thaler (Ibarra II),* 691 F.3d 677, 679-686 (5th Cir. 2012) (denying COA on issue later found to be wrong on the merits by the Court in *Trevino v. Thaler*, 569 U.S. 413, 420 (2013)); *Ibarra v. Stephens (Ibarra III)*, 723 F.3d 599, 600 (5th Cir. 2013) (reversing earlier denial of COA on panel rehearing in light of the Court's decision in *Trevino*).

Denial of a COA in *Jimenez* was particularly egregious in light of the unanimous agreement by this Court that the Fifth Circuit had been wrong on the merits of the issue. In *Jimenez*, the district court had held that a state court decision to grant a prisoner the right to file an out-of-time direct appeal did not reset the clock for the statute of limitations under 28 U.S.C. § 2244(d)(1). *Jimenez*, 555 U.S. at 115. The Fifth Circuit denied Petitioner a COA, apparently believing that reasonable jurists could not debate this conclusion, *Id.* The Court *unanimously* reversed—not only on the COA question, but on the merits of the underlying issue. *Id.* at121. The Court held that a state decision did not become "final" until the out-of-time appeal was completed. *Id.* at 121. *Jimenez* thus demonstrates that the Fifth Circuit will deny a COA to a prisoner seeking to litigate claims that are not only debatable, but ones this Court unanimously concludes are meritorious.

Ibarra is similarly astounding for two different reasons. First, as with *Jimenez*, the Court found that the Fifth Circuit had denied a COA to a litigant presenting a claim for which the Fifth Circuit had, in fact, been wrong on merits. *See Trevino*, 569 U.S. 413,420 (2013). But perhaps more strikingly, it denied COA notwithstanding the fact that there was a dissenting judge to the decision. *See Ibarra I*, 687 F.3d 222 at 227-231 (Graves, J., dissenting); *Ibarra II*, 691 F.3d at 686 (Graves, J., dissenting). In *Ibarra*, the Fifth Circuit thus demonstrated that it will deny meritorious COAs even

where there is existing disagreement from another judge in its own court.[1]

The Fifth Circuit thus regularly and routinely denies COAs that raise not only debatable, but often meritorious issues. The Court has repeatedly stepped in and reversed Fifth Circuit denials of COAs. The Fifth Circuit may pay "lipservice to the principles guiding issuance of a COA," as it did below in its perfunctory order denying a COA. *Tennard*, 542 U.S. at 283; Appendix A. But it has adopted an extremely narrow conception of debatability. Decisions are deemed "not debatable" that this Court later concludes are wrongly decided on the merits. Decisions are deemed "not debatable" even though another judge on the same court actively disagrees with it. This Court should grant this Petition and eliminate the Fifth Circuit's exceedingly narrow view of debatability.

II. Petitioner should have received a COA on each of the three claims for which the Fifth Circuit denied a COA.

A. Polygraph

Reasonable jurists could debate whether trial strategy could reasonably justify defense counsel's failure to exclude evidence that Petitioner had refused a polygraph. (ROA. 135-136.) It is well settled in Texas under long standing precedent that both the

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[1] This problem also exists at the district court level in courts across the country. One commentator canvassed district courts in eight circuits where a magistrate court had recommended § 2254 relief but the district judge declined to follow the recommendation. *See* Jonah J. Horwitz, *Certifiable: Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging*, 17 Roger Williams L. Rev. 695, 721 (2012). Even though the district judge had in fact disagreed with the magistrate judge on the proper resolution of the claims, the district court refused to issue COAs in a staggering 34% of those cases. *Id.*

admission of polygraphs and the refusal to take polygraphs are categorically inadmissible. *See Tennard v. State*, 802 S.W. 2d 678, 683 (Tex. Crim. App. 1990); *Renesto v. State*, 452 S.W. 2d 498, 500 (Tex. Crim. App. 1970). Furthermore, it is error for a trial court to admit polygraph evidence *even where*, as here, "there had been a prior agreement or stipulation" between both parties. *Romero v. State*, 493 S.W. 2d 206, 213 (Tex. Crim. App. 1973), *overruled on other grounds by Kelly v. State*, 824 S.W. 2d 568 (Tex. Crim. App. 1992). As *Romero* observed, the fact that both parties agree "does nothing to enhance the reliability of such evidence." *Id.* *Romero* thus suggests, or at least renders debatable whether strategic decisions could ever justify allowing evidence that a defendant had refused a polygraph.

Furthermore, reasonable jurists could debate whether allowing evidence of a refused polygraph was reasonable in light of trial counsel's own stated strategy in this particular case. The district court classified counsel's strategy as an effort of showing that Petitioner was "being honest and truthful" and "the defense was being as forthcoming as possible." (ROA. 135-136.) However, evidence of a polygraph refusal conveys precisely the opposite impression from this putative strategy. Far from establishing brutal honesty, "refusal to take a polygraph test could lead the jury to improperly infer that he had something to hide." *Kugler v. State*, 902 S.W. 2d 594, 597 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd.). Reasonable jurists could thus debate whether trial counsel's decision had been objectively unreasonable in light of their *own* claims regarding the strategy.

At both the COA and merits stage, the Fifth Circuit has found in other cases that strategic decisions could still constitute deficient performance under *Strickland*. *See Sanchez v. Davis*, 888 F.3d 746, 751 (5th Cir. 2018) (COA granted on *Strickland* claim where trial court's purported strategic reason to not object to inadmissible evidence seemed "wrongheaded," even under the two tiers of deference *Strickland* and AEDPA afforded counsel's performance. *Lyons v. McCotter*, 770 F.2d 529, 533-34 (5th Cir. 1985) (concluding that trial counsel's decision to elicit inadmissible testimony was strategic but nevertheless constituted deficient performance); *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1994) ("this Court . . . is not required to condone unreasonable decisions parading under the umbrella of strategy"). This precedent, from the very court which denied COA no less, provides empirical proof that it is debatable whether defense counsel is immune from scrutiny merely by citing strategy.

Reasonable jurists could also debate the district court's perfunctory conclusion that Petitioner could not show prejudice. (ROA. 135.) First, it is beyond the realm of debate that the state trial court applied the wrong legal standard. (ROA. 135, 265) (identifying the applicable standard for *Strickland* prejudice as preponderance of the evidence). The Supreme Court has held unequivocally that the "reasonable probability" standard "is not the same as, and should not be confused with, a requirement that defendant prove by a preponderance of the evidence that but for the error things would have been different." *See Dominguez-Benitez*, 542 U.S. at, n. 9 (2004) (citing *Kyles v. Whitley*, 514 U.S. 419 434 (1995); *Strickland v. Washington*, 466

U.S. 688, 694 (1984); *Nix v. Whiteside,* 475 U.S. 157, 175 (1986). The state habeas court's harm determination thus runs "contrary to federal law then clearly established in the holdings of this Court" and involves "an unreasonable application of such law" under § 2254(d)(1). *See Harrington v. Richter*, 562 U.S. 86, 100 (2011).

Further, the district court's assessment of the state court's application of the prejudice prong was at least debatable. The court notes, without further elaboration, that "the record reflects the complainant testified about years of sexual abuse." (ROA. 136.) But this is not a sufficiency of the evidence test. *See Kyles v. Whitley*, 514 U.S. at 434 (discussing reasonable probability standard as it applies for *Brady* claims, citing *Strickland* progeny, and noting the reasonable probability standard "*is not a sufficiency of evidence test*) (emphasis added). The question is whether it is reasonably probable that a jury might have viewed the evidence differently had it not known Petitioner had refused a polygraph. Jurists of reason would find this question at least debatable; there were no physical findings of abuse and the trial boiled down to a credibility dispute between Petitioner and the complainant. It is reasonably probable that knowledge of the refused polygraph "lead the jury to improperly infer that he had something to hide." *Kugler*, 902 S.W. 2d at 597.

B. Truth-vouching: jurists of reason have already in fact disagreed as to whether this constitutes ineffective assistance of counsel.

Petitioner must only show that jurists of reason would find the claim "*debatable*." *Slack*, 529 U.S. at 484. This hurdle should have been cleared by a

substantial margin with respect to the truth-vouching claim, because other jurists have already not only debated but *disagreed* with this finding in similar cases. That is, other jurists have found a trial counsel's failure to object to truth-vouching testimony to be an objectively unreasonable "strategy" in trials involving sexual assault of child. Specifically, a number of Texas appellate courts have held that no sound strategy justifies the failure to object to testimony vouching for the truthfulness of a child complainant's claims of sexual abuse. *See Fuller v. State*, 224 S.W. 3d 823, 836-37 (Tex. App.—Texarkana, 2007); *Sessums v. State*, 129 S.W. 3d 242, 248 (Tex. App.—Texarkana 2004, pet. ref'd.); *Miller v. State*, 757 S.W. 2d 880, 884 (Tex. App.—Dallas 1988, pet. ref'd.); *Garcia v. State*, 712 S.W. 2d 249, 253 (Tex. App.—El Paso 1986, pet. ref'd). In each of these cases, the courts found the failure to object to precisely the kind of testimony at issue here satisfied both prongs of *Strickland*. *Fuller*; 224 S.W. 3d at 836-37, *Sessums*, 129 S.W. 3d at 248; *Miller*, 757 S.W. 2d at 884; *Garcia*, 712 S.W. 2d at 253.

Notably, these cases were all decided "on the bare and undeveloped trial records on direct appeal," without the need to even conduct a post-trial hearing to assess whether trial counsel's failure to object had been strategically motivated. *See Fuller*, 224 S.W. 3d at 836-37 (discussing *Sessums* and *Miller*). In each of these cases, the courts concluded that the failure to object to the onslaught of testimony regarding the child's truthfulness could not have rested on a sound trial strategy. *See Fuller*, 224 S.W. 3d at 836 ("[i]n regard to persuasive testimony about the truthfulness of a

complainants allegations: 'there is no conceivable strategy or tactic that would justify allowing this testimony in front of a jury.'"(quoting *Sessums*, 129 S.W. 3d at 248)); *Miller*, 757 S.W. 2d at 884 ("[w]e can glean no sound trial strategy in defense counsel's failure to object to the extensive, inadmissible testimony concerning the only real issue at trial—complainant's credibility."); *Garcia*, 712 S.W. 2d at 253.[2]

Petitioner acknowledges that these state appellate court decisions did not have to review the *Strickland* question through the AEDPA framework. A federal court must determine whether the state trial court's decision reflected an "unreasonable application"'of *Strickland*. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011); 28 U.S.C. § 2254(d)(1). But at the COA stage Petitioner need only show that the federal court's conclusion was "*debatable*" among jurists of reason. *Miller-El*, 537 U.S. at 336-338 (emphasis added). It certainly was debatable; the state trial court had resolved Petitioner's *Strickland* claim in a manner directly at odds with multiple appellate courts in its state. In these appellate jurisdictions in Texas, trial counsel was legally required to object to victim-bolstering testimony regardless of his strategic inclinations.

Furthermore, precedent in the Fifth Circuit itself demonstrates that strategic decisions by trial counsel can be regarded as objectively unreasonable in some circumstances. *See Sanchez v. Davis*, 888 F.3d 746, 751 (5th Cir. 2018) (COA granted

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[2] *Garcia* arose on direct appeal following a motion for new trial in which trial counsel testified. *See Garcia*, 712 S.W. 2d at 253. However, this particular claim does not appear to have been the subject of the motion for new trial, which seems to have been focused on a challenge to the impartiality of a juror. *See id*. at 251-253.

on *Strickland* claim where trial counsel's purported strategic reason to not object to inadmissible evidence seemed "wrongheaded,"even under the two tiers of deference *Strickland* and AEDPA afford counsel's performance). *Lyons v. McCotter*, 770 F.2d 529, 533-34 (5th Cir. 1985) (concluding that trial counsel's decision to elicit inadmissible testimony was strategic, but nevertheless constituted deficient performance); *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1994) ("[t]his Court is . . . not required to condone unreasonable decisions parading under the umbrella of strategy");*see also Jimenez v. Davis*, 2018 U.S. Dist. LEXIS 154178 at *53 (W.D. Tex. 2018) ("[n]or could a 'strategy' to waive reversible error ever be deemed reasonable"). Given this backdrop, a federal judge could debate, if not disagree with the district court's conclusion that the state trial court had acted reasonably in upholding trial counsel's purportedly strategic decision. That was all Petitioner needed show to be entitled to a COA.

C. Failure to move for a directed verdict.

Reasonable jurists could debate whether legally sufficient evidence supported the verdict in this case. The evidence had to show that Petitioner committed two or more sexual acts *in Collin County prior to A.S.'s 14th birthday* over a period exceeding 30 days. (ROA. 202-203.) Only acts which took place—1) in Collin County, *and* 2) before A.S.'s 14th birthday—can trigger liability. *Both* elements must be satisfied. *See Ramos v. State*, 636 S.W. 3d 651-652 (Tex. Crim. App. 2021); Tex. Penal Code § 21.02.

The child complainant provided testimony about acts alleged acts committed

before Petitioner had moved to Collin County. She testified that she had been abused in Fayetteville, Georgia when she was 6 or 7 years old. (ROA. 1138.) She also testified to abuse while they lived in Arlington, where she moved when she was 12 years old. (ROA. 1132, 20-21.) None of this testimony supported a conviction for the charged continuous offense. All acts took place outside of Collin County.

The child then provided testimony about acts committed with Petitioner after he had moved to Collin County. None of this testimony supported a conviction because it all took place *after* she had turned 14. She testified that Petitioner had moved to McKinney after he had separated from her mother, in 2012 or 2013. (ROA. 1135.) She provided her birth date as May 30, 1998. (ROA. 1127.) Thus, the child complainant would have turned 14 on May 30, 2012. She testified that Petitioner did not begin to abuse her in Collin County until he moved into his second apartment in McKinney. (ROA. 1153.) The abuse did not commence until "the summertime" of 2012 and continued for "about a year" until Spring Break of 2013. (ROA. 1153.) But A.S. had turned 14 prior to summer on May 30, 2012. (ROA. 1127.)

A.S. did later state that "it" had started in McKinney when she "turned"13. (ROA. 1162.) But this only came in response from a leading question from the prosecutor:

> Q: And . . . when you were 12 and 13, is that when it was happening here in McKinney?
>
> A. It started when I turned 13.
>
> Q: Okay.

A: In McKinney.

(ROA. 1162-1163.)

This testimony is problematic for multiple reasons. First, there is no specification of "it." A.S. provides no reference to what particular acts were committed when "it" started. *Hines v. State*, 551 S.W. 3d 771 (Tex. App.—Fort Worth 2017) (no pet.) (victim's reference to when she and defendant started "dating" was not legally sufficient basis to support a finding that sexual abuse had commenced under continuous statute).

Second, it is implausible that the abuse occurred when she "turned 13," or soon after her 13th birthday. (ROA. 1163.) A.S. stated unequivocally that abuse did not resume at Petitioner's first apartment in McKinney. (ROA. 1153.) ("He didn't start until he got comfortable at the second apartment with my stepmom"). Petitioner would not have even moved into his *first* apartment until roughly a month before A.S.'s 13th birthday on May 30, 2011. According to A.S.'s mother, Petitioner did not even move out of Arlington until April 21, 2011. (ROA. 1018.) Further, according to A.S., the abuse lasted "almost a year" from 2012 to Spring Break 2013. (ROA. 1152.) Had "it" started around her 13th birthday, the abuse would have lasted two years. All the evidence supports the conclusion that any alleged abuse occurred after she "turned" 14, in the "summertime" of 2012. (ROA. 1153.)

The state appellate court correctly summarized the evidence admitted at trial: "[t]he sexual abuse in McKinney lasted from approximately the summer of 2012 until

spring break of 2013." *Sewell*, 2016 Tex. App. LEXIS 3644 at *2. *Petitioner cannot be guilty of continuous sexual abuse on this evidence.* The abuse did not commence until summertime of 2012 and by then she was 14. Under these circumstances, counsel was ineffective failing to move for a directed verdict; no rational juror could have found Petitioner guilty beyond a reasonable doubt. The district court cites as evidence that "the complainant testified about years of sexual abuse." (ROA. 176.) But this general statement does not address the particular issue: was there sufficient evidence of abuse 1) *in Collin County; 2) before age 14*. Because no reliable evidence that meets both criteria, there is a "reasonable probability that had counsel moved for a judgment of acquittal, the motion would have been granted on the basis of insufficiency of the evidence." *United States v. Rosales-Orozco*, 8 F.3d 198, 199 (5th Cir. 1993). Without a doubt this matter was reasonably debatable and a COA should have been granted on this issue.

III. The Fifth Circuit's conclusion that Petitioner raised an issue for the first time on appeal underscores the lower court's failure to properly apply the COA standard.

The COA inquiry "requires an *overview* of the claims . . . and a *general assessment* of their merits." *Miller-El*, 537 U.S. at 336. But "the statute forbids . . . full consideration of the factual or legal bases adduced in support of the claims." *Id.* At this stage, Petitioner must only present "something more than the absence of frivolity;" but he need "not demonstrate an entitlement to relief." *Miller-El,* 537 U.S. at 337-38.

The Fifth Circuit appears to be conducting a far more searching inquiry at the

COA stage than authorized by statute. The Court concluded, astoundingly, that Petitioner had raised for the first time on appeal his contention that his trial counsel had been ineffective for failing to narrow the scope of the dates in the jury charge. See Appendix A at 2. However, this claim had been addressed in both his state and federal writs. In his state writ, Petitioner contended:

> Applicant's conviction and sentence were obtained in violation of his right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments because his trial counsel allowed Applicant to be convicted of continuous sexual abuse of a child for acts that occurred after the alleged victim turned fourteen.

(ROA. 2018.)

Similarly in his federal writ, he claimed:

> Petitioner's conviction and sentence were obtained in violation of his right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments because his trial counsel allowed Applicant to be convicted of continuous sexual abuse of a child for acts that occurred after the alleged victim turned fourteen,

(ROA. 11.)

In both writs, Petitioner discussed the fact that the prosecutor had agreed to amend the indictment to a narrower date range so as to prevent conviction for any of the alleged acts committed after the complainant was 14. (ROA. 12, 2019.) Petitioner also noted how defense counsel had objected to this amendment, (ROA. 12, 2018.) And Petitioner further noted how the application paragraph in the jury charge authorized conviction for the broader date range. (ROA. 12, 2019.) Finally, in his legal briefing before both jurisdictions, Petitioner specifically discussed that trial counsel should

have objected to the application paragraph in the jury charge. (ROA. 86-87, 91-92, 2071, 2075.)

Counsel can only hazard a guess at the basis for the Fifth Circuit's conclusion. The only imaginable basis would be that the writ form itself discusses trial counsel's failure to object to the State's proposed amended indictment and not the application paragraph itself. (ROA. 12.) But this is a distinction without a difference. An application paragraph must track the indictment. *See Reed v. State*, 117 S.W. 3d 260, 265 (Tex. Crim. App. 2003). It is error for an application paragraph to exceed the scope of the indictment itself, because that would have the effect of authorizing the jury to convict for reasons beyond the scope of what is authorized by indictment. *See Rodriguez v. State*, 18 S.W. 3d 228, 232 (Tex. Crim. App. 2000).

It is no coincidence that the State agreed to amend the indictment *"during the conference on the guilt/innocence charge.*" (ROA. 12, 1245.) The whole purpose of amending the indictment at that point in time would be to similarly narrow the application paragraph so that the charge tracks the amended indictment, as it must. In fact, the prosecutor said this very thing; he proposed that the State amend the indictment "*then reflect the jury charge throughout the charge to match that*." (ROA. 1245,) By refusing to agree to amend the indictment, trial counsel was in effect refusing to agree to a narrower date range in the application paragraph. This point would have been all too obvious to any criminal practitioner in Texas.

However, the fact that the Fifth Circuit is in the weeds searching for the

narrowest discrepancy only demonstrates that it is not conducting "an *overview* of the claims . . . and a *general assessment* of their merits." *Miller-El*, 537 U.S. at 336 (emphasis added). Instead of merely determining whether Petitioner's jury-charge claim presents "something more than the absence of frivolity;" it is conducting a searching review of the claim to see if there is some technical basis from which to conclude the claim had not been preserved. *Miller-El,* 537 U.S. at 337-38. The Fifth Circuit was wrong in concluding the issue was not preserved. But to the extent there was even a question, Petitioner should have a chance to appropriately brief this narrow, technical, fact-driven question on his full appeal. The COA stage is a wholly inappropriate forum for the Court to conclude that the error had not been preserved.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

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Respectfully Submitted,

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