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

| | | |
|---|---|---|
| **JASON DANIEL SEWELL, #02068608** | § | |
| | § | |
| **VS.** | § | **CIVIL ACTION NO. 4:19cv59** |
| | § | |
| **DIRECTOR, TDCJ-CID** | § | |

**REPORT AND RECOMMENDATION**
**OF UNITED STATES MAGISTRATE JUDGE**

Petitioner Jason Daniel Sewell, an inmate confined in the Texas prison system, with the assistance of counsel, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred to United States Magistrate Judge Kimberly C. Priest Johnson for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636, and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

## I. PROCEDURAL BACKGROUND

Petitioner is challenging his Collin County conviction. Petitioner was charged by indictment with the offenses of continuous sexual assault of a child and indecency with a child, Cause No. 219-82792-2013. (Dkt. # 5-2, pp. 17-19). Petitioner pled not guilty, but a jury found him guilty of both offenses. The jury sentenced him to fifty-two years' imprisonment for continuous sexual assault of a child and ten years' imprisonment for indecency with a child, with the sentences to run concurrently. (Dkt. # 5-2, pp. 202-09).

Petitioner appealed his conviction, which was affirmed on April 7, 2016. *Sewell v. State*, No. 05-15-00356-CR, 2016 WL 1402967 (Tex. App. Apr. 7, 2016). (Dkt. # 5-21). Petitioner filed

a petition for discretionary review ("PDR"), which the Texas Court of Criminal Appeals ("TCCA") refused on June 29, 2016. *Sewell v. State*, PD-536-16. (Dkt. # 5-1).

Petitioner filed an application for state habeas corpus relief on June 20, 2017. (Dkt. # 5-33, pp. 5-32, 41-118). The state habeas court held a hearing on November 15, 2017 with respect to Petitioner's claims of ineffective assistance of counsel. (Dkt. # 5-33, pp. 120-233). The state habeas court subsequently entered findings of fact and conclusions of law and recommended that Petitioner's application be denied. (Dkt. # 5-33, pp. 263-74). On October 31, 2018, the TCCA denied the application without a written order on the findings of the trial court after a hearing. (Dkt. # 5-23).

Petitioner filed the instant petition on January 25, 2019. Petitioner asserts the following claims for relief:

> 1. Petitioner's trial counsel were ineffective by introducing evidence that Petitioner refused to take a lie-detector test;
>
> 2. Petitioner's trial counsel were ineffective in allowing the State to introduce that Petitioner led a "swinger's" lifestyle;
>
> 3. Petitioner's trial counsel were ineffective in failing to object when a State's witness testified that the complainant was being truthful;
>
> 4. Petitioner's trial counsel were ineffective in allowing the State to introduce evidence that some of the continuous sexual abuse occurred after the complainant turned fourteen years old;
>
> 5. Petitioner's trial counsel were ineffective in failing to move to suppress evidence obtained in violation of Petitioner's Fourth Amendment rights;
>
> 6. Petitioner's trial counsel were ineffective in failing to object to the admission of improper outcry testimony;
>
> 7. Petitioner's trial counsel were ineffective in failing to call a witness;
>
> 8. Petitioner's trial counsel were ineffective in failing to object to leading questions; and

9. Petitioner's trial counsel were ineffective in failing to move for a directed verdict or make a jury argument on the basis that the evidence was insufficient.

(Dkt. # 1, pp. 6-14). The Director filed a response, arguing that the claims are without merit. (Dkt. # 4). Petitioner filed a reply. (Dkt. # 6).

## II. FACTUAL BACKGROUND

The state appellate court set out the facts 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.

*Sewell*, 2016 WL 1402967, at **1-2 (Dkt. # 5-21, pp. 3-5).

## III. STANDARD FOR FEDERAL HABEAS CORPUS RELIEF

The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1354, 1367 (5th Cir. 1993); *Malchi v. Thaler*, 211 F.3d 953, 957 (5th Cir. 2000). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir. 1996); *Brown v. Dretke*, 419 F.3d 365, 376 (5th Cir. 2005). In the course of reviewing state proceedings, a federal court does not sit as a super state appellate court. *Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986).

The prospect of federal courts granting habeas corpus relief to state prisoners has been further limited by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The

new provisions of § 2254(d) provide that an application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) was contrary to federal law then clearly established in the holdings of the Supreme Court; (2) involved an unreasonable application of clearly established Supreme Court precedent; or (3) was based on an unreasonable determination of the facts in light of the record before the state court. *See Harrington v. Richter*, 562 U.S. 86, 97-98 (2011). A state court's factual findings are entitled to deference and are presumed correct unless the petitioner rebuts those findings with clear and convincing evidence. *Wooten v. Thaler*, 598 F.3d 215, 218 (5th Cir. 2010); *Garcia v. Quarterman*, 454 F.3d 441, 444 (5th Cir. 2006); *see also Moore v. Cockrell*, 313 F.3d 880, 881 (5th Cir. 2002) (the statutory provision requires federal courts to be deferential to habeas corpus decisions on the merits by state courts). This deference extends not only to express findings of fact, but also to any implicit findings of the state court. *Garcia*, 454 F.3d at 444-45 (citing *Summers v. Dretke*, 431 F.3d 861, 876 (5th Cir. 2005)).

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

in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *Wesbrook v. Thaler*, 585 F.3d 245, 255 (5th Cir. 2009).

Thus, the federal writ serves as a "'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Richter*, 562 U.S. at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)). "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

## IV. ANALYSIS

Petitioner raises nine claims of ineffective assistance of trial counsel. A petitioner who seeks to overturn his conviction on the grounds of ineffective assistance of counsel must prove entitlement to relief by a preponderance of the evidence. *James v. Cain*, 56 F.3d 662, 667 (5th Cir. 1995). Ineffective assistance of counsel claims are governed by the Supreme Court's standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* provides a two-pronged standard, and the petitioner bears the burden of proving both prongs. *Id.* at 687. Under the first prong, he must show that counsel's performance was deficient. *Id.* To establish deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness," with reasonableness examined under professional norms prevailing at the time counsel rendered assistance. *Id.* at 688. The *Strickland* court further explained:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . .

*Id.* at 689 (citations omitted). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance; that is, the defendant must overcome the presumption that, under the

circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation marks omitted).

Under the second prong of the *Strickland* test, the petitioner must show that his attorney's deficient performance resulted in prejudice. *Id.* at 687. To satisfy the prejudice prong, the habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An ineffective assistance of counsel claim fails if a petitioner cannot satisfy either the deficient performance or prejudice prong; a court need not evaluate both if he makes an insufficient showing as to either. *Id.* at 697.

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

**A. Trial Counsel Were Ineffective by Introducing Evidence that Petitioner Refused to Take a Lie-Detector Test**

In his first claim, Petitioner argues that trial counsel were ineffective because they introduced evidence that he refused to take a lie-detector test. (Dkt. # 1, p. 6).

During Petitioner's police interview, he stated that he would not be willing to take a polygraph examination. (Dkt. # 5-5, p. 185). At trial, the State introduced into evidence the videotape of Petitioner's interview with police and included Petitioner's statement that he would not take a polygraph examination. (Dkt. # 5-10, p. 4). Trial counsel did not object. (Dkt. # 5-5, p. 69). The State then played the entire videotape to the jury. (Dkt. # 5-5, pp. 72-187).

Prior to the beginning of the trial and outside the presence of the jury, Petitioner's counsel Paul Stuckle questioned Petitioner regarding the videotape and his refusal to take a polygraph examination. The record reflects that Petitioner agreed with counsel's trial strategy that the statement should not be edited out of the tape:

> Q. Mr. Sewell, it's been brought to our attention that the State intends to introduce into evidence at your trial a videotape of the discussion you had with the police after your arrest.
>
> A. Yes, sir.
>
> Q. Do you understand that?
>
> A. I do, sir.
>
> Q. You were arrested and you talked to—I believe it was Police Detective Gildon for quite some time, and then also a McKinney detective, Detective Agan; do you recall that?
>
> A. I do, sir.
>
> Q. At the—near the end of the tape, the—you were offered a polygraph—I don't know if it was offered by Gildon or Agan—to which you refused; do you recall that?
>
> A. I do, sir.

> *Q. You and I have discussed this and I had given you my advice that for strategic reasons I don't want the State to edit that out; do you understand?*
>
> *A. I do, sir.*
>
> *Q. Do you agree with that decision?*
>
> *A. Yes, sir.*
>
> MR. STUCKLE: That's all I have.
>
> MR. LEWIS [Prosecutor]: And for the record, Your Honor, we had this discussion off the record with Mr. Stuckle and I, as the representative of the State, did offer that we have the ability to edit that out, to have it be muted or blanked on that portion of the evidence. We wouldn't intend to offer polygraph evidence absent their agreement or their objection to us editing the tape.
>
> So we're happy to do that, if that's what they would like us to do. But it is their trial strategy that they would object to us editing it and don't want us to do that. Then we'll admit it unedited.
>
> MR. STUCKLE: That's what we prefer.

(Dkt. # 5-4, pp. 10-11) (emphasis added).

Thus, part of trial counsel's strategy was that Petitioner was "brutally honest" during his interview. Trial counsel wanted the entire videotape to be played without any editing to show the jury Petitioner was not hiding anything, and to serve as the equivalent of Petitioner's testimony. This strategy also included the fact that Petitioner maintained his innocence during the interview: "I understand. I can't change what you believe, officer, to be honest with you, whether you believe her or not. But I have nothing to give you on that, in all honesty." (Dkt. # 5-5, pp. 122-23); "I'm telling you it's not me." (Dkt. # 5-5, p. 129); "You can tell me that all day, but until you can show me otherwise, I don't see it. It's not there." (Dkt. # 5-5, p. 170); "That you're wrong, that comes to mind. . . ." (Dkt. #5-5, p. 172); "You can say that all day, officer. You can say that all day. You can't tell me what you know[.]" (Dkt. # 5-5, p. 175).

The record reflects that Stuckle followed this strategy throughout the trial. For example, he asked Detective Gideon on cross-examination whether "Jason [Petitioner] was, with some of his sexuality, brutally honest with you; would you agree?" and Detective Gideon responded, "Yes." (Dkt. # 5-5, p. 224). Stuckle also argued this theory at length in his closing argument. (Dkt. # 5-8, pp. 144-45). He did not, however, reference Petitioner's refusal to take the polygraph test in his closing argument. (Dkt. # 5-8, pp. 144-45).

"[A] conscious and informed decision on trial tactics and strategy cannot be the basis of constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Nelson v. Davis*, 952 F.3d 651, 665 (5th Cir. 2020) (quoting *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009)); *accord Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003). A federal habeas court "extend[s] highly deferential treatment" to counsel's case strategies and tactical decisions. *See Pape v. Thaler*, 645 F.3d 281, 292 (5th Cir. 2011). An attorney's decision to use a specific theme at trial is a "conscious and informed decision based on trial tactics and strategy" which, like all such decisions, cannot form the basis for habeas corpus relief unless "it is so ill chosen that it permeates the entire trial with obvious unfairness." *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983).

Petitioner's claim that trial counsel were ineffective for allowing the jury to hear the entire videotape was fully developed during the state habeas corpus proceedings. Trial counsel Stuckle provided the following testimony concerning his rationale for allowing the jury to hear the videotape without the statement regarding the lie-detector edited out:

> Q. Okay. So what was your—your strategy or rationale for allowing the jury to hear that?
>
> A. Partially based upon experience. And secondly, upon this specific interview itself, if I may—

> Q. Yes, sir.
>
> A.—expand on that a moment.
>
> Experience—I have been trying cases over 30 years. Our theory of defense was based on this interview. He gave the interview with the police voluntarily, we didn't see any reason to suppress it. Saw no—no legal reason that it would not be introduced against him. That's what we had to deal with, what he told the police was going to be our defense. He made that decision before I was appointed to the case, okay?
>
> Then, once we made the decision, that was our defense, also, we were going to call him as a witness. Our strategy was there was enough that Mr. Sewell said and enough cross-examination, if you will, by the police officers during his interview, that we felt it would suffice as the functional equivalent of Mr. Sewell's testimony at trial, we did not want anything in front of the jury to appear suspicious, we did not want it to appear that something had been edited out, concerned about what the jury may or may not be thinking if they were provided a—an altered tape.
>
> Second—second reason, again, based on experience, is that in the past I have been hurt as a trial attorney by, once getting what you want, trying to make it better. And what I mean by that is when our theory [of] the case is going to be hand-delivered to the jury as it was in this case with the introduction of Mr. Sewell's interview, to start agreeing to take things out led to possible, catastrophes for us in that I have learned in the past that once that happens, the State takes something out that may hurt the State, but all of a sudden, they start taking—wanting to take things out that would hurt us. I did not want to go down that road. I have been down that road before, we had what we wanted. It's time to shut up and move on. That was our decision.

(Dkt. # 5-33, pp. 137-38).

Petitioner's other trial counsel, Allan Ayers, also testified about counsel's strategy regarding the videotaped interview:

> Q. Okay. And did you—there are some things that came in to—that were presented to the jury through that videotaped interview, and I want to talk to you about a couple of those. Okay?
>
> A. Okay.
>
> Q. One of them in particular is Mr. Sewell—or the detective asking Mr. Sewell if he would take a polygraph, and Mr. Sewell refusing that polygraph. Do you know what I'm talking about?

A. I do.

Q. Okay. And whose decision was that to allow that testimony or that part of the video in front of the jury?

A. That was a joint decision.

Q. Okay. And so what, in your mind, strategically, why did y'all allow that in front of the jury?

A. One of the issues we had in this case is Mr. Sewell had talked extensively to the police. He made a lot of statements to them, now, the good news about that interview is he never confessed to anything, never said he had done anything.

From our perspective, we didn't think it would be a great decision to have Mr. Sewell testify; and we wanted to use the video, his interview with the police as his testimony. The advantage to leaving things in like that is we can tell the jury that Jason was being brutally honest with the detective. And this is going to be in several of the questions that we were going to ask him. Leaving something in there like a polygraph, that he doesn't like polygraphs, it gives the jury the impression that, number one, nothing's been taken out. We don't want them to see an edited video.

Number two is honesty. And that's really what we were going for is that, when Jason talked to the police, he was being honest.

Q. Okay. So in your experience, if you have a videotape and it has some admissible evidence and some inadmissible evidence, under the law; do you think it's possible to request a ruling from the Court that the inadmissible part of the tape be redacted?

A. Under the law, we could've made a request, but I don't know that it would've helped this case.

Q. And in that instance, in those—where you have parts of videotapes redacted, is it your experience that the jury is told or not told who has been—who has requested the section of the videotape to be redacted?

A. As far as being told who requested the redaction, no, the jury would not be aware of that.

(Dkt. # 5-33, pp. 204-05).

The state habeas court found that both Struckle and Ayers were credible, experienced criminal defense attorneys, and that their testimony at the habeas hearing was credible:

3. Stuckle is an officer of the Court, well known to the Court, and credible.

> 4. Stuckle's testimony in the writ hearing was credible.
>
> 5. Stuckle has practiced criminal defense in Texas since 1983. His practice has focused on defense of child sex abuse cases since about 2001. He estimated he had tried about 300 felony cases, over one thousand misdemeanor cases, and about 80 child sex abuse cases during his career.
>
> 6. Ayers is an officer of the Court, well known to the Court, and credible.
>
> 7. Ayers's testimony in the writ hearing was credible.
>
> 8. Ayers has practiced criminal defense in Texas since 2010. He has worked for Stuckle since about 2012, focusing with him on child sex abuse cases.

(Dkt. # 5-33, p. 263).

The state habeas court then issued the following findings regarding counsel's decision to allow the entire videotape to be played to the jury:

> 10. In Ground 1, Applicant claims his counsel were ineffective by allowing admission of evidence that he refused to take a polygraph examination after the police requested he do so during a videotaped interrogation.
>
> 11. Stuckle testified that he requested at trial that the complete video be admitted rather than a redacted version omitting reference to the polygraph test. 1 RR 15-16.
>
> 12. This was a strategic decision discussed with Applicant. 1 RR 17-18.
>
> 13. The defense strategy was to adopt Applicant's denials of the offense contained within the videotaped interrogation and use videotape in lieu of testimony from Applicant himself during trial to advance their theory that he did not commit the offense. 1 RR 18-19, 67. Applicant was "brutally honest" in the interview about other matters, and thus, the jury could believe he was honest when he denied molesting his daughter. 1 RR 22.
>
> 14. Redacted or edited videotapes make juries suspicious. 1 RR 18.
>
> 15. Juries "quite possibly" know when a videotape has been redacted or edited. 1 RR 61.
>
> 16. Stuckle was aware of authorities stating that polygraph evidence is inadmissible. 1 RR 19-20.

> 17. Applicant adduced no evidence in the writ hearing that allowing the entire interview—rather than portions of or a redacted version of the interview—was not a strategic decision.
>
> 18. Applicant adduced no evidence in the writ hearing that no reasonable attorney would adopt such a strategy.
>
> 19. Applicant adduced no evidence at the writ hearing proving that embracing the polygraph evidence along with the favorable evidence in the interview prejudiced him.
>
> 20. Applicant has failed to prove by a preponderance of the evidence that his counsel were deficient by seeking admission of the entire interview.
>
> 21. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by his counsels' strategic choice to embrace the polygraph evidence along with the favorable evidence contained in the interview.

(Dkt. # 5-33, pp. 264-65). The TCCA subsequently denied relief without a written order based on the findings of the trial court, which constitutes an adjudication on the merits. *See Singleton*, 178 F.3d at 384.

Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the state court's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See Moore*, 313 F.3d at 882. The state habeas court carefully and thoroughly discussed the facts and reasonably applied *Strickland* to the facts before it. The record demonstrates that trial counsel made the strategic decision to use the videotaped interrogation as Petitioner's testimony and to adopt Petitioner's denials of the offenses that he made during the interrogation to advance the defense theory that Petitioner did not commit the crimes. The videotape evidence furthered the defense's strategy to show that Petitioner was being honest and truthful in the interview and to give the impression to the jury that the defense was being as

forthcoming as possible. Additionally, Petitioner does not refute the fact that he testified under oath at trial that he agreed with trial counsel's decision about the interview being played in its entirety to the jury. Trial counsel's conscious and informed decision in this case was trial strategy that cannot form the basis of a meritorious ineffective assistance of counsel claim. A court may not, in hindsight, second-guess counsel's strategy because an alternative course of action existed during trial. *Green v. Johnson*, 116 F.3d 115, 1122 (5th Cir. 1997). Petitioner also cannot demonstrate prejudice from trial counsel's performance. The record reflects that the complainant testified at length about years of sexual abuse. (Dkt. # 5-8, pp. 16-83). Thus, Petitioner has not shown that the state courts unreasonably applied federal law in rejecting this ineffective assistance claim. *See* 28 U.S.C. § 2254(d)(1).

**B. Trial Counsel Were Ineffective in Allowing the State to Introduce Evidence that Petitioner Led a "Swinger's" Lifestyle**

In his second claim, Petitioner argues that trial counsel were ineffective in allowing the State to present evidence that Petitioner and his former wife (complainant's mother) were "swingers" and that Petitioner had sex with both men and women he met on Craig's List. (Dkt. # 1, p. 7). Petitioner also argues that trial counsel were ineffective because they failed to seek a limiting instruction regarding this evidence. (Dkt. # 1, p. 7).

This claim was fully developed during the state habeas corpus proceedings. Trial counsel Stuckle testified as follows about counsel's decision to allow Petitioner's statements regarding his "swinger" lifestyle:

> Q. Another section of the interview with Mr. Sewell that was presented to the jury, you were aware that there's testimony or there's statements from Mr. Sewell on that video about his swinging lifestyle? In other words, having sexual relations with men, women, with his former wife outside the—what we would think of as the bonds of marriage?

A. Yes. And again, as we were saddled with that to begin with, when the interview was made before our appointment, had became [sic] the theory of our defense, we made the decision to make the best use of what was going to be, in our opinion, admissible evidence.

Q. Okay, would you think of those types of admissions on a part of a person as an extraneous bad act under 404(b)?

A. I think certainly something that society would frown upon and, particularly, a Collin County jury. So I would agree with that.

Q. And was there any reason you didn't have—request to have that excised at a—at a— at a date pretrial from this interview?

A. Yes. Our theory of the defense was that Mr. Sewell was brutally honest in his police interview saying things, as you've just pointed out, that would make him look bad and hurt him in front of a jury. That became the crux of our defense that he was so honest with police about things that would hurt him, he also was honest in his denials of—of using—sexually abusing his daughter.

Q. And as far as chronologically in this trial, you'll recall that this interview was introduced by the State through—maybe not their first witness, but their—their second police witness, before the alleged victim was called or any—any other noticed outcry witness was called. So this came in very early on in the trial; do you recall that?

A. I don't recall that. I have no reason to doubt your assertion.

Q. Okay. And so if that's your theory of why it's coming in or why you're allowing it in, is—are you familiar with the—your ability to ask for a limine instruction be given to the jury if they're going to hear extraneous offenses or—

A. Well, you don't want to limit your theory of defense, we would be hurting ourselves to ask the Court to limit what we were going to use as our strategy to win the case.

Q. So I think that answers my question. That's why you did not request limine instructions—

A. Didn't want one.

(Dkt. # 5-33, pp. 140-42).

Trial counsel Ayers testified that Petitioner's sexual conduct went to the core of their defense and showed that the complainant had been exposed to extreme sexualization, which led to her accusations against Petitioner:

> Q. All right. And do you believe or not believe that that would be a—a bad act under 404(b)?
>
> A. I don't believe that it would be a bad act in this case.
>
> Q. What was your rationale or your reasoning for leaving that information in the video?
>
> A. We actually thought that one [sic] directly to the core of the defense here. The household that Mr. Sewell was in was extremely sexually liberated and leaving information in there about his sexual—none of which is illegal. There's nothing illegal about being a swinger. Leaving that information for the jury to hear proves that, number one, he's being honest with the detective because that's not really something that I think you would want to generally admit.
>
> Number two, it goes to the core of the extreme sexualization of the alleged—or the victim in this case and directly towards what we were moving for, that she had been exposed to this kind of sexualization, and that's where these—the idea for these allegations came from.

(Dkt. # 5-33, pp. 206-07).

The record reflects trial counsel Stuckle pursued this strategy in closing argument:

> She [complainant] saw a sex tape of Jason and her mother, graphic sex tape. And interestingly enough—and this is what no one—this brings me no joy, brings nobody any joy. But we've got to face the facts. This was such a dysfunctional family that the children, when they find a sex tape of their own parents, they show it to Ariel's [complainant] abuser, a friend that would take her out to the shed.
>
> Ariel shows him that sex tape of her parents, of Jason ejaculating into her mother's face. Ariel shows that to this boy that was molesting her. That's Ariel. No fun. Like I said, this brings nobody any joy. Think about what you're dealing with. There's issues here. There's issues that need counseling, that need therapy that weren't given. There's problems.
>
> Ariel has looked at porn. Not only the porn that friends have shown her, but she has gone home and surfed for it on her own. There is nothing that she told you, nothing that she hasn't seen through pornography, that she hasn't experienced through her

> friend that took her to the shed, and she didn't see on that sex tape. This is not a difficult story to come up with.
>
> The State is going to say, oh, wait, we've got these vibrators. Yeah. We've also got kids that go through the parent's room and look in their drawers and look in their closets and find these thing. Even Jason admitted, yeah, I found that stuff. What do you think they did with it. Well, it's here, let's leave that alone. Well, maybe we'll turn it on.
>
> If we're going to watch a sex tape of our parents and invited outside people to watch a sex tape with us, I bet they're going to turn those little devices on and see if they buzz and see if they make a noise. Nothing about her story is difficult or can't be contrived.
>
> We also know that Ariel came from a very sexual liberal household. They were careless. They were negligent. You don't have a sex tape of yourself and stick it out in the garage with other things that your children can get to. You don't leave these type of apparatus around where children are capable of finding them.

(Dkt. # 5-8, pp. 140-42).

The state habeas court issued the following findings regarding counsel's handling of the evidence of Petitioner's "swinger" lifestyle:

> 22. In Ground 2, Appellant claims trial counsel was ineffective for allowing evidence regarding his swinger lifestyle to be admitted via his videotaped interrogation and for failing to request a limiting instruction regarding that evidence.
>
> 23. Stuckle testified that the defense was "saddled" with Applicant's statement to begin with, and that their strategy was to adopt that statement and make the best use of it possible. 1 RR 21.
>
> 24. The evidence regarding a swinger lifestyle would not be viewed positively by a Collin County jury. 1 RR 22.
>
> 25. Allowing this evidence in, however, was consistent with the trial strategy. 1 RR 22.
>
> 26. Stuckle did not want a limiting instruction. 1 RR 22-23.
>
> 27. A limiting instruction might hamper the defense's use of the interview. 1 RR 23.

> 28. Applicant adduced no evidence at the writ hearing showing that counsels' decisions to embrace the entire video tape and forego a limiting instruction were not strategic decisions.
>
> 29. Applicant adduced no evidence at the writ hearing showing that no reasonable attorney would attempt this defensive strategy.
>
> 30. Applicant adduced no evidence at the writ hearing showing that his case was prejudiced by his counsels' choice to admit the entire interview at trial.
>
> 31. Applicant has failed to prove by a preponderance of the evidence that his counsel were deficient by embracing the bad parts of his interview along with the favorable parts and by choosing to forego a limiting instruction.
>
> 32. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by his counsel embracing the bad parts of his interview along with the favorable parts and by choosing to forego a limiting instruction.

(Dkt. # 5-33, p. 265). The TCCA subsequently denied relief without a written order based on the findings of the trial court, which constitutes an adjudication on the merits. *See Singleton*, 178 F.3d at 384.

Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the state court's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See Moore*, 313 F.3d at 882. The state habeas court carefully and thoroughly discussed the facts and reasonably applied *Strickland* to the facts before it. The record demonstrates that trial counsel made the strategic decision to allow evidence of Petitioner's "swinger" lifestyle and sexual activities. Allowing the jury to hear this evidence furthered the defense theory that the complainant made the accusations because she was exposed to her parents' corrupt lifestyle and raised in a dysfunctional environment in which she had ample access to pornography and videotapes of her parents in sexual situations. This evidence also advanced the

defense theory that Petitioner "was so honest with police about things that would hurt him, he also was honest in his denials of . . . sexually abusing his daughter." (Dkt. # 5-33, p. 141). Trial counsel's conscious and informed decision in this case was trial strategy that cannot form the basis of a meritorious ineffective assistance of counsel claim. A court may not, in hindsight, second-guess counsel's strategy because an alternative course of action existed during trial. *Green*, 116 F.3d at 1122. Furthermore, Petitioner also cannot demonstrate prejudice from trial counsel's performance. The record reflects that the complainant testified at length about years of sexual abuse. (Dkt. # 5-8, pp. 16-83). Thus, Petitioner has not shown that the state courts unreasonably applied federal law in rejecting this ineffective assistance claim. *See* 28 U.S.C. § 2254(d)(1).

**C. Trial Counsel Were Ineffective in Failing to Object to Testimony by a State's Witness that the Complainant Was Being Truthful**

In his third claim, Petitioner argues that trial counsel were ineffective because they failed to object when State witness Detective Grant Gildon indicated during the videotaped interview that he thought the complainant was being truthful. (Dkt. # 1, pp. 7-8).

The record reflects that Detective Gildon made the following statements during the police interview: (1) "Because I believe your daughter"; (2) "I believe that you sexually abused your daughter"; (3) "I'm telling you that I know this happened"; (4) "When I tell you I think you're a child molester, what comes to mind?"; and (5) "I know you raped your daughter." (Dkt. # 5-5, pp. 122, 128, 170, 172, 174). Trial counsel did not object to admission of these statements.

Petitioner's claim that trial counsel were ineffective in failing to object to these statements was fully developed during the state habeas corpus proceedings. Trial counsel Stuckle explained why he did not object to Detective Gildon's comments:

> Q. And would you agree with me that it would be objectionable for a witness to give their opinion as to the truthfulness of another witness?

A. Yes.

Q. Okay. And do you recall, within that interview that was played for the jury, that Detective Gildon made several statements indicating that he believed that the alleged victim, Mr. Sewell's daughter in this case, was being truthful?

A. Of course. It was a typical police child sexual abuse defendant interrogation. That's what they do. So yes, it happened in this case.

Q. Do you recall specifically—and this is part of the interview which is State's Exhibit 1 and within volume 3, Page 122 and Page 170 to 174, do you remember Detective Gildon making the following statements, saying, 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 that you sexually abused your daughter, that you're a child molester. And then, finally, I know you raped your daughter? Do you remember that series of statements that Detective Gildon made?

A. I don't recall those things specifically being said. I have no reason to doubt what is—in fact, what the detective said. That would be typical of a police interrogation for a child sexual abuse suspect. And I know that there was that type of disparaging language used by the detective regarding Mr. Sewell in this case.

Q. And did you have a—a reason for—well, let me back up.

So you didn't ask for that section of the—of the video to be excised, did you?

A. No, I didn't.

Q. And you didn't object to that in any way?

A. I did not.

Q. And what was your rationale for not objecting or asking for that to be excised?

A. Before this trial—this is not a legal reason, but as a practical matter, we attempted that motion to suppress in a different case, different county, same sort of a police interrogation interview in which several things were stated by the detective concerning their opinions of the defendant's guilt. And we filed a motion to suppress, had the—had the hearing. Judge overruled it and allowed the entire interview in.

Now, that doesn't mean this judge in this case would've done that. Certainly could've made the same motion and same arguments. However, looking at it as a whole, we didn't feel that the jury hearing the police believe the victim was

> necessarily harmful to our case. It seemed to be more natural, we would expect the police to believe the alleged victim.

(Dkt. # 5-33, pp. 142-44). As previously noted, Stuckle also testified that by allowing the entire interview to be admitted, it would serve as Petitioner's testimony, and allow Petitioner to not be subjected to cross-examination:

> I made the decision he wasn't going to testify after discussion with Mr. Sewell, giving him our thinking, listening to his reasons; and ultimately, coming to the same decision. From a defense lawyer's perspective, I made the decision as soon as I saw the—the police interrogation. There's no reason to put this man on the stand. That interrogation would serve well for his theory, our theory, and not subject him to cross-examination by a skilled prosecutor.

(Dkt. # 5-33, p. 149). Furthermore, as also previously noted, trial counsel's strategy was to allow the jury to hear the entire interview to show that Petitioner was not hiding anything. (Dkt. # 5-33, pp. 137-38).

After considering the evidence, the state habeas court issued the following findings regarding counsel's decision not to object to Detective Gildon's statements:

> 33. In Ground 3, Applicant claims trial counsel were ineffective in allowing admission of a detective's statement made during Applicant's interview that she [sic] believed the victim.
>
> 34. Stuckle knew that is generally objectionable for a witness to give an opinion as to the credibility of another witness. 1 RR 23.
>
> 35. It is common for detectives to tell suspects they believe victims during interviews. 1 RR 24.
>
> 36. Stuckle had attempted to exclude such testimony in a prior case but was unsuccessful.
>
> 37. He did not believe the statements would be harmful to Applicant in this case. 1 RR 25.
>
> 38. It is normal that a police officer would believe a victim. 1 RR 25.
>
> 39. Juries do not react favorably to the idea they are not hearing everything. 1 RR 61.

> 40. Counsel believed it was better for the jury to hear the whole interview rather than bits and pieces of the interview. 1 RR 62.
>
> 41. A typical juror will believe that a police officer believes the victim of a crime. 1 RR 63.
>
> 42. Applicant adduced no evidence at the writ hearing demonstrating that counsels' choice to embrace the entire interview—good and bad— rather than a piecemeal presentation of the interview was not a reasonable strategic decision.
>
> 43. Applicant adduced no evidence at the writ hearing that no reasonable attorney would have made this strategic decision.
>
> 44. Applicant adduced no evidence at the writ hearing proving that the decision to embrace the detective's comments during the interrogation prejudiced his case.
>
> 45. Applicant has failed to prove by a preponderance of the evidence that his counsel were deficient by choosing to allow admission of the entire interview recording.
>
> 46. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by his counsels' choice to admit the entire interview rather than force a piecemeal showing of the interview.

(Dkt. # 5-33, p. 266). The TCCA subsequently denied relief without a written order based on the findings of the trial court, which constitutes an adjudication on the merits. *See Singleton*, 178 F.3d at 384.

Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the state court's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See Moore*, 313 F.3d at 882. The state habeas court carefully and thoroughly discussed the facts and reasonably applied *Strickland* to the facts before it. The record demonstrates that trial counsel made the strategic decision to allow Detective Gildon's statements that he believed the complainant. Trial counsel Stuckle based this decision on his experience in a

similar case in which his attempt to exclude such testimony had been unsuccessful. Trial counsel also considered that the jury does not look favorably on hearing only parts of police interviews. Allowing the jury to hear the entire interview would give the impression that the defense was being as forthcoming as possible. Trial counsel also based his decision on his understanding that it was typical for police officers to tell suspects that they believed the complainant. Counsel developed a trial strategy based on Petitioner's decision to cooperate with the police; this strategy reasonably supported limitations on objections to Detective Gildon's testimony. Trial counsel's conscious and informed decision to refrain from challenging admission of Detective Gildon's statements made during Petitioner's interview that he believed the complainant was trial strategy that cannot form the basis of a meritorious ineffective assistance of counsel claim. A court may not, in hindsight, second-guess counsel's strategy because an alternative course of action existed during trial. *Green*, 116 F.3d at 1122. In sum, Petitioner has failed to overcome the doubly deferential standard that must be accorded to counsel in the context of § 2254(d); thus, he is not entitled to federal habeas corpus relief on his third ineffective assistance of counsel claim.

**D. Counsel Were Ineffective in Allowing the State to Introduce Evidence that Some of the Continuous Sexual Abuse Occurred after the Complainant Turned Fourteen Years Old**

In his fourth claim, Petitioner argues that trial counsel were ineffective because they allowed the State to introduce evidence that some of the continuous sexual abuse occurred after the complainant turned fourteen years old. (Dkt. # 1, p. 8). Petitioner further contends that trial counsel did "nothing during pretrial or jury selection to address the discrepancy between the date range in the indictment" and the complainant's fourteenth birthday. (Dkt. # 1, p. 9). Petitioner faults trial counsel for failing to address this issue in opening and closing argument, and for their failure to force the State to elect the dates on which it wanted to proceed. (Dkt. # 1, p. 9). Finally,

Petitioner argues that the instruction to the jury was improper because it was given as a general instruction in an abstract portion of the charge and not in the application paragraph. (Dkt. # 1, p. 9).

The indictment charged Petitioner with continuous sexual assault during a period of thirty days or more with a child younger than fourteen years of age. (Dkt. # 5-2, pp. 17-19). The date range in the indictment was "on or about the 1st day of April 2011 through the 30th day of September, 2013." (Dkt. # 5-2, p. 17). The indictment also alleged Petitioner had committed indecency of a child younger than seventeen years old. (Dkt. # 5-2, pp. 18-19). The complainant testified her birth date was May 30, 1998. (Dkt. # 5-8, p. 6).

At trial, the State made an informal offer to amend the indictment to "reflect the date change in the time period that would narrow the scope of the charged offenses to when the victim Ariel [complainant] was under 14 ending the date range at May 29th, 2012." (Dkt. # 5-8, pp. 124-25). Trial counsel Stuckle objected to the proposed amendment but agreed to a jury instruction:

> Defense did object to the amendment of the indictment. The Defense believes that the insertion on Page 4 of this requested paragraph that reads, "to wit, you may not consider testimony regarding the Defendant having committed offenses outside of Collin County, Texas, for the purpose of determining if the Defendant during a period that was 30 days or more in duration committed two or more acts of sexual abuse in Collin County, Texas, for Count 1 continuous sexual abuse of a young child."
>
> Defense believes that the Court's granting of its proposed instruction to add that language is the preferred method. Thank you.

(Dkt. # 5-8, p. 125). In the charge of the court, the phrase "1st day of April, 2021 through the 30th day of September, 2013" is circled, and there is a handwritten note in the margin that states "May 2012." (Dkt. # 5-2, p. 180).

This claim was fully developed during the state habeas corpus proceedings. Trial counsel Stuckle testified why he chose not to amend the indictment and, instead, chose to rely on the court's

charge. Stuckle testified that he operates under the assumption that the jury is going to consider each part of the charge:

> Q. Okay. So your position then, if I could—if I'm getting this right, and correct me if I don't—was that a general instruction in an abstract portion of the charge would override or control over the application paragraph?
>
> A. I wouldn't agree with that wording about abstract portion of the charge or—it was part of the Court's charge that was read to the jury. And we all operate under the assumption that the jury is going to consider each part of the charge to be relevant in their instructions. So when they're specifically told by the court that the cutoff date for the continuous is when she—was under the age of 14; yes, I felt comfortable with that rather than allowing the State to amend its indictment after trial. Again, that just didn't sit well with me.

(Dkt. # 5-33, pp. 152-53). Stuckle also explained why he did not highlight the timeframe issue to the jury:

> Q. And then, as you—as you then went forward to argue the case, did you make any effort to distinguish or at least highlight to the jury the differences in the alleged victim's testimony when she was just answering the question that the sex abuse started in the summertime of 2012 versus when the prosecutor led her to the '12 or '13? Did you make any distinction to the jury for that?
>
> A. No.
>
> Q. And why not?
>
> A. My experience indicates jurors could really care less about that issue. They want to know, was the child sexually assaulted. Our theory of the defense went to, no, that did not happen; and by arguing trivial matters from jury's perspective—not necessarily as lawyers, but from the jury's perspective over did it happen a day before she turned 14 or after 14 was not going to get us anywhere consistent with our defensive theory. That would hurt credibility with the jury closing argument.
>
> . . . .
>
> Q. All right. There was some testimony on direct about covering the date during voir dire, the—that discrepancy between the date range on which—the acts could be considered and that range on which the acts couldn't be considered.
>
> Is y'all's voir dire the same for every case, or does it vary based upon the facts of the case?

> A. There's a—a framework that we—we use from case to case; but then you have to adapt, obviously, with factual issues as you may encounter during the case, concerns you may have about potential juror prejudices or some aspect of the case or what you may have.
>
> Q. Okay. So on a case like this where your defensive theory is that Mr. Sewell denied it, he was very forthcoming with the police officers about everything else but denied committing this offense; would you necessarily find it necessary to address date ranges that could or could not underlie the offense during voir dire?
>
> A. No. But actually, the forensic interview and police reports and all the information we had, had sufficient evidence that everything occurred before her 14th birthday. Some things happened after that, but enough to meet the continuous elements. So that was not a part of voir dire that we were concerned about.

(Dkt. # 5-33, pp. 175-76, 185-86).

Stuckle also explained why he did not request or force the State to elect the acts that they were going to rely on for their convictions within the date range:

> Well, under continuous, a jury, they have the right to decide which one of those they—they want to use, and they don't have to be unanimous about it. I don't think I can really force the State into an election, they have no idea what might be on the juror's minds.

(Dkt. # 5-33, p. 149). Stuckle further testified that he elected not to give an opening statement because the defense had only one witness, "and we didn't feel that an opening statement at that point in time would've had much of an impact when all we were going to be presenting is the [Petitioner's] spouse." (Dkt. # 5-33, p. 149). Finally, he explained why he did not address the date range issue in closing argument:

> Q. All right. Counsel asked you why you didn't address the date range issued during the closing argument, and I believe that what I heard you explain—if I heard that wrong, let me know, I believe that you said that arguing the date range thing to the jury would undermine your defense that nothing happened at all.
>
> A. Correct.
>
> Q. Am I fairly stating that?
>
> A. Yes.

> Q. Okay. So that was a strategic choice to argue the defense you had prepared for rather than another defense; is that fair?
>
> A. Yes. While, certainly, it's a legal element of the offense and very important for a continuance, and I understand that. Same time, with those 12 people in the box, you start leaning that way too hard as a defendant and as defense counsel, my concern is the jury is thinking you're agreeing that something happened and you just are nitpicking, which is not the way we want to go.

(Dkt. # 5-33, pp. 188-89).

After considering the evidence, the state habeas court issued the following findings regarding counsel's decision not to address the date ranges:

> 47. In Ground 4, Applicant claims he received ineffective assistance of counsel because his counsel allowed him to be convicted for acts that could not support a conviction for the offense of continuous sexual (CSA) assault because of the age of the victim at the time of the acts.
>
> 48. Stuckle [was] aware that acts must be committed against a child younger than 14 years of age in order to be prosecutable acts for the purposes of CSA. 1 RR 26.
>
> 49. Stuckle reviewed the forensic interview and had it transcribed. He also reviewed the discovery provided by the State. 1 RR 26-27.
>
> 50. Stuckle was aware the victim turned 14 on May 30, 2012. 1 RR 28.
>
> 51. Stuckle was aware that the indictment alleged that Applicant committed the offense of CSA between April 1, 2011 and September 30, 2013. 1 RR 28.
>
> 52. Stuckle was aware that acts committed against the victim after May 30, 2012, could not be a basis for conviction of CSA. 1 RR 29.
>
> 53. Stuckle did not take steps, pre-trial, to limit Applicant's range of liability for the offense of CSA. 1 RR 29.
>
> 54. Stuckle did not recall whether the defense addressed the date range for CSA during voir dire. 1 RR 29.
>
> 55. Stuckle did not give an opening statement. 1 RR 39-31.
>
> 56. Stuckle did not attempt to limit Applicant's range of liability via a request for election by the State, but recognized that the State cannot be forced to elect in a CSA case. 1 RR 31, 69.

57. The date range for which the State could obtain a conviction for CSA was, however, limited by other language in the jury charge such that Applicant could only be convicted of CSA for acts committed while the victim was under the age of 14. 1 RR 32.

58. Applicant was protected by this language. 1 RR 33, 34.

59. Stuckle did not address the date issue in closing argument. 1 RR 34.

60. The State attempted to remedy the date issue during trial by requesting that the indictment be amended. Stuckle objected to the amendment. 1 RR 32-32, 64.

61. Stuckle did not believe it was right to agree to the amendment. 1 RR 64.

62. Juries are generally considered to follow the court's instructions. 1 RR 65.

63. Other binding jury instructions are located outside the application paragraph of the jury charge, including instructions on the defendant's failure to testify and that the indictment is not evidence of guilt. 1 RR 65-66.

64. Whether to address an issue in voir dire and whether to give an opening statement (and what to address in opening) depends upon the facts of the case and are therefore strategic choices. 1 RR 66-68.

65. In a case like this, where the defensive theory is that the accused committed no offense at all, it would not be necessary to discuss date ranges for offenses during voir dire. 1 RR 67.

66. Presenting closing argument about the applicable date ranges would undermine the defensive theory that nothing happened at all. 1 RR 69, 77.

67. Stuckle described such an argument as indicating to the jury "that something happened and you are just nitpicking, which is not the way we want to go." 1 RR 70.

68. Applicant adduced no evidence at the writ hearing that trial counsels' handling of the date-range issue was not a reasonable strategic choice.

69. Applicant adduced no evidence at the writ hearing that no reasonable attorney would handle the date-range issue in the same manner as trial counsel.

70. Applicant has failed to prove by a preponderance of the evidence that his counsel were deficient in their handling of the date-range issue.

> 71. Applicant adduced no evidence at the writ hearing that he was prejudiced by the way the jury charge prevented the jury from using an act committed after the victim turned 14 as a predicate offense for the charged offense of CSA.
>
> 72. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by his . . . counsels' handling of the date-range issue.

(Dkt. # 5-33, pp. 267-68). The TCCA subsequently denied relief without a written order based on the findings of the trial court, which constitutes an adjudication on the merits. *See Singleton*, 178 F.3d at 384.

Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the state court's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See Moore*, 313 F.3d at 882. The state habeas court carefully and thoroughly discussed the facts and reasonably applied *Strickland* to the facts before it. Petitioner has not demonstrated that counsel performed deficiently in his handling of the date-range issue. The record establishes trial counsel made reasonable strategic decisions that were consistent with the defense theory that Petitioner did not commit any offense. *See Nelson*, 952 F.3d at 665; *Cotton*, 343 F.3d at 752-53. A court may not, in hindsight, second-guess counsel's strategy because an alternative course of action existed during trial. *Green*, 116 F.3d at 1122. Petitioner also has not established that he was prejudiced by counsel's failures, because he has not shown that such objections would have resulted in a different outcome at trial. *See Strickland*, 466 U.S. at 692. The record reflects that the complainant testified at length about years of sexual abuse, including years when she was under fourteen years old. (Dkt. # 5-8, pp. 16-83). Thus, Petitioner has not shown that the state courts unreasonably applied federal law in rejecting this ineffective assistance claim. *See* 28 U.S.C. § 2254(d)(1).

**E. Counsel Were Ineffective in Failing to Move to Suppress Evidence Obtained in Violation of Petitioner's Fourth Amendment Rights**

In his fifth claim, Petitioner argues that trial counsel were ineffective for failing to file a motion to suppress the evidence obtained from the police's protective sweep of Petitioner's apartment during his arrest. (Dkt. # 1, pp. 9-10). Petitioner contends that, due to the protective sweep, several adult sex toys were located which were later admitted into evidence at trial. (Dkt. # 1, p. 9). Petitioner contends the sex toys were the only real evidence admitted at trial which supported the elements of the offense. (Dkt. # 1, p. 10).

A petitioner claiming that counsel was ineffective with respect to a purported Fourth Amendment violation must demonstrate that his or her Fourth Amendment challenge is meritorious. *See Evans v. Davis*, 875 F.3d 210, 218 (5th Cir. 2017) ("For Evans to demonstrate deficient performance, he must at a minimum show that the evidence would have been suppressed if objected to.") (internal citation omitted); *see also Kimmelman v. Morrison*, 477 U.S. 365, 375, (1986) ("Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.").

"A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *United States v. Silva*, 865 F.3d 238, 241 (5th Cir. 2017) (quoting *Maryland v. Buie*, 494 U.S. 325, 327 (1990)). Such a sweep is justified only when there are "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* (quoting *Buie*, 494 U.S. at 334). "If reasonable minds could differ on whether the sweep was warranted, [courts] do not second-guess

the judgment of experienced law enforcement officers concerning the risks in a particular situation." *Id.* (citing *United States v. Menchaca-Castruita*, 587 F.3d 283, 290 (5th Cir. 2009)).

Petitioner argues that "the testimony clearly shows that the officers had no 'reasonable, articulable suspicion that the area harbor[ed] an individual who pose[d] a danger to those on the scene.'" (Dkt. # 6, p. 38). Detective Gildon testified at trial that he conducted a "protective sweep" of Petitioner's apartment during Petitioner's arrest. Detective Gildon testified that the sweep was performed to protect the safety of officers on the scene. (Dkt. # 5-5, pp. 60-61). During the sweep, Detective Gildon testified that they saw the sex toys:

> As we entered the—what we believed to be the bedroom of Mr. Sewell, we saw on the nightstand next to the bed in plain view what we believed to be a sexually oriented toy that we believe had been described by the victim, and one that she had described as being used against her.
>
> Also in plain view right next to the nightstand that she had described having contained other sexually oriented devices that she stated had been used on her.

(Dkt. # 5-5, p. 62).

At the state habeas hearing, trial counsel Stuckle testified that he did not think there was anything wrong with the sweep and "there was nothing about what was found that was going to hurt our defense, in fact, what was located by the police became part of our theory of the defense, and we wanted that evidence in." (Dkt. # 5-33, p. 155-56). His testimony continued as follows:

> Q. Okay. So now, let's back up.
>
> You've been talking about your strategy as far as what was found, but what was found in the apartment that you felt was beneficial to your case?
>
> A. It was the—let's call it sex toys or vibrators that belonged to Mr. Sewell's spouse or maybe fiancee at—at the time. It became relevant to our theory of the defense when we knew that the alleged victim, as you've called her, A.S., mentioned those during her forensic interview; and we anticipated testimony on this subject.

> So we knew she was going to talk about it. Jury was going to hear it. And the fact that they were found became important for us to—to use in our theory of the defense.
>
> Q. Okay. So you didn't feel that those were more detrimental and that they corroborated A.S.'s testimony?
>
> A. No. We felt that it helped—it certainly did corroborate with her testimony. I'll give you that. But we also felt that it helped our theory of the defense more in showing what was consistent with our theory of Mr. Sewell being brutally honest, having the swinging lifestyle, and—and environment around the home that was negligent in terms of younger children being inundated with sexual-type atmosphere, possibly inappropriate on Mr. Sewell's part; but again, not illegal. And that was our theory of the defense.
>
> He was brutally honest. He was a swinger. They had sex toys. All that was coming in. We had to use that to our advantage in our theory.
>
> Q. Okay.
>
> A. That he was a bad man in terms of being very negligent about leaving items like that out for curious children, but it didn't make him a child molester.

(Dkt. # 5-33, pp. 157-58). Trial counsel Ayers also testified that he had researched the issue of Petitioner's protective sweep and concluded that the items seized would be admissible. (Dkt. # 5-33, p. 210).

After considering the evidence, the state habeas court made the following findings regarding trial counsel's failure to file a motion to suppress:

> 73. In Ground 5, Applicant claims his trial counsel were ineffective for failing to move to suppress evidence seized pursuant to a search warrant.
>
> 74. Stuckle was aware that Applicant was arrested at his apartment and that police conducted a "protective sweep" of the apartment when they arrested him. 1 RR 35.
>
> 75. Stuckle was familiar with the concept of a protective sweep from his three years as a police legal advisor for the city of Fort Worth. He believed the protective sweep was appropriate in this case. 1 RR 36.
>
> 76. Stuckle also believed Applicant would not be harmed by the items seen by the police during the sweep—sex toys—that were consistent with their defensive

> theory that Applicant was brutally honest in his interactions with the police about his sex life and when he denied committing the crime. 1 RR 36, 37-39.
>
> 77. Stuckle was familiar with the particular legal standard for a protective sweep—that officers could conduct a protective sweep when serving an arrest warrant when they had reasonable suspicion that the location might harbor an individual who could hurt them. 1 RR 37. *See Maryland v. Buie*, 494 U.S. 325, 335-36 (1990).
>
> 78. Ayers researched the validity of the protective sweep prior to trial and concluded that the sex toys subsequently seized under a search warrant would be admissible. 1 RR 90-91.
>
> 79. Applicant adduced no evidence at the writ hearing demonstrating that the officers' protective sweep at the time they arrested Applicant violated the Fourth Amendment.
>
> 80. Applicant adduced no evidence at the writ hearing showing that trial counsels' handling of the search issue was not part of their trial strategy.
>
> 81. Applicant has failed to prove by a preponderance of the evidence that his counsel were deficient in their handling of the search issue.
>
> 82. Applicant adduced no evidence at the writ hearing rebutting trial counsel's testimony that the items recovered in the search did not harm the case.
>
> 83. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by his counsels' handling of the search issue.

(Dkt. # 5-33, pp. 268-69). The TCCA subsequently denied relief without a written order based on the findings of the trial court, which constitutes an adjudication on the merits. *See Singleton*, 178 F.3d at 384.

Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the state court's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See Moore*, 313 F.3d at 882. The state habeas court carefully and thoroughly discussed the facts and reasonably applied *Maryland v. Buie* and

*Strickland* to the facts before it. Petitioner has failed to demonstrate that counsel's handling of the search and seizure issue was not reasonable trial strategy. The evidence discovered during the search supported the defensive theory that Petitioner and his wife were "swingers" and had exposed complainant to this lifestyle, which caused her to make false allegations against Petitioner. This advanced the defensive theory that Petitioner did not commit any offense. *See Nelson*, 952 F.3d at 665; *Cotton*, 343 F.3d at 752-53. A court may not, in hindsight, second-guess counsel's strategy because an alternative course of action existed during trial. *Green*, 116 F.3d at 1122. Additionally, Petitioner has not shown that had trial counsel filed a motion to suppress the evidence found during the protective sweep, the trial court would have granted the motion. Detective Gildon testified at trial that a quick search of Petitioner's residence, incident to Petitioner's arrest, was conducted to protect the safety of police officers present. Because courts do not second-guess the judgment of experienced law enforcement regarding the risks in a particular situation, *Buie*, 494 U.S. at 334, Petitioner cannot demonstrate that the trial court would have granted a motion to suppress the evidence found during the protective sweep. Moreover, Petitioner has not established that had the evidence been suppressed the outcome of trial would have been different. *See Strickland*, 466 U.S. at 692. The complainant testified at length about years of sexual abuse (Dkt. # 5-8, pp. 16-83), and the jury heard evidence regarding Petitioner's "swinger" lifestyle and sexual proclivities. Accordingly, Petitioner has not shown that the state courts unreasonably applied federal law in rejecting this ineffective assistance claim. *See* 28 U.S.C. § 2254(d)(1).

**F. Counsel Were Ineffective in Failing to Object to the Admission of Improper Outcry Testimony**

In his sixth claim, Petitioner argues that trial counsel were ineffective for failing to object to the portion of Petitioner's police interrogation in which Detective Gildon repeated certain

allegations or "outcry" statements the complainant made against Petitioner. (Dkt. # 1, pp. 10-11). Petitioner also argues that trial counsel were ineffective in eliciting other "outcry" statements from Detective Gildon on cross-examination and in failing to object to additional "outcry" testimony elicited on redirect. (Dkt. # 1, p. 11). Petitioner contends that Detective Gildon was not a qualified "outcry" witness and that trial counsel failed to request a hearing pursuant to Article 38.072 of the Texas Code of Criminal Procedure. (Dkt. # 1, p. 11).

The State provided notice to Petitioner that Sharai Collins (A.S.'s mother), Officer Ryan Garmin (first responding officer), and Joy Hallum (forensic interviewer) were the witnesses through which the State intended to offer outcry testimony. (Dkt. # 5-2, pp. 152-153). Detective Gildon was not listed as an outcry witness. Detective Gildon observed and listened to the forensic interview with the complainant, and then spoke with complaint's mother. (Dkt. # 5-5, pp. 48-53). Subsequently, he interrogated Petitioner and repeated the complainant's allegations. (Dkt. # 5-5, pp. 72-187). Detective Gildon's interrogation of Petitioner was played during his testimony on the first day of trial. (Dkt. # 5-5, pp. 72-187). On redirect, Detective Gildon testified as to additional outcry statements of complainant. (Dkt. # 5-2, pp. 244-46).

Texas Code of Criminal Procedure Article 38.072 provides an exception to the hearsay rule, allowing the State to introduce outcry statements by a child victim of certain offenses that otherwise would be considered inadmissible hearsay. It allows a child victim under the age of twelve years old to make an outcry statement to an adult over the age of eighteen. To invoke this hearsay exception, notice is required as well as a hearing. *Long v. State*, 800 S.W.2d 545, 546 (Tex. Crim. App. 1990). The statement is not considered inadmissible hearsay if:

> (1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:
>
> (A) notifies the adverse party of its intention to do so;

> (B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and
>
> (c) provides the adverse party with a written summary of the statement;
>
> (2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and
>
> (3) the child or person with a disability testifies or is available to testify at the proceeding in court or in any other manner provided by law.

Tex. Code Crim. Pro. Ann. art. 38.072.

At the state habeas hearing, trial counsel Stuckle explained his decision not to object to the parts of the police interrogation where Detective Gildon repeated to Petitioner the complainant's outcry statements:

> Q. Okay, is there—what was your rationale in not objecting to that as an improper outcry witness?
>
> A. We know it's a stupid move on the part of any criminal suspect to talk to the police. But we also know that, once they make that stupid move, in all likelihood, that's going to be played in front of the jury. You adapt and try to figure out how you can use that to your advantage.
>
> Did I think the Judge was going to suppress those statements? No, absolutely not.
>
> Q. Okay. So your—because you didn't feel like the Judge would, you took no action. You just let it come in without objection?
>
> A. Doubt that I even really looked into it that—that hard, we knew it was there in the interview, we knew he was cross-examined, it was going to be our testimony. And rather than having Mr. Sewell testify, that was our evidence. That was our argument. That was our theory, we were going with it.
>
> Q. And do you recall that, in addition to those statements that are on the video, that Detective Gildon, during his testimony in front of the jury, actually testified further as to some of the things that he was aware that A.S. had said, the alleged victim had said on her forensic interview?
>
> A. Don't recall.

> Q. Okay, if that's in the record, volume 3, Page 244 to 246, that, essentially, A.S. stated the first time anything happened was when they lived in Georgia, and then described the acts that happened the first time it happened in Georgia, would you disagree with me that that's what Detective Gildon testified to?
>
> A. No reason to doubt what you're saying.
>
> Q. Okay. And that came in with no objection that that's his testimony versus the video, is there a reason you didn't object to that as improper outcry?
>
> A. While the—practicing in this particular area of child sexual abuse defense over the last 16 years, I have found that, many times, your defense is stronger the more times people, including the alleged victim, give a rendition of the outcry. That's when you develop inconsistencies, and you can pit the witnesses against each other and try to diminish the credibility of the alleged victim.
>
> That's just a general theory that I have, and I use that in many of my cases, it's evidence the jury has already heard. It's not going to impact our case in a negative way any further. No reason to object.

(Dkt. # 5-33, pp. 161-63).

After considering the evidence, the state habeas court issued the following findings regarding counsel's decision not to object to Detective Gildon's alleged "outcry" testimony:

> 84. In Ground 6, Applicant claims that his counsel were ineffective for failing to object to statements made by the detective while interrogating him as improper outcry testimony. Application at 16-17.
>
> 85. During the interrogation, the detective told Applicant several specific allegations of sexual misconduct made by A.S. Application at 16; 1 RR 42.
>
> 86. Counsel did not object to these statements by the detective as improper outcry testimony because he did not believe the trial court would exclude the evidence. 1 RR 42.
>
> 87. Counsel described the interrogation as a "standard police interview." 1 RR 41-42.
>
> 88. Applicant offered no evidence, and cites no applicable authority, for the proposition that statements made by a detective during custodial interrogation constitute "outcry testimony" for the purposes of Article 38.072 of the Code of Criminal Procedure. 1 RR 39-44; Memorandum at 47-50.

> 89. Counsel cannot be found ineffective for failing to assert a claim that is based on unsettled law. *State v. Bennett*, 415 S.W.3d 867 (Tex. Crim. App. 2013) (declining to find counsel ineffective for failing to assert a statute of limitations defense when the law was unsettled as to the applicable statute of limitations for aggravated assault).
>
> 90. Applicant also claims that counsel were deficient for questioning the detective on cross-examination in a way that elicited further details of offenses committed by Applicant against A.S. Application at 17. Applicant also claims that counsel should have objected during the State's redirect of the detective when he gave additional details of the offenses. Application at 17.
>
> 91. Counsel testified that their defense was based around the denials in Applicant's interview. 1 RR 43. Moreover, counsel testified that, in his experience, the more times a witness testifies about a matter, the better it is for the defense because it generates inconsistencies. 1 RR 44. It will not harm the defense. 1 RR 44.
>
> 92. Applicant has failed to prove by a preponderance of the evidence that his counsel were deficient for declining to raise a novel outcry argument about the video interrogation of Applicant.
>
> 93. Applicant has failed to prove by a preponderance of the evidence that his counsel were deficient in their cross-examination of the detective regarding details of the acts committed by Applicant or for failing to object to redirect about details of the acts committed by Applicant.
>
> 94. Applicant adduced no evidence at the hearing that rebutted counsel's testimony that the additional testimony from the detective would not harm the case.
>
> 95. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by counsel's failure to raise a novel outcry argument about the video interrogation of Applicant.
>
> 96. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by his counsel's cross-examination of the detective or failure to object to the redirect of the detective.

(Dkt. # 5-33, pp. 269-71). The TCCA subsequently denied relief without a written order based on the findings of the trial court, which constitutes an adjudication on the merits. *See Singleton*, 178 F.3d at 384.

Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the state court's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable

application of, clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See Moore*, 313 F.3d at 882. The state habeas court carefully and thoroughly discussed the facts and reasonably applied *Strickland* to the facts before it. Trial counsel's performance must be measured against the law as it existed at the time of the alleged deficient conduct. *Lave v. Dretke*, 416 F.3d 372, 379-80 (5th Cir. 2005). Furthermore, counsel will not be found to be ineffective when the claimed error is based on unsettled law. *Givens v. Cockrell*, 265 F.3d 306, 309 (5th Cir. 2001); *Sharp v. Johnson*, 107 F.3d 282, 289-90 (5th Cir. 1997). Petitioner does not rebut the state habeas court's finding that Texas law was not clear that statements made by a detective during a custodial interrogation constituted "outcry testimony" for the purposes of Article 38.072 of the Code of Criminal Procedure. Thus, counsel were not ineffective for failing to object to those statements. Furthermore, Detective Gildon's statements during the police interrogation do not constitute hearsay because they were not offered for the truth of the matter asserted. Rather, Detective Gildon was merely repeating complainant's statements to Petitioner during the police interview. *See United States v. Dunigan*, 555 F.3d 501, 507 (5th Cir. 2009) (citing *United States v. Johnston*, 127 F.3d 380, 394 (5th Cir. 1997) ("Out-of-court statements offered for another purpose, e.g., providing background information to explain the actions of investigators, are not hearsay."). Thus, there was no need to use the hearsay exception set out in article 38.072 with respect to those statements. Finally, Detective Gildon's statements elicited on cross-examination and on redirect were repetitive of statements made by the complainant at trial, which alone were sufficient to sustain the conviction. Therefore, even if trial counsel's performance could be considered deficient, Petitioner cannot establish prejudice. *Strickland*, 466 U.S. at 694. The admission of cumulative testimony does not amount to

ineffective assistance of counsel. *Harrison v. Quarterman*, 496 F.3d 419, 425 (5th Cir. 2007). Accordingly, Petitioner has not shown that the state courts unreasonably applied federal law in rejecting this ineffective assistance claim. *See* 28 U.S.C. § 2254(d)(1).

**G. Counsel Were Ineffective for Failing to Call a Witness to Rebut Testimony that the Complainant was Injured as a Result of the Abuse**

In his seventh claim, Petitioner argues that trial counsel were ineffective for failing to call a witness, Marquise Broadus, to testify at trial. (Dkt. # 1, p. 12).

Complainant alleged that Broadus assaulted her when she lived in Georgia. Trial counsel hired an investigator who had obtained an affidavit from Marquise Broadus in which he claimed he was not the perpetrator. (Dkt. # 1, p. 12). Both complainant and Marquise Broadus were children at the time of the alleged assault. (Dkt. # 5-33, p. 171).

The Fifth Circuit "has repeatedly held that complaints of uncalled witnesses are not favored in federal habeas review because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have stated are largely speculative." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). To succeed on the claim, a petitioner must show that had counsel investigated the claim he would have found witnesses to support the defense, that such witnesses were available, and had counsel located and called these witnesses, their testimony would have been favorable and they would have been willing to testify on his behalf. *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985); *Gomez v. McKaskle*, 734 F.2d 1107, 1109-10 (5th Cir. 1984), *cert. denied*, 469 U.S. 1041 (1984). A petitioner must overcome a strong presumption that his counsel's decision in not calling a particular witness was a strategic one. *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984).

Petitioner's claim that trial counsel were ineffective for failing to call Marquise Broadus was fully developed during the state habeas corpus proceedings. Trial counsel Stuckle provided the following response concerning his decision not to call Marquise Broadus as a witness:

> Q. Okay. Now, this accusation that the alleged victim made as far as someone else sexually assaulting her when she was younger and the neighbor was younger, tell me what you did to investigate that.
>
> A. I researched it and also allowed the defendant to make a call on whether or not it should be followed up on. If I can briefly explain?
>
> Q. Sure.
>
> A. I was concerned about the—having tried many of these cases and studied in this area for some time, I was concerned about the admissibility of any prior sexual activity on the part of the alleged victim, whether consensual or nonconsensual, et cetera, with the rape shield law and the case law in place, that, in my opinion, severely limits the ability of the defense to put this evidence in front of the jury. I didn't think it was coming in.
>
> Plus the fact that it was remote, and I didn't think the jury would find that the alleged victim would have any difficulty in distinguishing between a neighbor her age and her father of—who was actually sexually abusing her during the trial testimony.
>
> With all those things, I—I felt very confident the Court was not going to allow this evidence in if the State objected to it. So it still was important. Took the idea to my client and his wife, who was helping him with his defense, and they made the decision, in fact, she orally agreed, verbally agreed to pay our investigator, to travel to Oklahoma to talk to this individual, when I say verbally agreed, she paid him a portion of his fees to do that; and then blew it off, didn't pay him the rest, and I ended up out of my own pocket paying him the—the balance of his fees. That's neither here nor there.
>
> In other words, we did send an investigator there to talk to the individual and get the affidavit.
>
> . . . .
>
> Q. So essentially, what A.S. [complainant] testified to on direct was that this Marquis had sexually assaulted her back in Georgia when they were younger, and he admitted it, right?
>
> A. Yes.

Q. Okay.

A. If—according to what you say is in the record, then yes.

Q. Okay. And so what, at that point—well, either before the trial—what did you—did you take any steps to try to make sure that Marquis Broadus would be available as a potential witness in case this did become admissible?

A. No.

Q. And why didn't you do that?

A. It was remote. I felt the case law was overwhelmingly against us getting any evidence of that prior sexual activity, if it occurred, into evidence. He was a juvenile, which would make it inadmissible—or not even a crime yet. If it arose to the level to where it could become culpable, I would anticipate he would take the Fifth Amendment. Didn't seem like something I wanted to approach our judges here in Collin County and ask for money when I didn't really have a good-faith basis that that call would be productive.

(Dkt. # 5-33, pp. 164-65, 171).

After considering the evidence, the state habeas court issued the following findings:

97. In Ground 7, Applicant claims his counsel were ineffective for failing to call a witness to testify that A.S. falsely claimed that the witness had also sexually assaulted her. Application at 18.

98. Counsel testified that he watched A.S.'s forensic interview in which she stated she had been assaulted by a neighbor who was roughly the same age as she in Georgia. 1 RR 44.

99. Counsel researched this claim and discussed with Applicant whether it should be followed up. 1 RR 45.

100. Counsel would be limited in his ability to use evidence of other sexual activity of the victim—consensual or non-consensual—because of the Rape Shield Law. 1 RR 45-46. Counsel did not believe evidence of an assault by a different person would be admissible. 1 RR 46. Counsel believed the allegation was remote and that the victim would have little difficulty distinguishing between an assault by another child and the assault allegations against her father. 1 RR 46.

101. Applicant and his wife, however, thought the matter should be followed up and agreed to pay for an investigator to go to Oklahoma and talk to the witness. 1 RR 46.

102. Counsel had a court appointed investigator, Johnny Rodriguez. 1 RR 45-46.

103. Counsel did not attempt to obtain court funding for the investigator for the trip to Oklahoma. 1 RR 47.

104. The investigator obtained an affidavit from the witness, Applicant's Exhibit 1. 1 RR 47-48; AX 1.

105. A.S. alleged she was six years' old when the witness, M.B., assaulted her. M.B.'s statement said he was six or seven when he last saw A.S. 1 RR 50; AX 1. M.B. denied the allegation. AX 1.

106. Counsel had the affidavit prior to trial. 1 RR 50.

107. A.S. testified at trial about the incident involving M.B. and said he had "come clean." 1 RR 51.

108. Counsel did not take steps to bring M.B. to court as a witness because the incident was remote and he thought it would be difficult to obtain admission of the evidence because it involved a juvenile and was prior sexual activity. 1 RR 52. M.B. could possibly assert a Fifth Amendment privilege. 1 RR 52.

109. Even after A.S. testified about the event, counsel did not attempt to bring M.B. to court to testify. 1 RR 53.

110. Counsel believed that it wasn't a "path" they "needed to go to[.]" 1 RR 53.

111. Applicant offered no evidence at the habeas hearing that M.B. was in fact available to come to Texas to testify at trial.

112. Applicant offered no evidence at the habeas hearing that M.B. would have provided beneficial testimony had he been subpoenaed to testify at trial.

113. An ineffective assistance claim regarding the failure to call a witness cannot succeed unless the record shows that the witness was available to testify and that the testimony would be beneficial to his case. *Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007).

114. M.B.'s statement, while showing a potential fact contrary to A.S.'s forensic interview and testimony, does not establish that M.B. would have been available at trial or that M.B. would actually have testified in Applicant's favor had he appeared at trial.

> 115. Applicant offered no evidence that counsel's decision not to subpoena M.B. for trial was not a reasonable strategic decision in light of counsel's investigation, preparation, and experience.
>
> 116. Applicant has failed to prove by a preponderance of the evidence that counsel was deficient in his handling of M.B.
>
> 117. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by his counsel's handing of M.B.

(Dkt. # 5-33, pp. 271-72). The TCCA subsequently denied relief without a written order based on the findings of the trial court, which constitutes an adjudication on the merits. *See Singleton*, 178 F.3d at 384.

Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the state court's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See Moore*, 313 F.3d at 882. The state habeas court carefully and thoroughly discussed the facts and reasonably applied *Strickland* to the facts before it. The record demonstrates that trial counsel made a reasonable strategic decision not to call Marquise Broadus as a witness at trial. Petitioner has not produced any evidence to demonstrate Marquise Broadus was available, was willing to testify, and that his testimony would have been favorable. Furthermore, Petitioner has not shown Marquise Broadus's testimony would have been admissible under the Rape Shield Law. *See* Tex. R. Evid. 412. Petitioner has failed to overcome the strong presumption that trial counsel's decision in not calling Marquise Broadus was a strategic one. *See Murray*, 736 F.2d at 282. In sum, Petitioner has failed to overcome the "doubly" deferential standard that must be accorded to his trial attorney in light of both *Strickland* and § 2254(d). *See*

*Richter*, 562 U.S. at 105. Thus, Petitioner is not entitled to federal habeas corpus relief on his seventh ineffective assistance of counsel claim.

**H. Counsel Were Ineffective in Failing to Object to Leading Questions**

In his eighth claim, Petitioner argues that trial counsel were ineffective in allowing the State to ask the complainant a series of leading questions on direct examination, which allowed her to change her testimony on redirect and provide a different timeline. (Dkt. # 1, pp. 12-13).

The Fifth Circuit has held that the "failure to object to leading questions and the like is generally a matter of trial strategy as to which [this court] will not second guess counsel." *Villanueva v. Stephens*, 555 Fed. App'x. 300, 307 (5th Cir. 2014) (quoting *Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993)).

This claim was fully developed during the state habeas corpus hearing. Trial counsel Stuckle provided the following testimony:

> Q. I'm going to talk to you about a different topic. We've already talked about the fact that, based on A.S.'s birthday, she would've turned 14th on May 30th of 2012. Agree with that?
>
> A. Yes.
>
> Q. And then, do you recall during her testimony that, on direct, she initially indicated that the first time any sexual abuse had occurred in McKinney was during the summertime of 2012?
>
> A. No, I don't recall that.
>
> Q. Okay. So if I tell you that that's in the record volume 5, Page 32, do you have any reason to disagree with that?
>
> A. No.
>
> Q. Would you agree then, in general, that leading questions should—are not allowed on direct questioning of a witness?
>
> A. Correct.

Q. Okay. And although there's case law, certainly, we would say that, with a child witness—especially certain younger children with—and if they have sort of mental competency issues or mental health issues, they—there's some legal implications, agree with that?

A. Yes.

Q. Do you recall at the time of this trial that A.S., the alleged victim, would've been 16 years old?

A. Yes.

Q. So then we're back to the general rule that, generally, leading questions are not allowed on direct?

A. Yes.

Q. So do you recall that the prosecutor was allowed or the prosecutor did ask leading questions to get A.S. to agree with the prosecutor that the first time the sexual activities occurred in McKinney were when she was 12 or 13?

A. Based on the designated issue, I did find that portion of the transcript. Yes, I agree it was a leading question.

Q. Okay and was there a reason you didn't object to that leading question?

A. It's not admissible in court, felony or dealing with an experienced prosecutor, he's just going to restate the—the question to a form that the witness is going to answer, make a decision to make objections in front of the—the jury when I felt it was—was necessary, very rarely would I make a leading objection in a felony trial.

It's an important issue. I agree. Again, I had no doubt that—there was plenty in the record that—prior to that, that covered the continuous ages, I felt sufficiently. And again, did not feel that objecting would do anything except have the prosecutor rephrase the question.

Q. Even—and in this instance when it potentially turns on a critical issue of whether the sexual abuse occurred before or after the alleged victim's 14th birthday?

A. It's an important issue. I agree. Again, I had no doubt that—there was plenty in the record that—prior to that, that covered the continuous ages, I felt sufficiently. And again, did not feel that objecting would do anything except have the prosecutor rephrase the question.

But you're right, an objection could've been made.

. . . .

Q. Let me move you on to Ground 8, which Mr. Brown addressed with you, talking about leading questions of the victim.

Now, the victim was 16 years old?

A. Yes.

Q. At the time of trial?

A. Yes.

Q. Okay, is a 16-year-old as sophisticated a witness as you are?

A. No, not typical.

Q. All right. You've been—

A. Thank you, by the way. Go ahead.

Q. Well, you've been practicing law for quite a bit longer than I have, do you think a 16-year-old witness would be as sophisticated a witness as I am?

A. No.

Q. Okay. Less sophisticated perhaps than a patrol officer?

A. Yes.

Q. Okay. So is it your experience that, in follow-up questions, that judges will often allow leading questions to clarify testimony?

A. On redirect? Is that what you're saying? Or—maybe I misunderstood the question.

Q. Well, I mean, whether it's in direct or redirect. I mean, it's been my experience that a judge will often allow a leading question or two of a child or a teen witness. Has yours been—

A. It happens in every case. Counsel is correct, an objection could've been—been made, but we did not feel it would be productive.

Q. All right. Would you agree that it's discretionary on the part of the Court whether to allow that type of question?

> A. I'm sure the Court would've shut it down and told the prosecutor not to—not to lead. But then, we—but then, we get the other questions that establish the point they were trying to make anyway.
>
> Q. And you testified on direct that you thought the prosecutor could've rephrased the question in any event; is that correct?
>
> A. I have no doubt.

(Dkt. # 5-33, pp. 172-74, 193-94).

> After considering the evidence, the state habeas court issued the following findings:
>
> 118. In Ground 8, Applicant complains that his counsel failed to object to leading questions asked of A.S. Application at 20-21.
>
> 119. Counsel testified that leading questions are generally not allowed during direct examination, but also acknowledged that they are allowed under certain circumstances. 1 RR 54.
>
> 120. A.S. was 16 years old at trial. 1 RR 54.
>
> 121. Counsel reviewed the transcript in question prior to the hearing a[n]d agreed that the prosecutor asked leading questions. 1 RR 54-55.
>
> 122. Counsel explained that he did not object to leading questions because an experienced prosecutor would simply restate the question in a proper form. 1 RR 55. He would object to leading "very rarely." 1 RR55.
>
> 123. Counsel agreed that the questions here dealt with A.S.'s age and was an important issue, but that the record already covered the ages relevant to the offense of continuous sexual abuse. 1 RR 55. Thus, objecting to the leading question would just lead to the prosecutor rephrasing the question. 1 RR 55.
>
> 124. Applicant has failed to prove by a preponderance of the evidence that counsel's decision not to object to leading questions of A.S. was deficient.
>
> 125. Applicant has failed to prove by a preponderance of the evidence that counsel's decision not to object to leading questions of A.S. prejudiced him.

(Dkt. # 5-33, pp. 272-73). The TCCA subsequently denied relief without a written order based on the findings of the trial court, which constitutes an adjudication on the merits. *See Singleton*, 178 F.3d at 384.

Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the state court's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See Moore*, 313 F.3d at 882. The state habeas court carefully and thoroughly discussed the facts and reasonably applied *Strickland* to the facts before it. The record establishes that counsel's decision not to object to leading questions was reasonable trial strategy. Based on trial counsel's experience, he determined that had he objected to every possible leading question, the trial judge simply would have instructed the prosecutor to rephrase the question, which the prosecutor presumably would have done. Furthermore, Petitioner has not shown that he was prejudiced by trial counsel's failure to object to leading questions. *See Rushing v. Butler*, 868 F.2d 800, 806 (5th Cir. 1989) (dismissing claim concerning failure to object to leading questions because "even if we were to surmise that defense counsel's performance was, in fact, deficient . . . [Petitioner]'s claims of ineffective assistance of counsel must fail under the prejudice prong of the *Strickland* analysis."). There was evidence already in the record establishing the ages relevant to the offense of continuous sexual abuse. Thus, Petitioner has not shown that the state courts unreasonably applied federal law in rejecting this ineffective assistance claim. *See* 28 U.S.C. § 2254(d)(1).

## I. Counsel Were Ineffective in Failing to Move for a Directed Verdict or Make a Jury Argument on the Basis that the Evidence was Insufficient

In his last claim, Petitioner alleges that trial counsel were ineffective for failing to move for a directed verdict based on insufficient evidence, or to make a jury argument based on insufficient evidence. (Dkt. # 1, pp. 13-14). Specifically, Petitioner asserts that the evidence was insufficient to prove that "the alleged sexual abuse occurred in McKinney when A.S. was under

14 years of age." (Dkt. # 1, p. 14). Petitioner argues that if the assault occurred "'during the summertime' of 2012," it occurred after the complainant's fourteenth birthday. (Dkt. # 1, p. 14).

This claim was fully developed during the state habeas corpus hearing. Trial counsel Stuckle provided the following testimony:

> Q. Then we would move further as far as once the State rests, did you—and I believe you urged a directed verdict for a purpose—you didn't urge a directed verdict on a sufficiency issue, did you?
>
> A. No.
>
> Q. Would you agree with me that, if—if the State had not been able to prove the age of the continuous is the first act occurring until after A.S. turned 14, then certainly a sufficiency argument would've been appropriate?
>
> A. If that were the case, it wasn't in our trial.
>
> Q. And then, as you—as you then went forward to argue the case, did you make any effort to distinguish or at least highlight to the jury the differences in the alleged victim's testimony when she was just answering the question that the sex abuse started in the summertime of 2012 versus when the prosecutor led her to the '12 or '13? Did you make any distinction to the jury for that?
>
> A. No.
>
> Q. And why not?
>
> A. My experience indicates jurors could really care less about that issue. They want to know, was the child sexually assaulted. Our theory of the defense went to, no, that did not happen; and by arguing trivial matters from jury's perspective—not necessarily as lawyers, but from the jury's perspective over did it happen a day before she turned 14 or after 14 was not going to get us anywhere consistent with our defensive theory. That would hurt credibility with the jury closing argument.
>
> . . . .
>
> Q. All right. In Ground 9, Mr. Brown asked you about—you moved for a directed verdict and your final argument to the jury on sufficiency evidence. And that was, again, I think a phrasing of the—the dates of offense issue. Is it your—you've testified that the forensic interview showed that dates of offense seemed to be in the range of continuous sexual abuse?

A. All of the police reports, outcry statements, forensic interviews, police interview with the—with the victim and her mother all showed the—that there was sufficient evidence for the date range to meet the continuous.

Q. Okay, what about the—the testimony? I mean, since I've heard Mr. Brown expound upon it with you, it sounds like there was evidence before the jury that the offenses happened within the proper date range and there might've been some testimony indicating an offense or acts outside of that date range, is that a fair assessment?

A. Yes.

Q. So in a situation where there's evidence on both sides of an issue, is it your experience that a court will often grant a directed verdict in that situation?

A. Well, I think from a—and part of it is that here was an indecency count as well, which would allow a conviction—in fact, got a conviction for—in this case for sexual activity, if there's an intent to arouse or gratify any person if the complainant is under 17 years of age. So that's separate from a continuous issue.

As far as the continuous goes, our belief is that there was sufficient evidence in front of the jury from several sources, including the victim, that make a directed verdict on that, but would not have been good faith on my part.

Q. All right. And I believe you testified on direct that arguing the date range to the jury would undermine your defensive theory that this didn't happen at all; is that fair?

A. You're basically saying, hey, yeah, we're guilty, we did it, but let's—let's, you know, give—give the guy a break and we'll split these hairs, not something we want to do.

(Dkt. # 5-33, pp. 174-75; 194-96).

After considering the evidence, the state habeas court issued the following findings:

126. In Ground 9, Applicant claims his counsel was ineffective for failing to move for a directed verdict that the State failed to prove an offense was committed against A.S. in McKinney when she was under age 14 or argue inconsistencies in A.S.'s testimony to the jury. Application at 22-23.

127. Counsel did not make a motion for directed verdict. 1 RR 56.

128. The State did not fail to prove the elements of its case in this trial. 1 RR 56.

> 129. Counsel did not argue the differences in A.S.'s testimony regarding her direct testimony and the prosecutor's redirect about her age at the time of the offenses. 1 RR 56.
>
> 130. In counsel's opinion, the jury would not care about various testimony regarding the victim's age. Rather, what would impact the jury was whether or not the victim was sexually assaulted. 1 RR 56. The theory of the defense was that A.S. was not sexually assaulted by Applicant. 1 RR 56-57. Arguments about A.S.'s age would undermine the defense theory. 1 RR 57.
>
> 131. Applicant has failed to prove by a preponderance of the evidence that counsel's decision against seeking a directed verdict was not a reasonable strategic decision.
>
> 132. Applicant has failed to prove by a preponderance of the evidence that his decision not to argue to the jury about the victim's age at the time of the offenses was not a reasonable strategic decision.
>
> 133. Applicant has failed to prove by a preponderance of the evidence that counsel was deficient for failing to move for a directed verdict.
>
> 134. Applicant has failed to prove by a preponderance of the evidence that counsel's jury argument on guilt was deficient.
>
> 135. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by his counsel's decision not to move for a directed verdict.
>
> 136. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by his counsel's jury argument on guilt.

(Dkt. # 5-33, pp. 273-74). The TCCA subsequently denied relief without a written order based on the findings of the trial court, which constitutes an adjudication on the merits. *See Singleton*, 178 F.3d at 384.

In order to show that trial counsel was ineffective for failing to file a motion—like a motion for a directed verdict—Petitioner must show a reasonable probability that such motion would have been successful or meritorious. *See, e.g.*, *Geiger v. Cain*, 540 F.3d 303, 309 (5th Cir. 2008) ("In addition, had counsel moved for a mistrial, we find no basis to conclude that the trial court would have granted it, or it would have reversibly erred by refusing it."); *United States v. Rosalez-Orozco*,

8 F.3d 198, 199 (5th Cir. 1993) ("In order to establish prejudice, Rosalez must show that [there was] a reasonable probability that had counsel moved for a judgment of acquittal, the motion would have been granted . . . ."); *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) (counsel is not required to make futile motions or objections in order to be effective). Failure to move for directed verdict does not render counsel ineffective "where there was possibly sufficient evidence of guilt to support a guilty verdict and no reason to believe that such a motion would be granted." *Burston v. Caldwell*, 506 F.2d 24, 28 (5th Cir. 1975). When reviewing whether there was insufficient evidence to convict, courts in the Fifth Circuit apply a rationality standard to determine whether "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *West*, 92 F.3d at 1393 (quoting *Jackson*, 443 U.S. at 322-26).

The right to effective assistance extends to closing arguments. *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003); *see also Bell v. Cone*, 535 U.S. 685, 701-02 (2002); *Herring v. New York*, 422 U.S. 853, 865 (1975). "Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should 'sharpen and clarify the issues for resolution by the trier of fact,' but which issues to sharpen and how best to clarify them are questions with many reasonable answers." *Yarborough*, 540 U.S. at 5-6 (internal citations omitted). "Judicial review of a defense attorney's summation is therefore highly deferential-and doubly deferential when it is conducted through the lens of federal habeas." *Id.* at 6.

Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the state court's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or resulted in

a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See Moore*, 313 F.3d at 882. The state habeas court carefully and thoroughly discussed the facts and reasonably applied *Strickland* to the facts before it. First, Petitioner has not demonstrated that a motion for a directed verdict based on insufficiency of the evidence would have been granted. A trial court may not grant a directed verdict if more than a scintilla of evidence supports the grounds underlying the directed verdict. *See Gill v. State*, 111 S.W.3d 211, 217 (Tex. App. 2003) (holding counsel not deficient for failing to move for directed verdict if State presents more than a scintilla of evidence to support a guilty verdict). "More than a scintilla of evidence exists when it rises to the level that would enable reasonable and fair-minded people to differ in their conclusions." *Rundles v. State*, 486 S.W.3d 730, 739 (Tex. App. 2016). The State presented more than a scintilla of evidence in its case-in-chief that would have supported a guilty verdict. *See Gill*, 111 S.W.3d at 217. The record reflects that the complainant testified at length about years of sexual abuse. (Dkt. # 5-8, pp. 16-83). Furthermore, as set forth above, the state habeas court found that "[t]he State did not fail to prove the elements of its case in this trial." (Dkt. # 5-33, p. 273, ¶ 128). Petitioner fails to rebut the presumed correctness of the state court's findings with clear and convincing evidence. Second, Petitioner has not demonstrated that any argument based on allegations of insufficient evidence would have changed the outcome of the trial. The complainant testified at length about years of sexual abuse that occurred when she was younger than fourteen years old (Dkt. # 5-8, pp. 16-83), and the prosecutor stressed to the jury during closing argument that Petitioner could only be convicted for continuous sexual abuse based on abuse that happened before the complaint turned fourteen years old (Dkt. # 5-8, pp. 127-28). In light of the evidence at trial and the State's closing argument, trial counsel's decision not to argue that the State failed to present sufficient evidence that the alleged sexual abuse occurred in

McKinney when the complainant was under fourteen years of age was reasonable trial strategy. Any argument challenging the sufficiency of this evidence would have been weak at best. A court may not, in hindsight, second-guess counsel's strategy because an alternative course of action existed during trial. *Green*, 116 F.3d at 1122. In sum, Petitioner has not shown that the state courts unreasonably applied federal law in rejecting this ineffective assistance claim. *See* 28 U.S.C. § 2254(d)(1).

## V. CONCLUSION

Petitioner has failed to show that any of his claims have merit. He has failed to prove that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. He has also failed to overcome the presumption that, under the circumstances, the challenged actions of his trial counsel might be considered sound trial strategy. *See id.* at 689. Above all, in each of his claims, Petitioner has failed to rebut the presumption of correctness to which the state court findings are entitled, *see Wooten*, 598 F.3d at 218, and he has not shown that the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, *see* 28 U.S.C. § 2254(d); *Richter*, 562 U.S. at 97-98; *Childress*, 103 F.3d at 1224-25. In sum, Petitioner has failed to show that there was no reasonable basis for the state court to deny relief. *See Richter*, 562 U.S. at 98. Accordingly, Petitioner's habeas petition should be denied and dismissed.

## VI. CERTIFICATE OF APPEALABILITY

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

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

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

## VII. RECOMMENDATION

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

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

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

**So ORDERED and SIGNED this 21st day of January, 2022.**

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE