APPENDIX

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 21-50427

United States Court of Appeals
Fifth Circuit
FILED
February 2, 2023
Lyle W. Cayce
Clerk

PATRICK L. MARTINEZ,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court
for the Western District of Texas
USDC No. 3:20-CV-250

ORDER:

On the showing made, IT IS ORDERED that petitioner's motion for a Certificate of Appealability is DENIED.

KURT D. ENGELHARDT
United States Circuit Judge

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
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February 02, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-50427 Martinez v. Lumpkin
USDC No. 3:20-CV-250

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa B. Courseault, Deputy Clerk
504-310-7701

Ms. Jessica Michelle Manojlovich
Mr. Patrick L. Martinez
Mr. Jon Rodney Meador

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

PATRICK L. MARTINEZ,	§	
TDCJ No. 1962692,	§	
Petitioner,	§	
	§	
v.	§	**EP-20-CV-250-FM**
	§	
BOBBY LUMPKIN,	§	
Director, Texas Department of	§	
Criminal Justice, Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Patrick L. Martinez challenges Bobby Lumpkin's custody of him through a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Pet'r's Pet., ECF No. 1. His petition is denied for the following reasons.

BACKGROUND AND PROCEDURAL HISTORY

On May 3, 2013, Martinez went to pick up his two children at their school. Martinez v. State, No. 08-14-00242-CR, 2018 WL 2328242, at *1 (Tex. App. May 23, 2018, pet. ref'd), cert. denied, 139 S. Ct. 1196 (2019). He was told upon his arrival to go the police station and meet with a detective about an incident involving his step-daughter, S.F. Id. He was interviewed at the station and told "S.F. had accused him of sexually assaulting her on multiple occasions." Id. He waived his rights and denied the allegation. Id. He agreed to take a polygraph examination—but it was never administered. Id. He was arrested at the end of the interview. Id.

Martinez was indicted for continuous sexual abuse of a child younger than fourteen in

cause number 20130D04142 in the 171st Judicial District Court of El Paso County, Texas. Id. Before his trial, the State offered him "a plea deal of ten years' deferred adjudication probation." Id. He refused the offer. Id. His attorney explained to the trial court that his client "did not want to register as a sex offender." Id.

Martinez proceeded to trial before a jury. He was found guilty and sentenced to fifty-two years' imprisonment. Id. at *2. After the court pronounced sentence, his counsel claimed he had failed to inform his client "he would be ineligible for parole if found guilty when he . . . communicated the State's offer of deferred adjudication to him." Id.

Martinez moved for a new trial based on his claim that he did not understand the consequences of rejecting the State's plea offer. Id. His counsel testified during a hearing on the motion that Martinez "had not been informed he would be ineligible for parole if convicted." Id. Further, Martinez "claimed he would have accepted the State's offer and pleaded guilty if he had been so informed." Id. He also "continued to maintain his innocence." His motion for a new trial was denied. Id.

Martinez raised two issues in his direct appeal. He claimed that "the trial court abused its discretion in excluding evidence he was willing to take a polygraph." Id. He also asserted that "the trial court abused its discretion in denying his motion for new trial based on ineffective assistance of counsel." Id. at *3.

The Eighth Court of Appeals overruled Martinez on both issues. It concluded "the trial court did not abuse its discretion in denying [Martinez's] request to admit the unredacted portion of the video where he stated he was willing to submit to a polygraph test." Id. It also concluded the trial court did not abuse its discretion when it denied his motion for a new trial:

> Based on the record, it was reasonable to conclude [Martinez] had serious regrets about not accepting the State's original offer of ten years' deferred adjudication—now that he has received a fifty-two-year sentence—and his testimony supporting his ineffective claim was not credible. Applying the highly deferential standard we are required to provide on matters of credibility, we cannot conclude the trial court abused its discretion in denying [Martinez's] motion for new trial based on allegedly ineffective assistance of counsel.

Id. at *5.

After Martinez exhausted his direct appeals, he filed a state application for a writ of habeas corpus. Ex parte Martinez, No. WR-90,751-01, 2020 WL 913296, at *1 (Tex. Crim. App. Feb. 26, 2020) (citing Tex. Code Crim. Proc. art. 11.07). He asserted his trial counsel provided constitutionally ineffective assistance when he:

> 1) improperly turned down a plea offer without the [Martinez's] express permission to do so and for reasons not articulated by [Martinez], 2) failed to know the applicable law to the charged offense, and 3) improperly gave the jury a definition of reasonable doubt, admitted that he thinks his client is guilty, and made incoherent and rambling nonsensical arguments to the jury. [Martinez] also claim[ed] his appellate counsel failed to properly argue her motion for new trial.

Id.

The Court of Criminal Appeals remanded the application to the trial court for findings of fact and conclusions of law. Id. After reviewing the trial court's response, it denied the application "without written order the application for writ of habeas corpus on the findings of the trial court without a hearing and on the Court's independent review of the record." Action Taken, WR-90,751-01, Aug. 19, 2020, ECF No. 8-16.

Mindful of Martinez's pro se status, the Court understands him to now assert five grounds for relief in his federal petition. Erickson v. Pardus, 551 U.S. 89, 94 (2007). First, he contends his trial counsel violated his rights when he turned down the State's plea offer without his express permission and for reasons not articulated by him. Pet'r's Pet. 6, ECF No. 1.

Second, he asserts his trial counsel did not know and failed to advise him before he turned down the State's plea offer that the charged offense—continuous sexual abuse of a child—"carried no parole." Id. Third, he argues his trial counsel erred when he gave the jury a definition of reasonable doubt, told the jury he believed his client was guilty, and made incoherent and rambling statements. Id. at 7. Fourth, he avers his appellate counsel was ineffective when she failed to give the State proper notice of the issues in his motion for a new trial. Id. Finally, he maintains the State engaged in misconduct when "it used derogatory names for [him] and vouched for the credibility of the complainant." Id. at 8. He asks the Court to "[r]everse the conviction and sentence and remand [the case] to the trial court for a new trial." Id. at 7.

APPLICABLE LAW

"[C]ollateral review is different from direct review," and the writ of habeas corpus is "an extraordinary remedy," reserved for those petitioners whom "society has grievously wronged." Brecht v. Abrahamson, 507 U.S. 619, 633–34 (1993). It "is designed to guard against extreme malfunctions in the state criminal justice system." Id. (citing Jackson v. Virginia, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring)). It is granted pursuant to 28 U.S.C. § 2254 only where a state prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Preiser v. Rodriguez, 411 U.S. 475, 484–87 (1973).

The federal habeas courts' role in reviewing state prisoner petitions is exceedingly narrow because "state courts are the principal forum for asserting constitutional challenges to state convictions." Harrington v. Richter, 562 U.S. 86, 103 (2011). "Indeed, federal courts do not sit as courts of appeal and error for state court convictions." Dillard v. Blackburn, 780 F.2d 509, 513 (5th Cir. 1986). They must generally defer to state court decisions on the merits.

Moore v. Cockrell, 313 F.3d 880, 881 (5th Cir. 2002). And they must defer to state court decisions on procedural grounds. Coleman v. Thompson, 501 U.S. 722, 729–30 (1991); Muniz v. Johnson, 132 F.3d 214, 220 (5th Cir. 1998). They may not grant relief 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).

In sum, 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." Harrington, 562 U.S. at 102–03 (quoting Jackson, 443 U.S. at 332, n.5). "If this standard is difficult to meet, that is because it was meant to be." Id. at 102.

A. Unadjudicated Claims

A state prisoner must exhaust available state remedies before seeking federal habeas corpus relief, thereby giving the state the opportunity to pass upon and correct alleged violations of its prisoners' federal rights. *See* 28 U.S.C. § 2254(b)(1) (explaining that habeas corpus relief may not be granted "unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State"); Baldwin v. Reese, 541 U.S. 27, 29 (2004); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). A petitioner satisfies the exhaustion requirement when he presents the substance of his habeas claims to the state's highest court in a procedurally proper manner before filing a petition in federal court. Baldwin, 541 U.S. at 29; Morris v. Dretke, 379 F.3d 199, 204 (5th Cir. 2004).

In Texas, the Court of Criminal Appeals is the highest court for criminal matters. Richardson v. Procunier, 762 F.2d 429, 431 (5th Cir. 1985). Thus, a Texas prisoner may only satisfy the exhaustion requirement by presenting both the factual and legal substance of his

claims to the Texas Court of Criminal Appeals, in either a petition for discretionary review or a state habeas corpus proceeding pursuant to Texas Code of Criminal Procedure article 11.07. See Tex. Crim. Proc. Code Ann. art. 11.07 ("This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death."); Tigner v. Cockrell, 264 F.3d 521, 526 (5th Cir. 2001); Alexander v. Johnson, 163 F.3d 906, 908–09 (5th Cir. 1998).

If a state prisoner presents unexhausted claims, the federal habeas court may dismiss the petition. Whitehead v. Johnson, 157 F.3d 384, 387 (5th Cir. 1998) (citing 28 U.S.C. § 2254(b)(1)(A); Rose v. Lundy, 455 U.S. 509, 519–20 (1982)). If a state prisoner presents a "mixed petition" containing both exhausted and unexhausted claims, the federal habeas court may stay the proceedings or dismiss the petition without prejudice to allow the petitioner to return to state court and exhaust his claims. Rhines v. Weber, 544 U.S. 269, 278 (2005); Pliler v. Ford, 542 U.S. 225, 227 (2004). Alternatively, the federal habeas court may deny relief on an unexhausted or mixed claim on the merits, notwithstanding the petitioner's failure to exhaust the remedies available in state court. 28 U.S.C. § 2254(b)(2). A federal habeas court may grant relief on an unexhausted or procedurally defaulted claim only if the petitioner demonstrates cause for the default and actual prejudice arising from the default—or shows the failure to consider the claim would result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 749–50; Barrientes v. Johnson, 221 F.3d 741, 758 (5th Cir. 2000). This means that before a federal habeas court may grant relief on an unexhausted claim, the petitioner must show that some objective, external factor prevented her from complying with the state procedural rule. Martinez v. Ryan, 566 U.S. 1, 13–14 (2012). When reviewing an unexhausted claim on the

merits, the deferential standard of review does not apply. Instead, the federal habeas court examines unexhausted claims under a de novo standard of review. Cullen v. Pinholster, 563 U.S. 170, 185–86 (2011); Carty v. Thaler, 583 F.3d 244, 253 (5th Cir. 2009).

B. Adjudicated Claims

For claims adjudicated in state court, 28 U.S.C. § 2254(d) imposes a highly deferential standard which demands a federal habeas court grant relief only where the state court judgment:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(2). The focus of this well-developed standard "is not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable—a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007). Moreover, the federal habeas court's focus is on the state court's ultimate legal conclusion, not whether the state court considered and discussed every angle of the evidence. Neal v. Puckett, 286 F.3d 230, 246 (5th Cir. 2002) (en banc); see also Catalan v. Cockrell, 315 F.3d 491, 493 (5th Cir. 2002) ("we review only the state court's decision, not its reasoning or written opinion"). Indeed, state courts are presumed to "know and follow the law." Woodford v. Visciotti, 537 U.S. 19, 24 (2002). Factual findings, including credibility choices, are entitled to the statutory presumption, so long as they are not unreasonable "in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Further, factual determinations made by a state court enjoy a presumption of correctness which the petitioner can

rebut only by clear and convincing evidence. Id. § 2254(e)(1); see Clark v. Quarterman, 457 F.3d 441, 444 (5th Cir. 2006) (noting that a state court's determination under § 2254(d)(2) is a question of fact). The presumption of correctness applies not only to express findings of fact, but also to "unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." Valdez v. Cockrell, 274 F.3d 941, 948 n.11 (5th Cir. 2001).

ANALYSIS

A. Plea Offer

Martinez contends his trial counsel provided constitutionally ineffective assistance when he turned down the State's plea offer without Martinez's express permission and for reasons not articulated by him. Pet'r's Pet. 6, ECF No. 1. He explains his counsel told the court he was turning down the plea offer because "it would require him to register as a sex offender." Id. He maintains that "was NOT a reason that he articulated to counsel or the court for turning down the plea offer." Id. He contends his counsel violated his "autonomy." Pet'r's Resp. 1, ECF No. 13 (citing McCoy v. Louisiana, 138 S. Ct. 1500, 1511 (2018) (explaining the Sixth Amendment guarantees a defendant the "[a]utonomy to decide . . . the objective of [his] defense," including whether the objective of that defense is to maintain an assertion of innocence even in the face of overwhelming evidence)).

Courts recognize the Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel. Lee v. United States, 137 S. Ct. 1958, 1964 (2017). Courts analyze an ineffective assistance of counsel claim under the well-settled standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). To successfully state a claim, a petitioner must demonstrate (1) his counsel's performance was deficient in that it fell below an objective

standard of reasonableness; and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 689–94. Unless the petitioner establishes both—deficient performance and prejudice—his ineffective assistance of counsel claim fails. United States v. Bass, 310 F.3d 321, 325 (5th Cir. 2002).

Under the first Strickland prong, a petitioner must establish his counsel's performance fell below an objective standard of reasonable competence. Lockhart v. Fretwell, 506 U.S. 364, 369–70 (1993). But when deciding whether counsel's performance was deficient, a federal habeas court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 at 688–89. Hence, a federal habeas court must presume that counsel's choice of trial strategy is objectively reasonable unless clearly proven otherwise. Id. at 689. In fact, Counsel's strategic choices, made after a thorough investigation of the law and facts relevant to plausible options, are virtually unchallengeable. Id. at 673; Pape v. Thaler, 645 F.3d 281, 289–90 (5th Cir. 2011). Furthermore, Counsel's performance cannot be considered deficient or prejudicial if counsel fails to raise a non-meritorious argument. Turner v. Quarterman, 481 F.3d 292, 298 (5th Cir. 2007); Parr v. Quarterman, 472 F.3d 245, 256 (5th Cir. 2006).

Under the second Strickland prong, a petitioner must demonstrate his counsel's deficient performance prejudiced him. Id. at 764. He "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Thus, "deficient performance does not result in

prejudice unless that conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon as having produced a just result." Knox v. Johnson, 224 F.3d 470, 479 (5th Cir. 2000) (quoting Strickland, 466 U.S. at 687).

In addition to applying the Strickland two-prong test, a federal habeas court must also review a state petitioner's ineffective assistance of counsel claim "through the deferential lens of [28 U.S.C.] § 2254(d)." Cullen, 563 U.S. at 190. It must consider not only whether the state court's determination was incorrect, but also "whether that determination was unreasonable—a substantially higher threshold." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) (citing Schriro v. Landrigan, 550 U.S. 465, 473 (2007)). Thus, considering the deference accorded by § 2254(d), "[t]he pivotal question is whether the state court's application of the Strickland standard was unreasonable." Harrington, 562 U.S. at 101.

The state trial court concluded the record did not affirmatively demonstrate that Martinez's counsel improperly turned down the State's plea offer without his consent and for reasons not articulated by him—or provided constitutionally ineffective assistance. Findings of the Trial Court 104, ECF No. 8-18. In support of this conclusion, the trial court noted:

> 49. The record of the hearing held on the applicant's motions for new trial does not affirmatively demonstrate that trial counsel rejected the State's plea offer without the applicant's permission or that he did so for reasons not articulated by the applicant.
>
> . . . .
>
> 51. The applicant's factual allegations in his motions for new trial that he unintelligently rejected the State's plea offer because of trial counsel's failure to properly advise him undermines the credibility of his writ allegation that he did not tell trial counsel to reject the State's plea offer.
>
> 52. The applicant's testimony at the hearing on his motions for new trial that advice regarding his parole eligibility "... [w]ould ... have changed [his] mind to take the deferred probation," (RR 6:32-35), also undermines the credibility of his writ allegation that it was not his own decision to reject the State's plea offer.

> . . . .
> 55. Rather, trial counsel's testimony at the new-trial hearing that he had not, during the plea discussions, misrepresented the applicant's position to this Court, (RR6:29-31), which testimony this Court implicitly found, and still finds, credible, affirmatively demonstrates that the applicant made the decision to reject the State's plea offer and that the applicant did so because he did not want to register as a sex offender.
> . . . .
> 57. This Court finds not credible the applicant's allegations underlying his writ claim that trial counsel rejected the State's plea offer without his permission and did so for reasons not articulated by him.
> 58. This Court finds not credible any assertion by the applicant that he did not convey to trial counsel his refusal to accept the State's plea offer.
> 59. This Court finds not credible any assertion by the applicant that he did not convey to trial counsel that he refused to accept the State's plea offer because he refused to accept any offer that required him to register as a sex offender.
> 60. This Court finds that the applicant's writ allegations are refuted by the record, including the statements trial counsel made on the record during the pretrial plea discussions.
> . . . .
> 62. The habeas record does not affirmatively demonstrate a reasonable probability that: (a) the applicant would have accepted the State's plea offer, but for any deficient performance by trial counsel; (b) the State would not have withdrawn the offer; and (c) this Court would not have refused to accept the plea bargain.
> . . . .
> 76. The applicant has failed to present credible evidence affirmatively demonstrating that he suffered prejudice as a result of any deficient performance by trial counsel in this regard.

Id. at 105–108.

After reviewing the trial court's response to Martinez's state writ application, the Court of Criminal Appeals denied his application "without written order the application for writ of habeas corpus on the findings of the trial court without a hearing and on the Court's independent review of the record." Action Taken, WR-90,751-01, Aug. 19, 2020, ECF No. 8-16.

This Court must give credibility determinations by the state courts deference—absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); Galvan v. Cockrell, 293 F.3d 760, 764 (5th Cir. 2002); Carter v. Collins, 918 F.2d 1198, 1202 (5th Cir. 1990). And this

Court will give the trial court's findings additional deference since the judge who prepared them also presided over Martinez's trial. 28 U.S.C. § 2254(e)(1); Clark, 202 F.3d at 764.

Martinez has not provided clear and convincing evidence which undermines the credibility determinations made by the state trial court. He has also has not shown the rejection by the state trial court and the Court of Criminal Appeals of his ineffective assistance of counsel claim—based on the record in his case—was unreasonable. He has not met his burden of establishing his entitlement to federal habeas relief on this claim.

B. Parole

Martinez also asserts his trial counsel did not know and failed to advise him before turning down the State's plea offer that the charged offense—continuous sexual abuse of a child—"carried no parole." Pet'r's Pet. 6. He suggests that—had he known—he have accepted the State's offer. Id. He argues that trial counsel's failure to know and advise a client about the applicable parole law for a charged offense is per se ineffective assistance of counsel. Pet'r's Mem. in Supp. 11, ECF No. 1-1 (citing Ex parte Moussazadeh, 361 S.W.3d 684, 691–92 (Tex. Crim. App. 2012).

In Ex parte Moussazadeh, the Court of Criminal Appeals held that trial counsel's misinformation to a defendant regarding parole eligibility constituted deficient performance under Strickland. Ex parte Moussazadeh, 361 S.W.3d at 690–91. But to successfully state a claim under Strickland, a petitioner must not only demonstrate that his counsel's performance was deficient but also that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 689–94.

In his direct appeal, Martinez asserted "his counsel rendered deficient performance by

failing to inform him, while communicating a plea offer from the State, that he would be ineligible for parole if convicted of the charged offense." Martinez, 2018 WL 2328242, at *3. His claim was overruled by the Eighth Court of Appeals after it determined it was not credible:

> Based on the record, it was reasonable to conclude defendant had serious regrets about not accepting the State's original offer of ten years' deferred adjudication—now that he has received a fifty-two-year sentence—and his testimony supporting his ineffective claim was not credible. Applying the highly deferential standard we are required to provide on matters of credibility, we cannot conclude the trial court abused its discretion in denying Appellant's motion for new trial based on allegedly ineffective assistance of counsel.

Id. at *5.

In response to Martinez's state habeas application, the state trial court specifically determined that Martinez had not suffered prejudice as a result of his counsel's failure to advise him of the unavailability of parole:

> 79. The applicant testified before the jury during the guilt/innocence stage of trial that he never touched S.F. inappropriately and that he was pleading not guilty because he was innocent of the charged offense. (RR3:193-94).
>
> . . . .
>
> 95. The prosecutor elicited from trial counsel that the applicant maintained his innocence at all times prior to trial and throughout trial and continued to maintain his innocence throughout the entire time trial counsel represented him. (RR6:21).
>
> . . . .
>
> 99. On cross-examination by the prosecutor, the applicant still maintained that he was innocent and agreed that if he had pleaded guilty, it would have been only to take advantage of the plea offer and that he would not have been admitting his guilt. (RR6:34).
>
> 100. The applicant also testified that he did not want to plead guilty to something he allegedly did not do. (RR6:34).
>
> . . . .
>
> 105. Even if this Court had found credible any assertions or testimony that trial counsel did not inform the applicant of the no-parole consequence of a conviction in this case, the record does not affirmatively demonstrate a reasonable probability that: (a) the applicant would have accepted the State's plea offer, but for any deficient performance by trial counsel; (b) the State would not have withdrawn the offer; and (c) this Court would not have refused to accept the plea bargain.
>
> 106. This Court finds not credible any assertion by the applicant that he would have

> accepted the State's plea offer if he had been made aware of the no-parole consequence of a conviction, particularly where: (a) the applicant testified at the new-trial hearing that he did not want to plead guilty to a crime he allegedly did not commit; (b) trial counsel stated during the plea discussions that the applicant would not plead guilty to any offense that required him to register as a sex offender; and (c) the applicant still denies, in his writ application, that he is guilty of the charged offense.
>
> . . . .
>
> 111. The record reflects that the State would have, in fact, withdrawn the plea offer if the applicant refused to admit his guilt.
>
> . . . .
>
> 114. This Court would not have accepted a plea bargain that allowed the applicant to plead guilty while at the same time professing his innocence.
>
> . . . .
>
> 116. The applicant has failed to present credible evidence affirmatively demonstrating that he suffered prejudice as a result of any deficient performance by trial counsel for failing to inform him that he would be ineligible for parole if convicted of the charged offense.

Findings of the Trial Court 108–113, ECF No. 8-18.

After reviewing the trial court's response to Martinez's state writ application, the Court of Criminal Appeals denied his application "without written order the application for writ of habeas corpus on the findings of the trial court without a hearing and on the Court's independent review of the record." Action Taken, WR-90,751-01, Aug. 19, 2020, ECF No. 8-16.

Once again, Martinez fails to provide clear and convincing evidence which undermines the credibility determinations made by the state courts. He has fails to show the rejection by the state courts of his ineffective assistance of counsel claim—based on the record in his case—was unreasonable. He has not met his burden of establishing his entitlement to federal habeas relief on this claim.

C. Counsel's Erroneous and Incoherent Statements

Martinez argues his trial counsel provided ineffective assistance when he defined reasonable doubt for the jury, said he believed Martinez was guilty, and made incoherent and

rambling statements. Pet'r's Pet. 7.

During voir dire, Martinez's counsel described reasonable doubt as "[t]he kind doubt in the mind of a reasonable person." Reporter's R., vol. II, p. 201, ECF No. 8-5. This drew an immediate objection from the prosecution, which the Court sustained. Id. at pp. 201–02.

Martinez suggests the following statement by his counsel during closing argument was an admission of his guilt:

> In addition to they [sic] young lady telling us about the bad stuff, there has not been any scientific evidence. They never had a rape or sexual exam. There was penetration here, not once, by according to her, time after time after time. Although I think it started out at some point, well, it happened once in a while and then it -- as we get into the case, testified more that it got frequent and frequent and finally it was once a week, or twice a week, or just every day and I exaggerate.

Pet'r's Mem. in Supp. 14 (citing Reporter's R., vol. IV, pp. 43–44, ECF No. 8-7). He also claims his counsel forgot some of the trial testimony and was rambling during his closing argument. Id.

The state trial court rejected Martinez's claims, concluding the record does not demonstrate that Martinez suffered prejudice as a result of any deficient performance by his counsel:

> 122. The record does not affirmatively demonstrate that trial counsel rendered deficient performance by improperly giving the jury a definition of reasonable doubt.
> 123. The jury charge in this case instructed the jury on a defendant's presumption of innocence and the beyond-a-reasonable-doubt burden of proof. (CR:112).
> 124. The applicant has failed to present any evidence demonstrating that the jury failed to properly follow this Court's instructions in the charge.
> 125. Even if trial counsel had somehow performed deficiently by improperly giving a definition of reasonable doubt during jury selection, the record does not affirmatively demonstrate that the applicant suffered prejudice as a result.
> . . . .
> 128. When the complained-of portion, specifically, "[a]though I think it started out at some point, well, it happened once in a while and then it -," is considered in the

> context of the rest of … trial counsel's statements before and after, the record reflects that trial counsel was merely recounting, sometimes in the first person, what he believed the child-victim's testimony had been and questioning why the child-victim's testimony about the frequency of the applicant's abuse had changed.
> 129. The record does not affirmatively demonstrate that trial counsel rendered ineffective assistance of counsel by allegedly telling, or insinuating to, the jury that he thought the applicant was guilty.
> 130. While the applicant complains that trial counsel's statement during closing argument that "I honestly do not recall them going in to [sic] the situation saying, why didn't you-why is it that you want [sic] away from home and didn't come home all [sic] at a time [sic]," (RR4:37), demonstrated that trial counsel had forgotten prior testimony, the applicant did not in his writ application identify any specific testimony, much less crucial testimony, that trial counsel actually failed to remember.
> 131. Even if the applicant had identified specific testimony that trial counsel had forgotten during closing argument, he has presented, and pointed to, no evidence demonstrating a reasonable probability that, but for trial counsel's inability to remember that testimony during closing argument, the outcome of the applicant's trial would have been different.
> 132. The record does not affirmatively demonstrate that trial counsel rendered ineffective assistance of counsel by allegedly forgetting prior testimony during closing argument.
> 133. This Court finds nothing rambling or incoherent about trial counsel's opinion that children can be subject to suggestion, specifically, "[c]hildren are suggestible. Any of other [sic] person with children know [sic] that they are," (RR4:44), which was made in the context of his argument that the child-victim lacked credibility and had changed her testimony to appease "... investigators and authority figures, some of them setting [sic] right over here at this table." (RR4:44).
>
> . . . .
>
> 144. The record does not affirmatively demonstrate that the applicant suffered prejudice as a result of any deficient performance by trial counsel during the guilt-innocence and punishment closing arguments.

Findings of the Trial Court 114–118, ECF No. 8-18. In sum, the state trial court found that any gaffs, misstatements, ramblings or errors by Martinez's counsel did not prejudice his defense.

The Court of Criminal Appeals denied Martinez's state writ application "without written order . . . on the findings of the trial court without a hearing and on the Court's independent review of the record." Action Taken, WR-90,751-01, Aug. 19, 2020, ECF No. 8-16.

The conclusion that Martinez's counsel was constitutionally effective was not an

unreasonable application of Strickland. Martinez is not entitled to relief on this claim.

D. Notice

Martinez avers his appellate counsel was ineffective when she failed to give the State proper notice of the issues in a motion for a new trial. Pet'r's Pet. 7. Specifically, he claims she failed to give the State proper notice of (1) how the trial court misdirected the jury in the charge as to the law of the case, and (2) his new evidence. Id. at 7; Pet'r's Mem. in Supp. 17–18. He explains his new evidence "was a family member who could have been used to impeach the complainant about her credibility." Pet'r's Mem. in Supp. 18. He argues, had his appellate counsel "followed proper procedural requirements," he would have "had a reasonable probability that he would have been granted a new trial. Pet'r's Pet. 7.

The trial court noted, in response to Martinez's state writ application, that his appellate counsel claimed she did not pursue the jury-charge issue before the trial court because she believe she could better raise the issue in a direct appeal:

> 147. This Court finds credible appellate counsel's assertions in her declaration that she included the misdirection-as-to-the-law claim in her new-trial motion out of deference to the applicant and his family and that she did not further develop this claim at the new-trial hearing because further factual development was not necessary on what was a record-based question of law; because she did not have the benefit of the appellate record to specifically argue jury-charge error at that time, which would have required a showing of both jury-charge error and egregious harm; and because she believed that any claim of jury-charge error would be better raised in a direct appeal, which the complained-of appellate counsel did not ultimately handle.

Findings of the Trial Court 118, ECF No. 8-18. The trial court also concluded the new evidence was insufficient to justify a new trial:

> 156. The record reflects that when appellate counsel, at the new-trial hearing, attempted to call Bertha Figueroa, the child-victim's grandmother, in support of the applicant's new-evidence claim, the State objected to litigating the new-evidence

> claim on the grounds that it had not been pled in the new-trial motion with sufficient specificity to put the State on notice as to what the alleged new evidence was. (RR6:8-12,20).
> 157. This Court sustained the State's objection to litigating the new-evidence claim at the new-trial hearing. (RR6:12).
>
> . . . .
>
> 161. This Court finds credible appellate counsel's assertions that she knew that Figueroa's testimony would likely not satisfy the requirements that the alleged new evidence be "new," which would have required a showing that the evidence was previously unknown or unavailable to the applicant at the time of trial, and that the alleged new evidence could not have been found with the exercise of diligence.
>
> . . . .
>
> 168. Figueroa's testimony was cumulative of testimony trial counsel had already elicited from the child-victim that she had oftentimes lied to her mother, (RR3:89), from which a jury could have inferred that she sometimes did not tell the truth.
> 169. The alleged new evidence that the child-victim sometimes told the truth and sometimes did not, even if true, would not have brought about a different result in a new trial in light of the State's evidence.
> 170. The applicant has failed to show that a new trial could have been properly granted on his new-evidence claim.
> 171. This Court finds that appellate counsel's decision not to aggressively pursue the new-evidence claim was legitimate strategy where a new trial would not have been properly granted on that basis.
> 172. The applicant has failed to present credible evidence demonstrating that appellate counsel rendered deficient performance in not further pursuing the new-evidence claim at his new-trial hearing.
> 173. The record does not affirmatively demonstrate that the applicant suffered prejudice as a result of any deficient performance by appellate counsel in this regard.

Id. at 119–122. In sum, the trial court thoroughly vetted Martinez' claims and determined that appellate counsel's performance was not deficient and did not prejudice his cause. Id.

The Court of Criminal Appeals denied Martinez's state writ application on the findings of the trial court. Action Taken, WR-90,751-01, Aug. 19, 2020, ECF No. 8-16.

The conclusion by the state courts that Martinez's appellate counsel was constitutionally effective was not an unreasonable application of Strickland. Martinez is not entitled to relief on this claim.

E. Prosecutorial Misconduct

Finally, Martinez maintains the State engaged in misconduct when "it used derogatory names for [him] and vouched for the credibility of the complainant." Pet'r's Pet. 8. Specifically, he complains the State improperly referred to him as a "predator" and "bully." Id.

The trial court observes the Court of Criminal Appeals did not remand this issue for its consideration. Findings of the Trial Court 99 n.1, ECF No. 8-18; Ex parte Martinez, 2020 WL 913296, at **1-2. The claim, though, was before the Court of Criminal Appeals, which ultimately denied relief on the findings of the trial court without a hearing and on the Court's independent review of the record. Action Taken, WR-90,751-01, Aug. 19, 2020, ECF No. 8-16. Claims not specifically addressed by the state courts are presumed adjudicated on the merits. Johnson v. Williams, 568 U.S. 289, 298–299 (2013).

The appropriate standard for a federal habeas court to review an improper-argument claim is "'the narrow one of due process, and not the broad exercise of supervisory power.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974)). It "'is not enough that the prosecutors' remarks were undesirable or even universally condemned.'" Id. (quoting Donnelly, 416 U.S. at 642). Instead, a petitioner must show in order to obtain relief that the comments in question "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. (quoting Donnelly, 416 U.S. at 642); see also Styron v. Johnson, 262 F.3d 438, 449 (5th Cir. 2001); Dowthitt v. Johnson, 230 F.3d 733, 755 (5th Cir. 2000).

The facts in this case support a conclusion that Martinez was a "predator" who took advantage of a troubled stepdaughter. See Reporter's R., vol. III, pp. 14–29, ECF No. 8-6. The

facts also supported the claim that he was a "bully."

> He was [the victim's] parent figure. He was the one who was in control of where she would go, what she would do, and he was the gatekeeper to her access to things. And what did he do as the ultimate bully in her life, he held perfectly normal, child like [sic] desires, like going to [a] friend's house [to] play, play[ing] video games, or do[ing] whatever around the house, just out of reach. He [sic] dangling those things in front of her face, just out of reach, until she give [sic] him what he wanted. And he did that, at least once a week, for approximately year.

See Reporter's R., vol IV, p. 32, ECF No. 8-7.

"Unflattering characterizations of a defendant do not require a new trial when such descriptions are supported by the evidence." United States v. Malatesta, 583 F.2d 748, 759 (5th Cir. 1978), on reh'g, 590 F.2d 1379 (5th Cir. 1979). In short, there was no prosecutorial misconduct giving rise to a constitutional violation. Martinez is not entitled to relief on this claim.

EVIDENTIARY HEARING

A federal court's review of claims previously adjudicated on the merits by a state court "is limited to the record that was before the state court." Cullen, 563 U.S. at 181; Blue *v.* Thaler, 665 F.3d 647, 656 (5th Cir. 2011). A court may hold an evidentiary hearing only when the petitioner shows that (1) a claim relies on a new, retroactive rule of constitutional law that was previously unavailable, (2) a claim relies on a factual basis that could not have been previously discovered by exercise of due diligence, or (3) the facts underlying the claim show by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have convicted the petitioner. 28 U.S.C. § 2254(e)(2).

Martinez's petition asserts multiple claims already adjudicated on the merits in state court. He does not rely on a new rule of constitutional law or new evidence. He is not entitled to an evidentiary hearing.

CERTIFICATE OF APPEALABILITY

A certificate of appealability "may issue only if the petitioner has made a 'substantial showing of the denial of a constitutional right.'" Gonzalez v. Thaler, 565 U.S. 134, 137 (2012) (quoting 28 U.S.C. § 2253(c)(2)). In cases where a district court rejects a petitioner's constitutional claims on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). To warrant a grant of the certificate as to claims that the district court rejects solely on procedural grounds, the petitioner must show both "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.

Martinez has not made a substantial showing of the denial of a constitutional right. Thus, he cannot show reasonable jurists could neither debate the denial of his § 2254 petition nor find that the issues presented are adequate to deserve encouragement to proceed. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (citing Slack, 529 U.S. at 484). He is not entitled to a certificate of appealability.

CONCLUSIONS AND ORDERS

The Court finds that Martinez has not met his burden of showing that the state habeas court's judgment denying him relief was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. The Court further finds he has also not met his burden of showing that the state habeas court's decision was based on an unreasonable determination of the facts considering the evidence presented in the state court proceedings. The Court accordingly concludes that Martinez is not

entitled to federal habeas relief. The Court additionally concludes that Martinez is not entitled to a certificate of appealability. The Court, therefore, enters the following orders:

IT IS ORDERED that the Martinez is **DENIED** an evidentiary hearing.

IT IS FURTHER ORDERED that Martinez's "Petition for a Writ of Habeas Corpus by a Person in State Custody" under 28 U.S.C. § 2254 (ECF No. 1) is **DENIED**.

IT IS FURTHER ORDERED that Martinez is **DENIED** a certificate of appealability.

IT IS FURTHER ORDERED that all pending motions are **DENIED**.

IT IS FINALLY ORDERED that the District Clerk shall **CLOSE** this case.

SIGNED this **29th** day of April 2021.

FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILE COPY

8/19/2020

MARTINEZ, PATRICK Tr. Ct. No. 20130D04142-171-1 WR-90,751-01

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing and on the Court's independent review of the record.

Deana Williamson, Clerk

DISTRICT CLERK EL PASO COUNTY
NORMA FAVELA
500 E. SAN ANTONIO, SUITE 103
EL PASO, TX 79901
* DELIVERED VIA E-MAIL *

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

8/19/2020

MARTINEZ, PATRICK Tr. Ct. No. 20130D04142-171-1 WR-90,751-01

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Deana Williamson, Clerk

PATRICK MARTINEZ
COFFIELD UNIT - TDC # 1962692
2661 FM 2054
TENNESSEE COLONY, TX 75884

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

8/19/2020

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Deana Williamson, Clerk

DISTRICT ATTORNEY EL PASO COUNTY
JAIME ESPARZA
500 E. SAN ANTONIO
EL PASO, TX 79901
* DELIVERED VIA E-MAIL *

FILE COPY

8/19/2020

MARTINEZ, PATRICK Tr. Ct. No. 20130D04142-171-1 WR-90,751-01

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing and on the Court's independent review of the record.

Deana Williamson, Clerk

PRESIDING JUDGE 171ST DISTRICT COURT
500 E SAN ANTONIO, #601
EL PASO, TX 79901-2457
* DELIVERED VIA E-MAIL *

APPENDIX D

Filed 5/11/2020 11:54 AM
NORMA FAVELA BARCELEAU
District Clerk
El Paso County
20130D04142

CAUSE NO. 20130D04142-171-1

EX PARTE	§	
	§	
PATRICK LEONARD MARTINEZ,	§	**IN THE 171st DISTRICT COURT**
	§	
APPLICANT	§	**EL PASO COUNTY, TEXAS**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER TO THE TRIAL COURT CLERK

This Court, after having considered the application for writ of habeas corpus filed under Article 11.07 of the Texas Code of Criminal Procedure, the State's answer thereto, and the official court records, makes the following findings of fact, conclusions of law, and recommendation to deny relief:

I. FINDINGS OF FACT

Procedural history

1. The applicant, Patrick Leonard Martinez, was indicted and convicted for continuous sexual abuse of a child in cause number 20130D04142 in the 171st Judicial District Court of El Paso County, Texas.

2. The applicant was represented during trial by counsel, Michael Gibson.

3. After hearing the punishment evidence, the jury assessed the applicant's punishment at 52 years' confinement in the Texas Department of Criminal Justice.

4. The applicant appealed this decision, and on May 23, 2018, the Eighth Court of Appeals affirmed his conviction in *Martinez v. State*, No. 08-14-00242-CR, 2018 WL 2328242 (Tex.App.–El Paso, May 23, 2018, pet. ref'd) (not designated for publication), *cert. denied*, 139 S.Ct. 1196, 203 L.Ed.2d 225 (2019).

5. The applicant was initially represented on appeal by counsel, Janet Burnett, then with the Public Defender's Office, who did not ultimately handle the applicant's appeal because she had left the Public Defender's Office by then.

6. The applicant's appellate brief was later filed by William Cox and Maya Quevado with the Public Defender's Office and Benjamin Gutierrez, a solo practitioner.

7. Mandate on the applicant's direct appeal was issued on November 15, 2018.

8. On December 9, 2019, the applicant filed his first application for writ of habeas corpus under article 11.07 of the Code of Criminal Procedure, a copy of which was served upon the State by the District Clerk on December 10, 2019.

9. By letter dated December 13, 2019, the State advised the District Clerk that the State would be relying on its statutory denial of the applicant's writ allegations pursuant to TEX. CRIM. PROC. CODE art. 11.07 § 3(b).

10. Pursuant to the provisions of article 11.07, the District Clerk transmitted the applicant's writ application to the Court of Criminal Appeals ("CCA").

11. On February 26, 2020, the CCA remanded, under CCA writ cause number WR-90,751-01, the applicant's writ application for this Court to make findings of fact and conclusions of law on the applicant's first four grounds for relief, specifically, three grounds of ineffective assistance of trial counsel and one ground of ineffective assistance of appellate counsel.[1]

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[1] The CCA did not remand for consideration the applicant's fifth ground for relief, in which the applicant asserted that the State engaged in prosecutorial misconduct.

12. On April 29, 2020, the State filed its answer to the applicant's writ application, along with documentary evidence attached thereto.

Facts of the offense and investigation

13. The victim in this case, S.F., who had just turned 14 years old the month before trial and had just finished the 8th grade, (RR3:12-13), testified that she was about 7 years old when the applicant began dating her mother. (RR3:25).[2]

14. Eventually, S.F. and her mother moved in with the applicant, and the applicant and her mother got married and had a child, A.M., together. (RR3:25-27).

15. S.F. testified that her relationship with the applicant was good, that he was like a real father to her, and that she called him "Daddy." (RR3:25-27).

16. S.F.'s relationship with the applicant was closer than that with her mother, and S.F. talked to the applicant about everything, including any problems she was having at school or with her mother. (RR3:27).

17. S.F. trusted and loved the applicant. (RR3:27).

18. S.F. testified that during the fall of her 7th grade year (which would have been the fall of 2012), she started seeing a counselor at her school twice a week to discuss anger issues she was having. (RR3:28).

19. Sometime after spring break (which would have been spring of 2013), S.F. finally told the counselor that the applicant had been touching her inappropriately. (RR3:29-30).

---

[2] Throughout these findings of fact, references to the appellate record of the applicant's trial will be made as follows: references to the clerk's record will be made as "CR" and page number; references to the seven-volume reporter's record will be made as "RR" and volume and page number; and references to exhibits admitted at trial will be made as "SX" or "DX" and exhibit number.

20. The counselor immediately called the police and CPS, and the investigation of these allegations commenced. (RR3:29-30).

21. S.F. testified that she could not remember exactly when the applicant began touching her, but that it was when she was 11 years old and in the 6th grade (which would have been the 2011-12 school year). (RR3:41-43).

22. The last time the applicant touched S.F. was just a few days before she told the counselor in the spring of 2013. (RR3:43-44).

23. The applicant would touch S.F. "about every week" throughout that period of approximately one year. (RR3:44).

24. At trial, S.F. recounted five such touching incidents she specifically remembered.

25. As for the very first time the applicant touched her:
    a. S.F. was lying on her bed watching television when the applicant came into her room, laid down next to her, put his hand on her stomach, and then moved his hand down under her shorts and panties and touched her vagina, "mov[ing] his fingers around, up and down." (RR3:44-47).
    b. The applicant did not penetrate her vagina with his fingers during this incident. (RR3:47).
    c. After a couple of minutes, the applicant stopped, left S.F.'s room, washed his hands, and went downstairs. (RR3:47).

26. As to the second specific incident described by S.F.:
    a. S.F. related that the incident occurred in the upstairs office room in their house when she asked the applicant for the computer pass code so she could play a video game. (RR3:48-49).
    b. As S.F. was sitting on the floor, the applicant laid on his stomach in front of her, moved her shorts and underwear to the side, and put his mouth on her vagina. (RR3:49-51).
    c. The applicant moved his tongue around on her vagina for about five minutes, then gave her the pass code and left the room. (RR3:51-52).
    d. The applicant told S.F. not to tell her mother. (RR3:52).

27. As to the third specific incident described by S.F.:
    a. S.F. related that the third incident occurred in the applicant's and S.F.'s mother's bedroom, where S.F. was playing with the applicant's phone on the bed. (RR3:52-53).
    b. The applicant got on his knees beside the bed, took S.F.'s shorts and underwear off, and penetrated her vagina with his fingers. (RR3:53-54).
    c. After a couple of minutes, the applicant told S.F. to leave the room, which she did. (RR3:54).

28. As to the fourth specific incident described by S.F.:
    a. S.F. related that the fourth incident occurred when S.F. was sitting on the couch in the living room watching television. (RR3:54-55).
    b. The applicant approached from behind the couch and put his arm on her stomach and tried to reach under her pants, but she was able to prevent him from doing so. (RR3:55).

29. S.F. related that the fifth incident occurred in the office room, (RR3:56), specifically:
    a. S.F. was lying on the couch playing a game, and the applicant was on the computer. (RR3:56-57).
    b. When the applicant was done with the computer, he rolled his desk chair towards her and touched and squeezed her breasts over her clothes. (RR3:57-58).
    c. The applicant then reached under S.F.'s shorts and underwear and touched her vagina. (RR3:58-59).
    d. After a few minutes, the applicant scooted his chair back, got up, and left the room. (RR3:59-60).

30. S.F. testified that there were many other times when the applicant touched her, but she could not remember them. (RR3:60).

31. S.F.'s mother was never at home when the applicant touched her. (RR3:60-61).

32. The applicant testified that he was 35 years old at the time of trial and that before these allegations, he had been full-time active duty with the Army National Guard as a recruiter. (RR3:172-73).

33. The applicant testified that he and S.F.'s mother began dating and moved in together in 2006, when S.F. was 5 or 6 years old. (RR3:175).

34. The applicant and S.F.'s mother had a child together in October of 2006, and they were formally married in January of 2013. (RR3:175-76).

35. On the date these allegations came to light (May 3, 2013), the applicant went to pick up A.M. and S.F. from school, where he was met by the school principal. (RR3:181, 191).

36. A police officer then told the applicant that the police were taking A.M. to CPS and that he (the applicant) needed to go to the police station to talk about something that had happened with S.F. (RR3:181-82).

37. The applicant testified that he drove himself to the police station and met with a detective, who told him that S.F. was accusing him of touching her. (RR3:182-85).

38. The applicant claimed he was shocked by the allegation. (RR3:185).

39. The applicant voluntarily waived his rights and spoke to the detective, and he denied all of the allegations, after which he was arrested. (RR3:183-85).

40. At trial, the applicant again specifically denied ever touching S.F. inappropriately:

[Trial counsel]:	Okay. Now, during the period that has been testified about here, sir, have you ever touched [S.F.] in any manner?
[Applicant]:	No, sir, I have not.
[Trial counsel]:	Okay. Did you ever touch her vagina and put your fingers in her?
[Applicant]:	No, sir.
[Trial counsel]:	Did you ever put your mouth on her vagina?
[Applicant]:	No, sir.
[Trial counsel]:	In your mind, can you think of any reason why she might have made these allegations?
[Applicant]:	No, sir.
[Trial counsel]:	When you were being interviewed by the police

did, [sic] you tell them at that time that you had not committed these offenses?

[Applicant]: Correct, sir.

[Trial counsel]: Okay. And you're telling the ladies and gentlemen of the jury the same thing, under oath, here today?

[Applicant]: Correct, sir.

[Trial counsel]: That's why you pled not guilty?

[Applicant]: Correct, sir. (RR3:193-94).

41. After the applicant's trial testimony, a video recording of his approximately hour-long interview with the detective, redacted to remove references to a prior conviction, was admitted into evidence. (RR4:4-10); (SX19).

42. By its guilty verdict, jurors necessarily chose to believe S.F.'s testimony that the applicant touched her inappropriately over the applicant's denials.

Ground for relief one: the applicant's claim that trial counsel rendered ineffective assistance of counsel by improperly turning down a plea offer without the applicant's express permission to do so and for reasons not articulated by the applicant

43. The habeas record does not affirmatively demonstrate that trial counsel improperly turned down the State's plea offer without the applicant's consent and for reasons not articulated by the applicant.

44. This Court finds not credible any assertion by the applicant that trial counsel turned down the State's plea offer without his consent.

45. This Court finds not credible any assertion by the applicant that trial counsel turned down the State's plea offer for reasons not articulated by the applicant.

46. The record reflects that just before the start of jury selection, the prosecutor, noting that the range of punishment for the charged offense was 25 years to life in prison, stated for the record that the applicant had rejected the State's plea offer of ten-years deferred-adjudication probation for the lesser-included offense of aggravated sexual assault of a child. (RR2:4-5).

47. During these plea discussions, trial counsel agreed that the applicant had rejected that plea offer and that it was the applicant's decision to go to trial, explaining that the applicant's primary reason for rejecting the offer was that the applicant did not want to have to register as a sex offender and that he would rather spend 20 years in prison than have to register. (RR2:5-6).

48. During these plea discussions, when trial counsel stated that the applicant would only be open to a plea deal that did not include having to register as a sex offender, the prosecutor responded that the State was not willing to extend any such plea. (RR2:5-6).

49. The record of the hearing held on the applicant's motions for new trial does not affirmatively demonstrate that trial counsel rejected the State's plea offer without the applicant's permission or that he did so for reasons not articulated by the applicant.

50. The record reflects that one of the applicant's complaints in his motions for new trial was that the decision he made to reject the State's plea offer was not intelligently made because trial counsel had failed to advise him that he would be ineligible for parole if convicted of the charged offense. (CR:134-36, 143-47).

51. The applicant's factual allegations in his motions for new trial that he unintelligently rejected the State's plea offer because of trial counsel's failure to properly advise him undermines the credibility of his writ allegation that he did not tell trial counsel to reject the State's plea offer.

52. The applicant's testimony at the hearing on his motions for new trial that advice regarding his parole eligibility "...[w]ould...have changed [his] mind to take the deferred probation," (RR6:32-35), also undermines the credibility of his writ allegation that it was not his own decision to reject the State's plea offer.

53. Appellate counsel's attestation in her declaration in response to the applicant's ineffective-assistance-of-appellate-counsel complaint that trial counsel had informed her that he had provided incomplete advice "...prior to the client rejecting a plea offer" supports the finding that the applicant, and not trial counsel, made the decision to reject the State's plea offer.

54. Trial counsel's agreement with appellate counsel, at the new-trial hearing, that the words that appear in the transcript of the plea discussions came from his own mouth and not the applicant's does not demonstrate that trial counsel was not acting upon the applicant's wishes in rejecting the State's plea offer or that the applicant never told trial counsel that he would not accept a plea that required him to register as a sex offender.

55. Rather, trial counsel's testimony at the new-trial hearing that he had not, during the plea discussions, misrepresented the applicant's position to this Court, (RR6:29-31), which testimony this Court implicitly found, and still finds, credible, affirmatively demonstrates that the applicant made the decision to reject the State's plea offer and that the applicant did so because he did not want to register as a sex offender.

56. The applicant's testimony at the new-trial hearing explaining the process by which he made the decision to reject the State's plea offer, which testimony this Court had found not credible, does not demonstrate that the sex-offender-registration requirements were never a concern that he articulated to trial counsel.

57. This Court finds not credible the applicant's allegations underlying his writ claim that trial counsel rejected the State's plea offer without his permission and did so for reasons not articulated by him.

58. This Court finds not credible any assertion by the applicant that he did not convey to trial counsel his refusal to accept the State's plea offer.

59. This Court finds not credible any assertion by the applicant that he did not convey to trial counsel that he refused to accept the State's plea offer because he refused to accept any offer that required him to register as a sex offender.

60. This Court finds that the applicant's writ allegations are refuted by the record, including the statements trial counsel made on the record during the pretrial plea discussions.

61. The applicant has failed to present credible evidence affirmatively demonstrating that trial counsel rendered deficient performance by rejecting the State's plea offer without the applicant's permission and that he did so for reasons not articulated by the applicant.

62. The habeas record does not affirmatively demonstrate a reasonable probability that: (a) the applicant would have accepted the State's plea offer, but for any deficient performance by trial counsel; (b) the State would not have withdrawn the offer; and (c) this Court would not have refused to accept the plea bargain.

63. At the hearing on his motions for new trial, the applicant testified that he would have accepted the State's plea offer, even though he would have had to register as a sex offender. (RR3:32-35).

64. At the hearing on his motions for new trial, the applicant testified that he did not want to plead guilty to a crime he allegedly did not commit. (RR6:34).

65. In his legal memorandum attached to his writ application, the applicant has asserted that he "...still does aver that he has not inappropriately touched the complainant." *See* (legal memorandum at 2).

66. This Court finds not credible any assertion by the applicant that he would have accepted the State's plea offer, but for any deficient performance by trial counsel.

67. The applicant has failed to present any credible evidence affirmatively demonstrating that he would have accepted the State's plea offer.

68. At the hearing on the applicant's new-trial motions, the prosecutor unequivocally stated on the record that the State would not have agreed to what would have been an *Alford* plea and would have withdrawn its plea offer if the applicant had insisted on entering such a plea. (RR6:20).

69. The record reflects that the State would have insisted, as part of the plea agreement, that the applicant admit his guilt to the charged offense and would not have participated in allowing an *Alford* plea in this case.

70. The habeas record reflects that the applicant has been, and is still, unwilling to admit guilt as part of any plea.

71. The record reflects that the State would have, in fact, withdrawn the plea offer if the applicant refused to admit his guilt.

72. The applicant has failed to present credible evidence demonstrating that the State would not have withdrawn its plea offer.

73. The applicant has presented no evidence on whether this Court would have been willing to accept an *Alford* plea.

74. This Court would not have accepted a plea bargain that allowed the applicant to plead guilty while at the same time professing his innocence.

75. The applicant has failed to present credible evidence demonstrating that this Court would have accepted an *Alford* plea.

76. The applicant has failed to present credible evidence affirmatively demonstrating that he suffered prejudice as a result of any deficient performance by trial counsel in this regard.

Ground for relief two: the applicant's claim that trial counsel rendered ineffective assistance of counsel by failing to know the law applicable to the charged offense

77. The record reflects that the fact that the applicant would be ineligible for parole if convicted of the charged continuous-sexual-abuse offense was not mentioned during the pretrial plea discussions.

78. During jury selection, neither the prosecutor nor trial counsel, during their discussions of the punishment range, explained to the prospective jurors that the applicant would not be eligible for parole. (RR2:98-99, 140, 193-95).

79. The applicant testified before the jury during the guilt/innocence stage of trial that he never touched S.F. inappropriately and that he was pleading not guilty because he was innocent of the charged offense. (RR3:193-94).

80. At the punishment stage of trial, trial counsel did not object, or make any other reference, to the no-parole provision in this Court's proposed jury charge. (RR5:11-13).

81. This Court's charge thus instructed the jury that if convicted of the charged continuous-sexual-abuse offense, the punishment range was 25 years to life in prison and that the applicant would not be eligible for parole. (CR:127); (RR5:15-16).

82. The record reflects that trial counsel opened his punishment argument to the jury by explaining that whatever sentence the jury assessed would be how long the applicant spent in prison, as he would not be eligible for parole. (RR5:21-22).

83. After this Court sentenced the applicant to the 52 years in prison assessed by the jury, trial counsel stated on the record that when he conveyed the State's plea offer to the applicant, he (counsel) did not know that the charged offense was a no-parole offense, such that he never explained to the applicant that if he went to trial and was convicted and sentenced for the charged offense, he would not be eligible for parole. (RR5:37-40).

84. Trial counsel thus surmised that he had rendered ineffective assistance to the applicant in that regard. (RR5:37-40).

85. Trial counsel subsequently filed a motion to withdraw, again asserting that he was not aware of the no-parole provision when he conveyed the State's plea offer to the applicant and that, had the applicant been so informed, it "might have affected [the applicant's] decision to take the case to trial rather than to accept the plea bargain offer." (CR:131-33).

86. Trial counsel also filed a motion for new trial alleging this ineffective-assistance claim, but this time asserting that the applicant's decision to reject the plea offer was based in part on his understanding that he would be eligible for parole at some point if convicted. (CR:134-36).

87. This Court granted trial counsel's motion to withdraw, (CR:154), and appointed the Public Defender's Office to represent the applicant. (CR:140).

88. Initial appellate counsel, Janet Burnett, filed another motion for new trial on the applicant's behalf and likewise raised the claim of ineffective assistance based on trial counsel's alleged failure to advise the applicant that he would not be eligible for parole if convicted of the charged offense. (CR:143-47).

89. In appellate counsel's motion for new trial, appellate counsel alleged that the applicant would have accepted the State's plea offer if properly advised of the no-parole situation. (CR:144).

90. At the new-trial hearing, trial counsel testified that he had been a lawyer for 50 years and detailed his extensive criminal-law experience. (RR6:5-7).

91. Trial counsel testified that he conveyed the State's plea offer of ten-years deferred-adjudication probation to the applicant, but that he (counsel) did not advise the applicant about the no-parole situation because he (counsel) was not aware that the charged offense was included among the offenses for which parole is not available under section 508.145 of the Texas Government Code. (RR6:15-17).

92. Trial counsel opined that his failure to discuss the no-parole provision constituted ineffective assistance of counsel. (RR6:17).

93. When asked if he discussed the possibility of an *Alford* plea with the applicant, trial counsel testified that he did not because he did not think that an *Alford* plea was available under Texas law. (RR6:18).

94. Before starting his cross-examination of trial counsel at the new-trial hearing, the prosecutor stated for the record that the State had never offered to allow the applicant to enter an *Alford* plea, that such plea was never on the table, and that the State would not have agreed to allow the applicant to enter a plea of guilty while maintaining his innocence. (RR6:20).

95. The prosecutor elicited from trial counsel that the applicant maintained his innocence at all times prior to trial and throughout trial and continued to maintain his innocence throughout the entire time trial counsel represented him. (RR6:21).

96. Trial counsel also agreed, after reading the transcription of the trial proceedings wherein the applicant's rejection of the plea offer was discussed, that the sex-offender-registration requirement was "certainly" one of the primary considerations in the applicant's rejection of the plea offer and that the applicant would rather spend 20 years in prison than have to register as a sex offender. (RR6:22-24).

97. The record of the new-trial hearing reflects that when appellate counsel attempted to suggest that the rather-spend-20-years-in-prison statement was trial counsel's words and not the applicant's words, the prosecutor elicited from trial counsel that he (trial counsel) did not misrepresent to this Court the applicant's position. (RR6:29-31).

98. The applicant testified at the new-trial hearing that he did not know he would not be eligible for parole and that, had he been so advised, he would have changed his mind and accepted the plea offer of ten-years deferred-adjudication probation even though he would have to register as a sex offender. (RR6:32-34).

99. On cross-examination by the prosecutor, the applicant still maintained that he was innocent and agreed that if he had pleaded guilty, it would have been only to take advantage of the plea offer and that he would not have been admitting his guilt. (RR6:34).

100. The applicant also testified that he did not want to plead guilty to something he allegedly did not do. (RR6:34).

101. The applicant testified, contrary to trial counsel's statements during trial and testimony at the new-trial hearing, that the sex-offender-registration issue was not part of his decision as to whether to accept the plea offer. (RR6:34-35).

102. This Court denied the applicant's new-trial motions without entering any express findings of fact.

103. The applicant's complaint that trial counsel rendered ineffective assistance of counsel for failing to inform him, while communicating the State's plea offer, that he would be ineligible for parole if convicted of the charged

offense was raised and rejected in his new-trial motion and was then rejected on direct appeal on the grounds that the applicant failed to prove, with credible evidence, that he suffered prejudice as a result of any deficient performance by trial counsel.

104. The applicant has presented no new evidence that conflicts with that already presented and considered by this Court at the new-trial hearing.

105. Even if this Court had found credible any assertions or testimony that trial counsel did not inform the applicant of the no-parole consequence of a conviction in this case, the record does not affirmatively demonstrate a reasonable probability that: (a) the applicant would have accepted the State's plea offer, but for any deficient performance by trial counsel; (b) the State would not have withdrawn the offer; and (c) this Court would not have refused to accept the plea bargain.

106. This Court finds not credible any assertion by the applicant that he would have accepted the State's plea offer if he had been made aware of the no-parole consequence of a conviction, particularly where: (a) the applicant testified at the new-trial hearing that he did not want to plead guilty to a crime he allegedly did not commit; (b) trial counsel stated during the plea discussions that the applicant would not plead guilty to any offense that required him to register as a sex offender; and (c) the applicant still denies, in his writ application, that he is guilty of the charged offense.

107. The applicant's request for relief, in which he requests a "...new trial with new counsel," *see* (writ application at 8), undermines any assertion that the applicant would have accepted the State's plea offer.

108. The applicant has failed to present any credible evidence affirmatively demonstrating that he would have accepted the State's plea offer if he had been made aware of the no-parole consequence of a conviction.

109. The record reflects that the State would have insisted, as part of the plea agreement, that the applicant admit his guilt to the charged offense and would not have participated in allowing an *Alford* plea in this case.

110. The habeas record reflects that the applicant has been, and is still, unwilling to admit guilt as part of any plea.

111. The record reflects that the State would have, in fact, withdrawn the plea offer if the applicant refused to admit his guilt.

112. The applicant has failed to present credible evidence demonstrating that the State would not have withdrawn its plea offer.

113. The applicant has presented no evidence on whether this Court would have been willing to accept an *Alford* plea.

114. This Court would not have accepted a plea bargain that allowed the applicant to plead guilty while at the same time professing his innocence.

115. The applicant has failed to present credible evidence demonstrating that this Court would have accepted an *Alford* plea.

116. The applicant has failed to present credible evidence affirmatively demonstrating that he suffered prejudice as a result of any deficient performance by trial counsel for failing to inform him that he would be ineligible for parole if convicted of the charged offense.

Ground for relief three: the applicant's claim that trial counsel rendered ineffective assistance of counsel by improperly giving the jury a definition of reasonable doubt, admitting that he thought the applicant was guilty, and making incoherent and rambling nonsensical arguments to the jury

117. The record does not affirmatively demonstrate that trial counsel improperly gave the jury a definition of reasonable doubt.

118. The record refutes the applicant's assertion that trial counsel told veniremembers that reasonable doubt is defined as "...the kind [of] doubt in the mind of a reasonable person."

119. The record reflects that while discussing the State's burden of proof and comparing it to the burdens of proof required in other situations, such as in civil and parental-rights-termination cases, trial counsel explained to the

veniremembers that reasonable doubt used to be defined, but that there was no longer such a definition. (RR2:199-202).

120. Then, trial counsel referred to his previous discussion of the State's burden of proof, as compared to other burdens of proof, as a way for the veniremembers to understand that the beyond-a-reasonable-doubt standard was a "high" and "heavy" burden, more than any other burden of proof, for the State to satisfy. (RR2:202).

121. Referring to the State's prior explanation that it was not required to prove guilt beyond all doubt, trial counsel explained that this Court's instructions would instruct the jury that the State was required to prove a defendant's guilt beyond all reasonable doubt. (RR2:202).

122. The record does not affirmatively demonstrate that trial counsel rendered deficient performance by improperly giving the jury a definition of reasonable doubt.

123. The jury charge in this case instructed the jury on a defendant's presumption of innocence and the beyond-a-reasonable-doubt burden of proof. (CR:112).

124. The applicant has failed to present any evidence demonstrating that the jury failed to properly follow this Court's instructions in the charge.

125. Even if trial counsel had somehow performed deficiently by improperly giving a definition of reasonable doubt during jury selection, the record does not affirmatively demonstrate that the applicant suffered prejudice as a result.

126. The applicant's assertion that trial counsel allegedly admitted during closing argument that he thought the applicant was guilty is based on a mischaracterization of an excised portion of a single sentence.

127. The record reflects that trial counsel did not tell, or insinuate to, the jury that he thought the applicant was guilty.

128. When the complained-of portion, specifically, "[a]lthough I think it started out at some point, well, it happened once in a while and then it–," is considered in the context of the rest of the sentence and trial counsel's statements before and after, the record reflects that trial counsel was merely recounting, sometimes in the first person, what he believed the child-victim's testimony had been and questioning why the child-victim's testimony about the frequency of the applicant's abuse had changed.

129. The record does not affirmatively demonstrate that trial counsel rendered ineffective assistance of counsel by allegedly telling, or insinuating to, the jury that he thought the applicant was guilty.

130. While the applicant complains that trial counsel's statement during closing argument that "I honestly do not recall them going in to [sic] the situation saying, why didn't you–why is it that you want [sic] away from home and didn't come home all [sic] at a time [sic]," (RR4:37), demonstrated that trial counsel had forgotten prior testimony, the applicant did not in his writ application identify any specific testimony, much less crucial testimony, that trial counsel actually failed to remember.

131. Even if the applicant had identified specific testimony that trial counsel had forgotten during closing argument, he has presented, and pointed to, no evidence demonstrating a reasonable probability that, but for trial counsel's inability to remember that testimony during closing argument, the outcome of the applicant's trial would have been different.

132. The record does not affirmatively demonstrate that trial counsel rendered ineffective assistance of counsel by allegedly forgetting prior testimony during closing argument.

133. This Court finds nothing rambling or incoherent about trial counsel's opinion that children can be subject to suggestion, specifically, "[c]hildren are suggestible. Any of other [sic] person with children know [sic] that they are," (RR4:44), which was made in the context of his argument that the child-victim lacked credibility and had changed her testimony to appease "...investigators and authority figures, some of them setting [sic] right over here at this table." (RR4:44).

134. The record reflects that the complained-of statement by trial counsel that "[i]t didn't happen and I don't know why I did that, but I–you know something I wanted you to consider," (RR4:49), was not rambling or incoherent when properly read in context and was simply a summation of the evidence and reasonable deductions from the evidence:

a. The complained-of statement was simply another instance of trial counsel recounting, from a first-person point of view, what he believed the child-victim's testimony had been regarding her own state of mind.

b. Immediately preceding this complained-of statement, trial counsel referred to testimony he had elicited from the child-victim on cross-examination about the fact that she had called the applicant after accusing him of molesting her and apologized to him, (RR3:95-97), and then argued that it made no sense for a victim to call and apologize to her abuser. (RR4:48-49).

c. Trial counsel related what he believed the child-victim, from her point of view, must have thought when the matter became more serious and concluded that statement with his own request that the jury consider that evidence: "I [(the victim)] think, wait a minute. I'm very sorry for all I've said. It didn't happen and I don't know why I did that, but I–you know, something I wanted you to consider." (RR4:49).

d. The record reflects that trial counsel's statement that "[i]t didn't happen" likely refers to testimony he successfully elicited from the child-victim on cross-examination that she had initially told one of the prosecutors that the applicant had never put his mouth on her vagina. (RR3:117-18).

135. The applicant's assertion that trial counsel "...told the jury that the State had a Constitutional right to 'do bad things to you'" is unsupported by the record, which reflects that trial counsel, first observing that "...this is one of the best countries in the world," told the jury that if the State decides to do "bad things" to someone, presumably an arrest or conviction, the jury had to make sure that the State followed the law and that those "bad things" were not unconstitutional. (RR4:54).

136. There was nothing incoherent or rambling about the complained-of statements made by trial counsel during the punishment phase, which, when considered in the context of trial counsel's entire argument, merely

explained to the jury that the wide range of punishment allowed them to determine where on the sliding scale the applicant's case fell, given the specific facts and circumstances of the case.

137. The record does not affirmatively demonstrate that trial counsel rendered deficient performance by making incoherent and rambling nonsensical arguments to the jury.

138. Even if trial counsel's statements had been less-than-polished, the record reflects that trial counsel did not argue anything objectionable or detrimental to the applicant.

139. Even if trial counsel had made some isolated incoherent and rambling statements during closing arguments, the applicant has presented, and pointed to, no evidence demonstrating a reasonable probability that, but for the complained-of isolated statements, the outcome of the applicant's trial would have been different.

140. Given the strength of the State's evidence, which included very detailed testimony by the child-victim regarding the offense and the events surrounding it, this Court finds that the complained-of statements by trial counsel during his guilt-innocence closing argument would not have impacted, in any significant way, the jury's subjective determinations regarding the child-victim's credibility.

141. The record reflects that during the guilt-innocence phase, the jury had already heard testimony regarding the applicant's betrayal of his step-daughter's trust through his extensive and long-term sexual abuse of her, which involved oral sex and digital penetration.

142. During the punishment phase, the jury heard evidence that in 2011, the applicant was convicted of discharging a firearm in certain municipalities as a lesser-included offense of aggravated assault with a deadly weapon. (RR5:4-5); (SX19A, 21).

143. The applicant has presented, and pointed to, no evidence showing a reasonable probability that his 52-year sentence would have been lighter had

trial counsel not made the complained-of statements during the punishment phase of trial.

144. The record does not affirmatively demonstrate that the applicant suffered prejudice as a result of any deficient performance by trial counsel during the guilt-innocence and punishment closing arguments.

Ground for relief four: the applicant's claim that appellate counsel rendered ineffective assistance of counsel by failing to properly argue her motion for new trial

145. The motion for new trial filed by initial appellate counsel in this case alleged, as a ground for relief, that "[t]he trial court misdirected the jury as to the law of the case, which misdirection was a material error calculated to injure the rights of the accused." (CR:143).

146. This Court finds credible appellate counsel's explanation, set out in her declaration, made pursuant to section 132.001 of the Texas Civil Practices and Remedies Code, as to why she did not further develop at the new-trial hearing the claim that this Court misdirected the jury as to the law of the case.

147. This Court finds credible appellate counsel's assertions in her declaration that she included the misdirection-as-to-the-law claim in her new-trial motion out of deference to the applicant and his family and that she did not further develop this claim at the new-trial hearing because further factual development was not necessary on what was a record-based question of law; because she did not have the benefit of the appellate record to specifically argue jury-charge error at that time, which would have required a showing of both jury-charge error and egregious harm; and because she believed that any claim of jury-charge error would be better raised in a direct appeal, which the complained-of appellate counsel did not ultimately handle.

148. This Court finds credible appellate counsel's explanation that she focused on the ineffective-assistance-of-counsel claim based on trial counsel's alleged failure to properly advise the applicant as to his parole eligibility because she believed that was the only claim that might have had any chance of success at the new-trial hearing.

149. This Court finds credible appellate counsel's assertions in her declaration that her decisions were also based on her consideration of the likelihood that the grant of a new trial unsupported by the law and the facts would be challenged and reversed on a State's appeal, which she knew, based on prior experience, the State would have pursued in the event a new trial was granted.

150. In his writ application, the applicant complains that he should have been afforded an opportunity at his new-trial hearing to develop a record on the misdirection-as-to-the-law claim, but has failed to identify an instance where the jury was actually misdirected on the law to such an extent that it could have served as a meritorious ground upon which he would have legitimately received a new trial.

151. The applicant has failed to show that a new trial could have been properly granted on a claim that this Court misdirected the jury as to the law.

152. This Court finds that appellate counsel had legitimate, strategic reasons for not further developing grounds upon which a new trial could not have been properly granted.

153. The applicant has failed to present credible evidence demonstrating that appellate counsel rendered deficient performance in not further pursuing the misdirection-as-to-the-law claim at his new-trial hearing.

154. The record does not affirmatively demonstrate that the applicant suffered prejudice as a result of any deficient performance by appellate counsel in this regard.

155. The motion for new trial filed by appellate counsel also alleged, as a ground for relief, that a new trial should be granted on the basis of new evidence. (CR:143).

156. The record reflects that when appellate counsel, at the new-trial hearing, attempted to call Bertha Figueroa, the child-victim's grandmother, in support of the applicant's new-evidence claim, the State objected to litigating the new-evidence claim on the grounds that it had not been pled in the new-trial

motion with sufficient specificity to put the State on notice as to what the alleged new evidence was. (RR6:8-12, 20).

157. This Court sustained the State's objection to litigating the new-evidence claim at the new-trial hearing. (RR6:12).

158. On a bill of exception, appellate counsel presented, in relevant part, the following testimony by Figueroa:

[Appellate counsel]:	Okay. And how do you know [S.F.]?
[Figueroa]:	I raised her until she was four years old.
[Appellate counsel]:	How much contact did you have with [S.F.] after the age of four?
[Figueroa]:	Okay. My daughter will take her every week and I would tell her be very careful and this and that, and then I will talk to her about the victim. He was a good man.
[Appellate counsel]:	Okay. Now, is it safe to say that you have had constant contact with [S.F.] for her entire life?
[Figueroa]:	Yes.
[Appellate counsel]:	Does she lie when she's angry?
[Figueroa]:	Sometimes she does.
[Appellate counsel]:	Have you caught her doing so?
[Figueroa]:	Yes.
[Appellate counsel]:	Okay. So your opinion of this child's truthfulness is bad?
[Figueroa]:	Yes, my granddaughter sometimes she tells the truth and sometimes she doesn't. (RR6:9, 11-14).

159. This Court finds credible appellate counsel's explanation, set out in her declaration, as to why she did not further develop the new-evidence claim at the new-trial hearing.

160. This Court finds credible appellate counsel's assertions that she did not further pursue the new-evidence claim because she knew that Figueroa's testimony would likely not meet the requirements for the proper grant of a new trial on the basis of new evidence.

161. This Court finds credible appellate counsel's assertions that she knew that Figueroa's testimony would likely not satisfy the requirements that the alleged new evidence be "new," which would have required a showing that the evidence was previously unknown or unavailable to the applicant at the time of trial, and that the alleged new evidence could not have been found with the exercise of diligence.

162. This Court finds credible appellate counsel's explanation that she knew that Figueroa's testimony, which was simply impeachment evidence, would likely not satisfy the requirement that the alleged new evidence not be merely impeaching.

163. This Court finds credible appellate counsel's explanation that she did not have the benefit of the record to be able to argue the strength and weaknesses of the State's case in attempting to show that Figueroa's testimony would have brought about a different result in a new trial.

164. This Court finds credible appellate counsel's assertions in her declaration that her decisions in this regard were also based on her consideration of the likelihood that the grant of a new trial unsupported by the law and the facts would be challenged and reversed on a State's appeal.

165. The applicant has failed to show that Figueroa's proffered testimony was unknown or unavailable to him at the time of trial and could not have been found with the exercise of diligence.

166. The record reflects that Figueroa's testimony that the child-victim sometimes told the truth and sometimes did not was, at best, weak impeachment evidence that was cumulative of other trial testimony.

167. Figueroa's testimony did not demonstrate that the child-victim's trial testimony about the offense was untruthful in any way.

168. Figueroa's testimony was cumulative of testimony trial counsel had already elicited from the child-victim that she had oftentimes lied to her mother, (RR3:89), from which a jury could have inferred that she sometimes did not tell the truth.

169. The alleged new evidence that the child-victim sometimes told the truth and sometimes did not, even if true, would not have brought about a different result in a new trial in light of the State's evidence.

170. The applicant has failed to show that a new trial could have been properly granted on his new-evidence claim.

171. This Court finds that appellate counsel's decision not to aggressively pursue the new-evidence claim was legitimate strategy where a new trial would not have been properly granted on that basis.

172. The applicant has failed to present credible evidence demonstrating that appellate counsel rendered deficient performance in not further pursuing the new-evidence claim at his new-trial hearing.

173. The record does not affirmatively demonstrate that the applicant suffered prejudice as a result of any deficient performance by appellate counsel in this regard.

II. CONCLUSIONS OF LAW AND RECOMMENDATION

1. The applicant's claim that trial counsel rendered ineffective assistance of counsel for failing to know the law applicable to the charged offense, specifically, that trial counsel failed to inform him, while communicating the State's plea offer, that he would be ineligible for parole if convicted was raised and rejected in his motion for new trial and on direct appeal and is thus not cognizable in these habeas proceedings. *See Ex parte Reynoso*, 257 S.W.3d 715, 723 (Tex.Crim.App. 2008).

2. Alternatively, the applicant has failed his burden of proving that trial counsel rendered ineffective assistance of counsel for failing to know the law applicable to the charged offense, specifically, by allegedly failing to inform him, while communicating the State's plea offer, that he would be ineligible for parole if convicted.

3. The applicant has failed his burden of proving deficient performance by trial counsel, much less harm, based on the following allegations of ineffective assistance of counsel: (1) allegedly improperly turning down a plea offer without the applicant's express permission to do so and for reasons not articulated by the applicant; and (2) allegedly giving the jury a definition of reasonable doubt, admitting that he thought the applicant was guilty, and making incoherent and rambling nonsensical arguments to the jury.

4. The applicant has failed his burden of showing that he was prejudiced as a result of any alleged deficient performance by trial counsel. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999).

5. The applicant has failed his burden of proving that appellate counsel rendered deficient performance by allegedly failing to properly argue the applicant's motion for new trial.

6. The applicant has failed his burden of showing that he was prejudiced as a result of any alleged deficient performance by appellate counsel. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999).

7. The applicant has failed to show that he received ineffective assistance of counsel, in violation of U.S. CONST. amends. VI, VIII, and XIV and TEX. CONST. Art. I, §§ 10, 13, and 19.

Based on the above findings of facts and conclusions of law, it is the recommendation of the Court that the applicant's application for writ of habeas corpus be: **DENIED**.

III. ORDER TO THE TRIAL COURT CLERK

The Clerk of this Court is hereby ORDERED to prepare a supplemental transcript of all records in cause number 20130D04142 and the ancillary writ cause number 20130D04142-171-1and the proceedings had therein and transmit the same to the CCA, as provided by article 11.07 of the Texas Code of Criminal Procedure, rules 73.4(b)(3)-(b)(4) of the Texas Rules of Appellate Procedure, and the CCA's remand order dated February 26, 2020. The supplemental transcript shall include certified copies of the following documents: the indictment, the court's docket sheet, the court's guilt-innocence and punishment charges, the jury's guilt-innocence and punishment verdicts, the judgment and sentence, any and all appellate transcripts and statements of fact related to any and all appeals arising out of this cause, and any other relevant documents required by rule 73.4(b)(4); all of the applicant's pleadings and any attachments thereto; all of the respondent's (State's) pleadings and any attachments thereto; any orders on the applicant's and respondent's pleadings; any proposed findings of fact and conclusions of law filed by either party; and this Court's Findings of Fact, Conclusions of Law, and Order to the Trial Court Clerk. Said supplemental transcript shall be transmitted to the CCA by the Clerk of the Court no later than **May 26, 2020**, which is the 90-day deadline provided by the CCA in its February 26, 2020, remand order.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S (STATE'S) PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

SIGNED AND ENTERED this the 8 day of May, 2020.

HONORABLE Bonnie Rangel
Presiding Judge
171st Judicial District Court
El Paso County, Texas

APPENDIX E

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

PATRICK MARTINEZ,	§	No. 08-14-00242-CR
Appellant,	§	Appeal from the
v.	§	171st District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC#20130D04142)

O P I N I O N

Patrick Martinez appeals his conviction of continuous sexual abuse of a child younger than fourteen. In two issues, Martinez asserts: (1) the trial court abused its discretion in excluding his statement from a recorded interview that he agreed to take a polygraph exam because it was admissible under the rule of optional completeness; and (2) the trial court abused its discretion in denying his motion for new trial because, when communicating a plea offer from the State, his attorney did not inform him he would be ineligible for parole if convicted and he thus received ineffective assistance of counsel. We affirm.

BACKGROUND

On May 3, 2013, Appellant went to pick up his two children at school. When he arrived, he was met by the school principal and a police officer. The officer told him that something had

happened with his stepdaughter, S.F., and that his other child, A.M., had been taken by Child Protective Services. Appellant was told to go the police station to meet with a detective about the incident involving S.F. S.F. had been seeing a school counselor for anger issues, so Appellant believed the incident was somehow related to her anger problems. At the station, Appellant was interviewed by Detective Olga Gomez, who informed him that S.F. had accused him of sexually assaulting her on multiple occasions. Appellant made a voluntary waiver of his rights and denied the allegations. At the end of the nearly hour-long interview, Detective Gomez asked if Appellant would be willing to take a polygraph exam, and he agreed to do so. Detective Gomez then concluded the interview and Appellant was arrested. No polygraph was ever administered.

Prior to trial, the State offered Appellant a plea deal of ten years' deferred adjudication probation. Appellant refused the offer, and his attorney stated his client's refusal was based partially on the fact that his client did not want to register as a sex offender.

The case proceeded to trial, and the State called S.F. to testify. S.F. testified that she first met Appellant at the age of seven when Appellant started dating her mother. Eventually, she and her mother moved in with Appellant, and her mother and Appellant married and had a child together, A.M. S.F. testified her relationship with Appellant was good, that he was like a real father to her, and that she called him "Daddy." She stated she was eleven when he first touched her. While she was lying on her bed at night watching television, Appellant came into her room, laid down next to her, and moved his hand down under her shorts and rubbed his fingers on her vagina. S.F. stated that he touched her "about every week" for the next year, and then recounted four other instances of touching in graphic detail. Shortly after the first incident, S.F. began speaking with a school counselor about her anger issues. Months later, on the day Appellant had

gone to pick her and her brother up from school, she made an outcry statement to her counselor.

Appellant testified he was thirty-five years' old at the time of trial and that he had worked full-time as a recruiter for the Army National Guard before being fired over the charges. He denied all allegations during his testimony. Following his testimony, the State introduced a video recording of his interview with Detective Gomez. The video had been redacted to remove references to a prior conviction and remove his statement he was willing to take a polygraph. Appellant objected to the redacted video, and argued the full, unredacted video should be admitted under the rule of optional completeness to show his willingness to take a polygraph. The trial court overruled his objection, and admitted the redacted recording.

After deliberations, the jury returned a verdict of guilty and sentenced him to fifty-two years imprisonment with the Texas Department of Criminal Justice. Following the court's pronouncement of sentence, defense counsel stated he had failed to inform Appellant he would be ineligible for parole if found guilty when he had communicated the State's offer of deferred adjudication to him. Appellant moved for a new trial, both he and defense counsel testified during the hearing that Appellant had not been informed he would be ineligible for parole if convicted. Further, Appellant claimed he would have accepted the State's offer and pleaded guilty if he had been so informed. Appellant continued to maintain his innocence. After listening to the testimony and arguments, the trial court denied the motion for new trial. This appeal followed.

DISCUSSION

Polygraph Admissibility

In his first issue, Appellant contends the trial court abused its discretion in excluding evidence he was willing to take a polygraph. Specifically, he complains the State opened the door

to this evidence when the State played a redacted video of his interrogation that excluded his statement he would be willing to take a polygraph, claiming it was admissible under the rule of optional completeness.

Standard of Review

A trial court is given broad discretion in determining the admissibility of evidence. *Allridge v. State*, 850 S.W.2d 471, 492 (Tex.Crim.App. 1991). Accordingly, we review a trial court's admission or exclusion of evidence under an abuse of discretion standard. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex.Crim.App. 2010). A reviewing court should not reverse a trial court's ruling that falls within the "zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1990)(op. on reh'g).

Analysis

In Texas, the results of or references to a polygraph examination are inadmissible "for all purposes." *Martinez v. State*, 272 S.W.3d 615, 626 (Tex.Crim.App. 2008); *Nethery v. State*, 692 S.W.2d 686, 700 (Tex.Crim.App. 1985). This is so even if the State and defendant agree and stipulate to use the results of a polygraph test at trial. *Nethery*, 692 S.W.2d at 700. The two primary reasons for excluding polygraph evidence are: (1) the inherent unreliability of polygraphs; and (2) the tendency of the results to be unduly persuasive to the fact finder. *Martines v. State*, 371 S.W.3d 232, 250 (Tex.App.--Houston [1st Dist.] 2011, no pet.). Regardless of whether the case involves the results of a polygraph test or a defendant's willingness to take a polygraph test, evidence of either will result in the same problem: the fact finder will speculate about its outcome or a witness or defendant's position will be bolstered. *Ex Parte Huddlestun*, 505 S.W.3d 646, 664 (Tex.App.--Texarkana 2016, pet. ref'd). Therefore, it is generally error to

allow the introduction of evidence of polygraph results or a defendant's willingness to submit to a polygraph. *Tennard v. State*, 802 S.W.2d 678, 684 (Tex.Crim.App. 1990).

A limited exception has been carved out for instances where one party "open[s] the door" for the other party to introduce evidence regarding a polygraph. *Lucas v. State*, 479 S.W.2d 314, 315 (Tex.Crim.App. 1972). In *Lucas*, the defendant testified that he took a polygraph test and the results showed he was not guilty of the charged offense. *Id*. In response, the district attorney took the witness stand and testified the defendant had not passed the polygraph test. *Id*. On appeal, the defendant complained of the erroneous admission by the trial court of testimony regarding his polygraph. *Id*. While acknowledging the results of polygraph tests are ordinarily inadmissible, the Court of Criminal Appeals held that under the facts of the case the defendant had opened the door for the State to introduce testimony about his polygraph test by testifying about it himself. *Id*.

Here, the State introduced a video recording of Appellant's interview with Detective Gomez, but redacted the portion of the video where Appellant agreed to take a polygraph test. In the unredacted video, after denying the charges throughout the interview, Appellant was asked if he would take a polygraph test and he responded affirmatively. Appellant asserts his willingness to take the polygraph test was admissible under the rule of optional completeness to correct the false impression that he had been uncooperative in the video and to rebut the State's assertions that he was being untruthful. Texas Rules of Evidence 107, known as the rule of optional completeness, provides in relevant part as follows:

> If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the *same subject*. An adverse party may also introduce any other act, declaration, conversation,

> writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. [Emphasis added].

TEX.R.EVID. 107. The statements given to the detective denying his guilt are not the "same subject" as Appellant's willingness to take a polygraph. *Hoppes v. State*, 725 S.W.2d 532, 537 (Tex.App.--Houston [1st Dist.] 1987, no pet.)(State's introduction of statements made by defendant during polygraph test—without referring to the polygraph test—did not open the door under the rule of optional completeness for defendant to discuss polygraph test because "[s]tatements from the polygraph examination are not the 'same subject' as the results of the polygraph examination, which are inadmissible."). Further, the Court of Criminal Appeals has expressly declined to hold that polygraph evidence becomes admissible to correct a false impression not created by inadmissible polygraph evidence. *Robinson v. State*, 550 S.W.2d 54, 60 (Tex.Crim.App. 1977). The State introduced admissible evidence that did not make reference to a polygraph, and that cannot open the door to inadmissible polygraph evidence. *Id*. To admit the redacted portion would have resulted in the type of harm the rule seeks to prevent: the jury would have speculated what the results of the test may have been; why the state did not accept his offer to take the polygraph test; and Appellant's position would have been impermissibly bolstered. *Tennard*, 802 S.W.2d at 684; *Bradley v. State*, 48 S.W.3d 437, 443 (Tex.App.--Waco 2001, pet. ref'd). Accordingly, the trial court did not abuse its discretion in denying Appellant's request to admit the unredacted portion of the video where he stated he was willing to submit to a polygraph test. Appellant's first issue is overruled.

Ineffective Assistance of Counsel

In his second issue, Appellant contends the trial court abused its discretion in denying his motion for new trial based on ineffective assistance of counsel. Specifically, Appellant asserts

his counsel rendered deficient performance by failing to inform him, while communicating a plea offer from the State, that he would be ineligible for parole if convicted of the charged offense.

Standard of Review

A trial court's decision to deny a motion for new trial is reviewed for abuse of discretion. *Riley v. State*, 378 S.W.3d 453, 457 (Tex.Crim.App. 2012). A trial court is granted broad discretion in assessing the credibility of witnesses and weighing the evidence when considering a motion for new trial. *Messer v. State*, 757 S.W.2d 820, 824 (Tex.App.--Houston [1st Dist.] 1988, pet. ref'd). The trial court abuses its discretion only if no reasonable view of the record supports its ruling. *Webb v. State*, 232 S.W.3d 109, 112 (Tex.Crim.App. 2007). In applying this deferential review, the appellate court must view the evidence in the light most favorable to the trial court's ruling, and must uphold the ruling if it is within the zone of reasonable disagreement. *Riley*, 378 S.W.3d at 457.

Analysis

A criminal defendant is entitled to be represented by effective, competent counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). When challenging the effectiveness of counsel, an appellant must show that there was no plausible professional reason for a specific act or omission by counsel. *Bone v. State*, 77 S.W.3d 828, 836 (Tex.Crim.App. 2002). If counsel was ineffective, we determine whether there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Id.*; *Adekeye v. State*, 437 S.W.3d 62, 73 (Tex.App.--Houston [14th Dist.] 2014, pet. ref'd). This two-prong test need not be analyzed in any particular order: appellant's failure to satisfy either prong defeats a claim of

ineffective assistance of counsel. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex.Crim.App. 2001) (citing *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069).

In order to make an intelligent decision to accept or reject a plea, a defendant must be given all the information relevant to the decision. *Turner v. State*, 49 S.W.3d 461, 465 (Tex.App.--Fort Worth 2001, pet. dism'd). To establish prejudice in a claim of ineffective assistance of counsel where a defendant rejects a plea-bargain because of bad legal advice, the defendant must show there is a reasonable probability that: (1) he would have accepted the plea but for the deficient advice; (2) the prosecution would not have withdrawn its offer; and (3) the court would have accepted the plea bargain. *Ex parte Argent*, 393 S.W.3d 781, 784 (Tex.Crim.App. 2013). A reasonable probability is one "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Here, defense counsel testified that when he conveyed the State's offer of ten years' deferred adjudication, he did not inform Appellant he would be ineligible for parole if convicted for continuous sexual abuse of a child. Appellant also testified he was not told he would be ineligible for parole when his attorney informed him of the State's plea offer. Had he known parole was not an option, Appellant asserts, he would have accepted the State's offer and pleaded guilty. Conversely, the State directs the Court's attention to statements made during the pretrial hearing. While discussing Appellant's rejection of the State's plea offer, defense counsel made the following remarks:

> DEFENSE COUNSEL: Anything -- my major problem is the sex offender registration situation, and his take on it is, I'm [sic] might as well be in prison for 20 years than been [sic] a registered sex offender. You know, he was --
>
> THE COURT: So the problem is the registration?

DEFENSE COUNSEL: Yeah, if they were to offer something that did away with the registration . . .

THE COURT: Okay. That's a counter.

DEFENSE COUNSEL: We would be interested in that.

PROSECUTOR: That we can't do.

THE COURT: That you can't do.

. . .

DEFENSE COUNSEL: I don't see anyway [sic] around it, frankly.

THE COURT: Well, you did come up with a counter offer, Mr. Gibson.

DEFENSE COUNSEL: Okay.

THE COURT: Very well. We tried and if it's the registration then we have to go with the registration, so we will be in trial.

As noted above, the trial court has broad discretion in assessing the credibility of witnesses and evidence, and we will not disturb its judgment unless no reasonable view of the record supports its ruling. *Webb*, 232 S.W.3d at 112; *Messer*, 757 S.W.2d at 824. One reasonable view of the record, per the testimony of Appellant and defense counsel, is counsel rendered ineffective assistance by failing to inform Appellant he would be ineligible for parole when he conveyed the State's offer of deferred adjudication, and Appellant would have accepted the offer if he had been so informed. Another reasonable view, based on the statements at the pretrial conference, is that Appellant's primary concern in rejecting the plea was that it required him to register as a sex offender, and he was willing to risk a lengthy prison sentence to avoid that burden. In assessing the credibility of Appellant and counsel's subsequent testimony that Appellant had not been informed of the ineligibility of parole upon conviction, the trial court was within its right to

disbelieve any of those assertions provided that disbelief is based on a reasonable view of the record. *Odelugo v. State*, 443 S.W.3d 131, 137 (Tex.Crim.App. 2014).

Based on the record, it was reasonable to conclude defendant had serious regrets about not accepting the State's original offer of ten years' deferred adjudication—now that he has received a fifty-two-year sentence—and his testimony supporting his ineffective claim was not credible. Applying the highly deferential standard we are required to provide on matters of credibility, we cannot conclude the trial court abused its discretion in denying Appellant's motion for new trial based on allegedly ineffective assistance of counsel. Accordingly, Appellant's second issue is overruled.

CONCLUSION

Having overruled Appellant's first and second issue, we affirm the judgment of the trial court.

May 23, 2018

YVONNE T. RODRIGUEZ, Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J. (Not Participating)

(Do Not Publish)

APPENDIX F

REPORTER'S RECORD
VOLUME 6 OF 7 VOLUME
TRIAL COURT CAUSE NO. 20130D04142
COURT OF APPEALS NO. 08-14-00242-CR

STATE OF TEXAS,	)	IN THE DISTRICT COURT
	)	
vs.	)	EL PASO COUNTY, TEXAS
	)	
PATRICK L. MARTINEZ.	)	171ST JUDICIAL DISTRICT

MOTION FOR NEW TRIAL

On the 19th day of September, 2014, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable BONNIE RANGEL, Judge presiding, held in El Paso, El Paso County, Texas:

Proceedings reporting by machine shorthand utilizing computer-assisted realtime transcription.

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CHRONOLOGICAL INDEX
Motion for New Trial

EXHIBIT INDEX

(Open court; attorneys and defendant present.)

THE COURT: Court calls cause number 20130D04142, State of Texas versus Patrick Martinez.

Announcement of counsel, please.

MR. SCHULZ: Your Honor, Kevin Schulz for the State of Texas. State of Texas is ready.

MS. BURNETT: Janet Burnett present and ready for Mr. Patrick Martinez, who is present in the courtroom. We are -- there have been two separate motions for new trial filed consider -- we consider both of them to be before the Court at this time.

MR. SCHULZ: I only have one. What's the other one?

MS. BURNETT: I filed one and Mr. Gibson filed one.

MR. SCHULZ: Oh, I guess we're going on yours.

MS. BURNETT: Yes. I'm considering both of tell to be before the Court and I'm arguing from both of them. Do you need -- I may have an extra copy.

MR. SCHULZ: Do you have an extra, that would be great.

THE COURT: Mr. Gibson, did you give notice the DA's Office on yours?

MR. SCHULZ: He probably did, Judge. I just don't have it.

MS. BURNETT: Okay.

MR. SCHULZ: Let me check, maybe I do.

MS. BURNETT: And I have got a spare one, the one Mr. Gibson filed. I'm giving it to --

MR. SCHULZ: That's the one I need. Thank you.

MS. BURNETT: Yeah. And I'm giving that and our first witness is Mr. Gibson.

THE COURT: Mr. Gibson, please come up, sir.

Please raise your right hand to be sworn.

(Witness sworn.)

THE COURT: Very well, sir.

You may have a seat.

MS. BURNETT: Thank you.

THE COURT: You may proceed, Ms. Burnett.

MS. BURNETT: Thank you.

MICHAEL GIBSON,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. BURNETT:

Q. Mr. Gibson, you have been sworn. My name is Janet Burnett. I'm a lawyer. We have met. We have

known each other for 30 years; is that true, sir?

A. That is correct.

Q. Okay. Can you state and spell your complete name for the court reporter?

A. Michael R. Gibson. M-I-C-H-A-E-L, middle initial R., Gibson, G-I-B-S-O-N.

Q. How are you employed, sir?

A. I'm self-employed as an attorney.

Q. How long have was been so employed?

A. For myself, about 30 years I have been a lawyer with various other enterprises for -- it would be 50 years in December.

Q. Okay. And are you licensed to practice law in the State of Texas?

A. I'm licensed to practice in the State of Texas.

Q. Are you licensed in other states in addition?

A. I'm also licensed in colorado and New Mexico.

Q. Okay. And very briefly, what's your work experience, your educational experience that lead you to be a lawyer for the past 50 years?

A. Well, I got an undergraduate degree in psychology and English, nobody will hire people with a thing like that, so I went to law school instead. And then after graduation from law school, I worked for couple firms in San Antonio for five years. I then was

hired by Jaime Boyd who was a 34th Judicial District Attorney here in El Paso County. I stayed there for four years, became chief District Attorney. I left that in '73 and opened up a private practice here in El Paso County. I have continued with that private practice, in this County and other states, where I'm licensed also.

Q. Okay. And are you familiar with the case before the Court, the case involved Patrick Martinez?

A. That's the correct. I am familiar.

Q. Okay. What was he charged with?

A. He was charged with Continuous Sexual Abuse of a Child.

THE COURT: Ms. Burnett, if you don't mind the interpreter just came in.

MS. BURNETT: Oh, okay.

THE COURT: Can we switch witnesses?

MS. BURNETT: Okay.

THE COURT: Right.

MS. BURNETT: Absolutely.

Mr. Gibson, do you mind? When we get those interpreters we run with it.

THE COURT: Yes, please.

THE WITNESS: No problem.

THE COURT: Thank you, Mr. Gibson.

MS. BURNETT: I apologize.

THE COURT: Thank you.

Yeah, Mr. Gibson, we don't want to let these interpreters go.

Thank you for coming up as quickly as you can.

MR. SCHULZ: As a preliminary matter, what portion of the defense's motion is this witness going to address.

MS. BURNETT: On the motion for new trial, August 12th, 2014, new evidence is now available under Roman Numeral Three, bottom of the first page.

MR. SCHULZ: Judge, we would object to that as that as insufficient.

THE COURT: What is insufficient?

MR. SCHULZ: You have to have this available, it is insufficient to advise the parties as to what the information is that they are going after.

MS. BURNETT: Your Honor, I didn't receive a motion to quash from our motion for new trial, which the District Attorney's Office received, almost, over a month ago, and would have been happy to entertain some request to put this on for the appellate record.

THE COURT: Well, procedurally it says you've got to specify, in the motion for new trial, the specific, newly discovered evidence. So whether they

filed a response, a motion to quash, Ms. Burnett, That rules are very clear. It's got to specifically state the newly discovered evidence on the motion for new trial.

MS. BURNETT: My understanding, with due respect to the Court.

THE COURT: Right.

MS. BURNETT: Is the allegation in the motion for new trial is sufficient to raise this. If this Court does not consider this testimony on the merit, we request that it merely be provided to the Appellate Court for -- in the nature of a bill of exception, Your Honor. Our position is --

THE COURT: Motion for new trial, what is the rule number.

MR. SCHULZ: The 20s, Judge.

THE COURT: Yeah.

MR. SCHULZ: The Court has correctly stated it because --

THE COURT: Right.

MR. SCHULZ: -- it think we had a motion the new trial, that I wasn't involved in, but involved Ms. Hamilton where they went round and round on exactly this issue.

THE COURT: It's --

MR. SCHULZ: And caselaw was presented.

THE COURT: It's elementary. It's elementary. If you have newly discovered evidence, you've got to specify it in the motion for new trial, that's just standard operating procedure, and I think it's statutory according to motion for new trial. What's the rule number?

MR. SCHULZ: It's somewhere in the 21s, Judge, of the Rules of Appellate Procedure.

THE COURT: It's in the Rules of Civil Procedure, not the Appellate Procedure; isn't it?

MR. SCHULZ: I thought it was in the rules for Appellate Procedure, Judge. Rule 21 addresses new trials in criminal cases.

THE COURT: Where?

MR. SCHULZ: Rule 21.

MS. BURNETT: Your Honor?

MR. SCHULZ: I think the rule comes in -- with caselaw it comes in, I'm not sure if it specifically says you have to articulate --

THE COURT: Rule 21 of the Texas Rules of Appellate Procedure?

MR. SCHULZ: Yes, ma'am.

MS. BURNETT: And our response is that the caselaw has held that Rule 21, the list of reasons

specified there, are not inclusive, they are illustrative and that the Court has the authority to grant a new trial. And we have specifically alleged in our motion to -- that a new trial be granted in the interest of justice, that the case that holds the listing of grounds in the motion for new trial statute is illustrative, not exhaustive is State versus Evans. 843 S.W2d 576, Texas Criminal Appeals 1992.

And the Court has the authority to grant a motion for new trial, on the grounds of newly discovered evidence. We have alleged that and we have a witness ready, willing and able to speak to that. And if the Court is not willing to address this testimony on the merits, we would request that the summary of the evidence be placed on the record, at this point, with the Appellate Court, and it will only take the briefest of moments. And let it shake down on the direct appeal and at least the Appellate Court will have the bill in front of it to make the decision on this issue.

MR. SCHULZ: And Judge, again, you know the stating of the grounds is fine, but once you state the grounds of new evidence you have to do it with some sort of --

THE COURT: Specificity.

MR. SCHULZ: Something to put people on

notice, and they have done nothing to that effect, and again, the Court has been round and round on this.

THE COURT: Right.

MR. SCHULZ: So I'm going to stop.

THE COURT: Need not. Need not. I'm going to go ahead and sustain your objection, sustain your objection.

MR. SCHULZ: Thank you, Your Honor.

THE COURT: So for purposes of this motion the new trial, I am not going to consider this witness on the merits of the motion for new trial. We are doing a bill for purpose of appeal at this point.

Do you want to do that or -- well, don't want to well lose --

MS. BURNETT: We don't want to lose the interpreter, Judge. They are like pure gold.

THE COURT: You're right. So let us proceed with the bill for appellate purposes only.

MS. BURNETT: Thank you, Your Honor.

THE COURT: Yes, ma'am.

MS. BURNETT: We appreciate the Court.

THE COURT: Yes, ma'am.

BILL OF EXCEPTION

BY MS. BURNETT:

Q. Please state your name for the record?

A. Bertha Figueroa.

Q. Do you know the child that is subject of suit that we will refer to as S.F. for purposes of the record?

A. His son?

Q. Serena?

A. Yes.

Q. Okay. And how do you know Serena?

A. I raised her until she was four years old.

Q. How much contact did you have with Serena after the age of four?

A. Okay. My daughter will take her every week and I would tell her be very careful and this and that, and then I will talk to her about the victim. He was a good man.

Q. Okay. Now, is it safe to say that you have had constant contact with Serena for her entire life?

A. Yes.

Q. Does she lie when she's angry?

A. Sometimes she does.

Q. Have you caught her doing so?

A. Yes.

Q. Okay. So your opinion of this child's truthfulness is bad?

A. Yes, my granddaughter sometimes she tells the

truth and sometimes she doesn't.

Q. Thank you.

MS. BURNETT: That's all I have on the bill, Your Honor. Thank you.

THE COURT: Very well. Okay, thank you. You maybe step down, ma'am. Thank you very much.

MS. BURNETT: May the interpreter be excused?

THE COURT: Yes.

We don't need -- we don't have any other Spanish speakers?

MS. BURNETT: No, ma'am. I know they are busy.

THE COURT: Thank you very much. Thank you.

MS. BURNETT: Maybe she be excused from the rule at this point?

THE COURT: Yes.

And Ms. Giron thank you so much.

May this witness be permanently excused, Mr. Schulz?

MR. SCHULZ: State has no objection.

THE COURT: Very well. Yes, ma'am. She may be permanently excused, if you would like.

MS. BURNETT: I believe that we had Mr.

Gibson on the stand.

THE COURT: Come on back, Mr. Gibson.

Okay. Continue. Go ahead, Ms. Burnett.

MS. BURNETT: Thank you, ma'am.

Q. (BY MS. BURNETT) And I believe, Mr. Gibson, I apologize on the record, I may repeat some questions, but that's better than leaving them unsaid.

You represented Patrick Martinez at trial; is that correct, sir?

A. That is correct.

Q. Were you retained or appointed?

A. I was retained.

Q. Okay. And are you familiar with the statute her was charged under, Penal Code 21.02, Continuous Sexual Abuse of Young Children?

A. Yes, I am.

Q. Okay. And was there a plea offer on the table in this case?

A. There was.

Q. What was the plea offer?

A. Ten years deferred adjudication probation.

Q. When -- did you talk to Mr. Martinez about this plea offer?

A. I did.

Q. When you talked to Mr. Martinez, did you talk

to him about Texas Government Code 508.145, eligibility for release on parole?

A. I did not.

Q. Were you familiar with this section of the Government Code that controls when people are eligible for parole based on the nature of their criminal charge?

A. Not in connection with this particular charge.

Q. Have you -- at some point subsequent to this trial become familiar with this section of the Government Code as it relates to the offense of Continuous Sexual Abuse?

A. Yes, I have.

Q. Are you aware if this section addresses that provision of the Penal Code?

A. Yes.

Q. Okay. Do you know now that someone convicted of the offense that Mr. Martinez was convicted of is never eligible for parole?

A. I'm now aware of that.

Q. Did you tell, prior to trial -- tell my client prior to trial that he could -- if he were convicted of what he was charged of, that getting parole would never been an option?

A. I did not.

Q. Does the statute clearly provide that

information?

A. Yes, the statute does.

Q. Is the statute clear and easy to locate?

A. Yes.

Q. Okay. In your opinion, was it effective assistance of counsel to not provide that information to Mr. Martinez for him to intelligently make the decision whether to take the probation or to go the trial?

A. In my opinion that information would have to have been provided to anyone accused under that statute in order to make some kind of informed and intelligent decision as so whether to accept the plea bargain or whether to plead not guilty and go to trial.

Q. Okay. Are you familiar with the case of North Carolina versus Alford?

A. Yes.

Q. Okay. And what is the basic holding of that case?

A. I don't know right the name of everything.

Q. Okay.

A. But it involves what you have to do to represent the client properly.

Q. Okay. Does it involve the possibility of a guilty plea for someone that maintains their innocence?

A. Correct.

Q. Okay. Did you talk to Mr. Martinez about an Alford plea?

A. No, because it's my understanding that type of plea is no available under Texas law. It's available under Federal Court. You can maintain that you did not commit the act and enter some sort of a plea of no contest or something like that. There is a no contest obligation under Texas law, but it's not exactly like what I understand Alford to hold.

Q. Okay. As soon as you read this statute, did you recognize you made a little mistake and file a motion for new trial for Mr. Martinez?

A. Yes, I became aware during the course of the trial that this was a no parole statute situation. I was surprised by that. I was not aware of it before and I never discussed it with Mr. Martinez because of this fact, that came up during the trial. We continued with the trial of the case. He was convicted and sentenced and then I filed a motion with two requests.

One was a motion for new trial based on some evidentiary issues that came up in the trial, and the other was a suggestion that I had rendered ineffective assistance of counsel. It's kind of strange to file a motion accusing yourself of that, but I did it any way. I then asked the Court to relieve me because

of that possibility, as far as the representation of Mr. Martinez so that someone, such as yourself, could present that issue to the Court and that it would granted.

Q. Okay. Thank you.

MS. BURNETT: I now have two questions for my bill on the topic.

Q. (BY MS. BURNETT) Mr. Gibson, were you familiar with the family member, of the complaining witness in this case, that just testified? Have you ever met her or spoken to her before?

A. No I, have not.

Q. Were you aware that the complaining witness in this case had family members that had a bad opinion as to the complainant's character for truth and voracity?

A. I was not aware of that. You advised me of it today.

Q. Okay. Thank you, Mr. Gibson.

MS. BURNETT: And I just want the record to reflect that I have known Mr. Gibson for 30 years and he's a very, very fine attorney and he is one of the lawyers that trained me.

Thank you.

THE COURT: Very good. Okay.

Mr. Schulz, your cross-examination of Mr.

Gibson.

MR. SCHULZ: Yes, Judge. As -- a couple of preliminary matters first. As the Court has sustained the State's objection as to the new evidence allegation by the defense, the State will not be addressing that as it is not properly before the Court.

THE COURT: Very well.

MR. SCHULZ: Second, defense counsel, during her questioning, of prior defense counsel Mr. Gibson, has made illusion to an Alford plea and to submission of a no contest plea. As a matter of note, for the record, as the State's primary attorney on this case, as a motion for new trial, and during the plea negotiations of this case, and throughout the course of the trial itself, that was never part of the plea bargain. The State would not have accepted a plea of guilty wherein the defendant maintained his innocence, or we would have accepted a no contest test plea; hence there is no bearing and no relevance here.

That was never the offer, that was never going to be the offer and will -- not going to happen. It was never going to happen. Okay.

CROSS-EXAMINATION

BY MR. SCHULZ:

Q. Next. Mr. Gibson, good morning?

A. Yes, sir.

Q. Mr. Gibson, prior to the trial on the merits of this case against Mr. Patrick Martinez, your client maintains his factual innocence as to the charges in this case; is that correct, sir?

A. That's true.

Q. And throughout the trial, he in fact, maintained his factual innocence as to the charges, correct?

A. That is correct.

Q. And to your knowledge, he continues to maintain his factual innocence as to charges; is that correct, sir?

A. I'm -- up until the time that I no longer represented him, and was accused by the Court because of the issue that I have testified about, that is correct. Since that time, I do not know because I don't consult with him. He has other counsel.

Q. And that would be -- the better question to ask would be, of course, throughout the period of your representation of Mr. Patrick Martinez, he has maintained his factual innocence as to the charges in this case, correct?

A. That would be correct counsel.

Q. Okay. Thank you.

MR. SCHULZ: Next, at this time, Your Honor, the State would like to admit State's Exhibit Number 1, a portion of the transcript of the trial?

(Exhibit offered, State's 1.)

THE COURT: Any objection, Ms. Burnett?

MS. BURNETT: Can I see it first?

THE COURT: Oh, absolutely.

MR. SCHULZ: In fact, Mr. Gibson, at one point, prior to the beginning of voir dire.

THE COURT: You offered --

MR. SCHULZ: Is State's 1 admitted?

THE COURT: Any objection to the admission of State's 1?

MS. BURNETT: No objection.

THE COURT: State's 1 will be admitted.

(Exhibit admitted, State's 1.)

Q. (BY MR. SCHULZ) In fact, Mr. Gibson, prior to the beginning of the voir dire process, the State, on the record, said, hey, is there any possibility of plea here? And you indicated on behalf your client that no, there is no possibility of a plea because your client did not want to plea to an offense that involved registration, and that he'd rather spend 20 years in jail, than be a registered sex offender; is that correct, sir?

A. I don't remember the exact exchange, sir.

Q. You don't. Okay.

A. Counsel, you have handed me -- you have handed me transcription of some things that happened in court. I've not looking through here to see whether that matter is covered in it. If it is I can look at it and I will tell you, but I'm just telling you I don't have any independent recollection of that conversation.

Q. Let me draw you attention the Page 4, on the upper portion of the page. Mr. Gibson, anything -- my major problem is the sex offender registration situation and --

A. Hold on counsel, you have me on Page 3 here. You're getting a little ahead of me. Let me look at it.

Q. And his take on it is, I might as well be in prison for 20 years than be a registered sex offender.

Do you recall that now?

A. I do recall that now.

Q. Okay. So not only does he maintain his factual innocence throughout the course of your representation of him, beyond even that, to the extent that he was willing to admit guilt, he didn't want to be a sex offender?

A. That is correct.

Q. Thank you.

That was a primary consideration in turning down the State's offer of ten deferred?

A. That certainly was one.

Q. Okay. And finally Mr. Gibson, you are an advocate for you client, correct?

A. That is correct.

Q. Okay. And of course, we as lawyers are all add advocates for our clients. It is our job to zealously advocate for our clients; is it not, sir?

A. I agree with that.

Q. Okay. In that regard, I have a few more questions for you. Mr. Gibson, you filed a motion for new trial which you have alleged ineffective assistance, correct?

A. That is correct.

Q. Can I assume that as a attorney, in good standing with the State Bar of Texas, you have called disciplinary counsel to advise them that you have rendered ineffective assistance of counsel?

MS. BURNETT: I'm going to object as to being outside the scope of the hearing as being irrelevant and being improper cross-examination.

THE COURT: Mr. Schulz, your response?

MR. SCHULZ: Judge, if he thinks it's ineffective assistance, put your money where you mouth

is.

MS. BURNETT: I'm not -- I haven't seen citations in disciplinary rules. There is no disciplinary rules that generally says we must provide ineffective assistance. There are a lot of disciplinary rules, but that's not one of them. I'm not seeing it as being relevant before the Court on that issue. Every single good attorney makes mistakes.

MR. SCHULZ: You're supposed be adult. Adults advocate for your client and if you violate the rules then you're suppose to report yourself.

THE COURT: I don't know --

MR. SCHULZ: I want to see. Did he report himself?

THE COURT: I don't recall the rules. I mean, you can't be ineffective, but I don't recall the rules mandating that -- a self reporting. I believe -- I'm almost certain it's there, Judge. You have to report yourself.

MS. BURNETT: Well, I would like an almost certain to translate into a rule number because I'm pretty familiar with the rules and I don't know one that says that and I also --

THE COURT: Could you?

MR. SCHULZ: If I can have a moment,

Judge?

THE COURT: Yes.

MR. SCHULZ: I will find it.

THE COURT: Yes, please.

MR. SCHULZ: Judge, for whatever reason the computer is not cooperating with me as far as the Internet goes.

THE COURT: Okay.

MR. SCHULZ: May we recess for five minutes so I can find the rule citation for the Court?

THE COURT: Can --

MS. BURNETT: Can we -- maybe perhaps this Court can do it through a bill of exception and just establish that he didn't self report and then just leave legal arguments, maybe, towards the end.

THE COURT: Why don't -- I'd rather get it straight. This is a motion for new trial.

MS. BURNETT: Okay.

THE COURT: You know why, well -- I guess I can't proceed with proceed mister -- because I was going to proceed with Mr. Hughes. How come Ms. Meraz isn't here?

MR. SCHULZ: Shes's -- I received a note from the secretary that she's at the doctor's office.

THE COURT: Okay. Because we can't

proceed with Mr. Madrid.

MR. SCHULZ: I know.

THE COURT: I know.

MR. SCHULZ: This will be quick.

THE COURT: Okay.

MR. SCHULZ: I should be able the find it quickly.

THE COURT: Okay.

MR. SCHULZ: May I step out, Judge?

THE COURT: Yes. Go ahead, Mr. Schulz.

(Recess taken.)

THE COURT: Very well. We are back on the record in the motion for new trial.

MR. SCHULZ: Yes, ma'am.

THE COURT: Yes, sir. I gave you an opportunity to do some research.

MR. SCHULZ: Yes, ma'am.

THE COURT: Please proceed.

MR. SCHULZ: The rule doesn't -- my phone it talking let me tell it to shut up.

THE COURT: Okay. Please. Tell Siri you're very busy.

MR. SCHULZ: Yes.

The rule is not -- I don't think it's explicitly clear. I'm proceeding on the basis of what

someone I know and trust very well, who's been on the disciplinary panel for his District Court 25, 30 years.

THE COURT: Yeah. I'm going to go ahead and sustain, then, Ms. Burnett's objection.

MS. BURNETT: Thank you, ma'am.

THE COURT: So you may proceed with other matters.

MR. SCHULZ: Thank you, Judge.

Okay.

THE COURT: You may proceed.

Q. (BY MR. GIBSON) All right. Back to where we were. You were aware, however, that it's a 25 year minimum sentence of course?

A. Yes.

Q. Okay.

MR. SCHULZ: Pass the witness.

THE COURT: Very well.

MS. BURNETT: A few additional follow up, Your Honor.

THE COURT: Yes, Ms. Burnett.

MS. BURNETT: Thank you.

THE COURT: Yes, ma'am.

REDIRECT EXAMINATION

BY MS. BURNETT:

Q. Mr. Gibson, you have been handed a transcript

which is a State's Exhibit, sir; is that correct?

A. That is correct.

Q. Would you agree that my client, Patrick Martinez's, words nowhere appear on that transcript?

A. That is true.

Q. And any words on there as far as sex offender registration, would you agree with me those are your words, not his?

A. That is correct.

Q. Is the transcript more accurate or you memory more accurate?

A. I'm sorry?

Q. Which is more accurate the transcript or you memory?

A. The transcript.

Q. Thank you, sir.

MS. BURNETT: I have nothing further.

THE COURT: Anything further, Mr. Schulz?

MR. SCHULZ: Sure.

RECROSS-EXAMINATION

BY MR. SCHULZ:

Q. We can of course rely on that you represented your client, correct, at that time?

A. I'm sorry, can you say that again?

Q. You represented you client, Patrick Martinez,

at that time, correct?

A. Yeah.

Q. You were his voice, correct?

A. Yes.

Q. And in communicating to the Court, you would have not misrepresented Mr. Martinez's position, would you?

A. No.

Q. So you're not attempting to imply that the registration was the important fact for him in turning down the State's offer?

A. Wait a minute. I'm not implying anything. It's clear in that that was a consideration and I revealed that to the Court at the time, and the other problem, of course, was that even though offer that was made, ten years deferred adjudication, under our procedure, somebody was placed on deferred adjudication probation, has to register as a sex offender.

Q. Okay.

A. Yeah.

Q. So your client's position was, I'd rather spend 20 years in prison than register as a sex offender?

A. I don't know if that was his absolute way he would put it, but that was my understanding of his approach to -- in accepting or rejecting the State's

offer.

Q. Okay.

MR. SCHULZ: Pass the witness.

MS. BURNETT: No further questions of this witness, Your Honor.

THE COURT: Very well.

You may step down Mr. Gibson. Thank you very much.

May Mr. Gibson be permanently excused or subject to recall?

MR. SCHULZ: State has no objection.

MS. BURNETT: No objection.

THE COURT: Permanently excused. Very well.

Thank you very much, Mr. Gibson. Have a great say.

Any more witnesses, Ms. Burnett?

MS. BURNETT: Yes, Your Honor. We would call Patrick Martinez.

THE COURT: Mr. Martinez, please come on up.

You know what, I thought I was done after this one.

Mr. Hughes?

We are going to take a little break from

this one.

(Recess taken.)

THE COURT: We're back on the record with Mr. Patrick Martinez.

Ms. Burnett, you may continue with your examination of Mr. Martinez.

MS. BURNETT: Thank you. I don't recall whether he's been sworn.

THE COURT: Please raise your right hand to be sworn.

(Witness sworn.)

THE COURT: Very well. Have a seat.

PATRICK MARTINEZ,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. BURNETT:

Q. Please state your name for the record.

A. Patrick Leonard Martinez.

Q. Are you the Patrick Leonard Martinez that has been convicted in the case before the Court?

A. That is correct.

Q. Okay. You were offered a plea offer of ten deferred in this case; is that correct?

A. That is correct.

Q. Okay. Did you know that if you were convicted

and got a prison sentence you would never be eligible for parole?

A. I did not.

Q. Would that have been important information for you?

A. Yes, it would have.

Q. Would that have changed your mind to take the deferred probation, even knowing that you would have to register as a sex offender?

A. Yes, it would have.

Q. Okay. Was it ever discussed with you, something called, an Alford plea?

A. No, ma'am.

Q. Did you know what one was then?

A. No, ma'am.

Q. Okay. At this point, have I discussed a case called North Carolina versus Alford with you?

A. Yes, you have.

Q. Okay. And was that the first time you obtained the information?

A. Yes, ma'am.

Q. And is it your testimony today that you, absolutely, would have taken this ten deferred had you known you would not be eligible for parole after conviction?

A. That is correct.
Q. Thank you.
MS. BURNETT: I pass the witness, ma'am.
THE COURT: Mr. Schulz, your cross-examination?
MR. SCHULZ: Thank you.

CROSS-EXAMINATION

BY MR. SCHULZ:

Q. Mr. Martinez, do you continue to maintain your innocence as to this charge?
A. Yes, sir.
Q. Okay. That was true from the beginning, it was true during the trial and it is true now, correct?
A. Correct, sir.
Q. Okay. And so when you would have pled guilty, you would have plead guilty in order to get a plea bargain, but not because you were admitting that you were actually guilty?
A. Correct, sir.
Q. Okay. Furthermore, is it true to say, sir, that you didn't want to register as a sex offender?
A. I didn't want to plead guilty to something I didn't do, sir.
Q. Okay. Assuming that you would have pled guilty, would you have wanted to register as a sex

offender?

A. Had I known the facts that I know now, sir, I would have done it. Yes, sir.

Q. Okay. And when you were making your decision, did you want to be a sex offender?

A. That was not a part of it, sir.

Q. Okay.

MR. SCHULZ: I don't need to go there.

Pass the witness.

THE COURT: Very well.

Anything else, Ms. Burnett?

MS. BURNETT: No further witnesses, no further questions of this witness. I do have argument, ma'am.

THE COURT: Absolutely.

Please step down, Mr. Martinez. Thank you very much.

Brief argument, Ms. Burnett, first.

MS. BURNETT: Thank you, Your Honor.

This Court has an enormous amount of discretion in granting and overruling a motion for new trial. And the reviewing court examines it only if the granting or denial of motion for new trial is outside the grounds of reasonable disagreement. I believe and this Court has discretion to grant a motion for new

trial for errors amounting to ineffective assistance of counsel, Reyes versus State, 849 S.W.2d 812, Texas Court of Criminal Appeals 1993.

A single egregious error can amount to ineffective assistance of counsel, and this is a case where we have an experienced and extremely competent trial counsel, that made a very serious mistake. I don't believe it's an ethical violation, but a mistake that made a huge difference in my client's life. It was an understandable mistake, but the Court of Criminal Appeals has held in Ex Parte Moussazadeh, 361 S.W.3d 684, Court of Criminal Appeals, 2012, that not knowing the parole consequences, which Mr. Gibson admitted he didn't know, an extremely unprepared statute, buried in the Texas Government Code, but a crucial one. He didn't know that this offense was not eligible for parole, and because he didn't know that, he didn't tell his client. It's not an issue of trial strategy. He didn't know because he couldn't find this esoteric statute buried in the Texas Government Code.

And it is black letter law and it is clear -- once your find it, it is very clearly laid out and easier to read. And a client is entitled to effective assistance of counsel during plea negotiations, and the United States Supreme Court has so held in a case called

Lafler versus Cooper, 132 S.Ct. 1376 (2012).

In these 2012 cases, were the law, prior to this case being tried this summer, in 2014, and the Supreme Court, in fact, has recognized the importance of plea negotiation and plea bargaining, too. The criminal justice system has recognized that effective assistance of counsel is crucial to the criminal justice system in both the Texas Court of Criminal Appeals and the United States Supreme Court have recognized that perfect information is necessary to advise your client whether to accept or reject a plea because most -- 97 percent of all cases are disposed of as pleas and do not go to trial.

And cases have been reversed both for not effectively advising their client to take the deal, and not an Ex Parte Serena Staglin, the Texas Court of Criminal Appeals, where the client didn't get through the plea colloquy with the Court saying the right things. I am pleading guilty because I am guilty and for no other reason. Didn't coach his client adequately to get through the plea colloquy, that lawyer was found ineffective because the client went to trial and got more time than was offered.

Your Honor, we believe that you also have the authority, given you wide discretion, to grant a new

trial based on the other errors raised in Mr. Gibson's initial motion and for newly available discretion -- the newly available evidence in the Court's discretion. I apologize to the court reporter. We have an order and we are requesting that this Court grant the motion for new trial.

Thank you, Your Honor.

THE COURT: Very well. Thank you, Ms. Burnett.

Mr. Schulz?

MR. SCHULZ: Yes, Your Honor.

I guess let me address the last first. She addressed other grounds brought up in Mr. Gibson's motion. Specifically, the first ground he mentioned is that he wanted to have the whole tape admitted, if the Court remembers, the whole videotape of the whole polygraph thing.

THE COURT: Right.

MR. SCHULZ: And he says -- he's kind of proceeding under the Rule of Optional Completeness. However, the Rule of Optional Completeness, as the Court is well aware, is subject to the rules of relevance and harm and that's why when I said, okay, you want the whole tape in? Well, great. Why don't we put in his prior criminal history, that's part of it.

Well, I object to relevance. Well, you just proved my point. And so for that ground, I think the Court is well aware that his first ground that was not mentioned in testimony, but was mentioned in the motion for new trial by Gibson, is of no import.

His second ground is addressing the parole eligibility which also is what defense counsel has mentioned. Before I get to that, let me address a ground brought up by Ms. Burnett in her motion for new trial, it's under Roman Numeral Number 2. She has stated the Court misdirected the jury as to the law of the case, which misdirection was a material error calculated to injure the rights of the accused.

She has, nowhere in her motion, that I am aware of, or on the record, specified what portion of the law the Court misdirected anybody at. So the Court is not in a position to rule because they don't even know what they were told was wrong. The Court doesn't even know and so the Court doesn't have enough information to even base a decision on that. And so, as such, it's insufficiently alleged what the Court did not do. Okay. We've covered that.

Finally, that takes us to the ground of ineffective assistance. As the Court is aware, there are two grounds under the Strickland prong. The first

ground -- not ground, prong. The first prong has to do with was he efficient.

THE COURT: Okay.

MR. SCHULZ: That's not really where the meat of this one lies. Okay. I think we all know that Mr. Gibson correctly advised his client. So I'm going to leave whatever other arguments are there to the Appellate Courts to address, but I'll go to the second ground.

In the second ground or second prong -- I keep on saying ground -- is but for the defense error there is a reasonable probability that results proceeding would have been different. Reasonable probability is one that is sufficient to underline competent proceeding so serious as to deprive the defendant of a fair trial, a trial where a result is reliable. In this particular instance, the -- what we are looking at is the plea itself, I suppose.

I will quote a couple things for the Court. Ex Parte Carillo, 687 S.W.2d 320, Court of Criminal Appeals, 1985. The erroneous advice from counsel about the frame of parole eligibility then is -- is then about the event of parole, which at the time of occurrence, if any, cannot even be accurately guessed at. It should not be ordered sufficient accordance as

to outweigh the other factors considered in this case. And that was in the Texas systems on habeas, where the habeas was denied. Okay.

I bring that up in this regard. There are quite a few cases that I think that defense counsel is aware of and the Court is aware of where it says, you know, ineffective assistance, I was told parole eligibility from my lawyer was wrong, or I was told this was a probation eligible offense and I was wrong. And going up to the Court of Criminals Appeals they said, okay. No, that doesn't pass the second Strickland prong. Sorry. Too bad.

In that regard, offering up this, Richard versus State, which is not a published opinion, so it's -- and I will give the Westlaw cite, 2013, WL 6669388.

MS. BURNETT: Can you say that again slower?

MR. SCHULZ: Yes.

MS. BURNETT: Thank you.

MR. SCHULZ: And probably the court reporter would appreciate that too. 2013 WL 6669388.

And Judge, I'll announce Erin Delaney for the State of Texas as well as she was second chair in this trial, if the Court --

THE COURT: Absolutely.

MR. SCHULZ: Thank you.

In that case, Judge, the defendant denies that he didn't -- did it and couldn't plea to what he didn't do; therefore, the defense couldn't show a reasonable probability that the result would have been different. Okay. The defendant says now, of course, after the fact, arguably what is sour grapes, once you're facing 52 years. Oh, yes. I should have, would have, which, of course, the Court can take into account the defendant's credibility in that regard. This guy didn't do it then; isn't admitting it now. Okay.

Now, I'll finally fall back on this, State versus Argent, 393 S.W.3d 781, and the opinion on rehearing, 2013 WL 2112363, Court of Criminal Appeals, 2013. In that particular case it was addressing -- the Court of Criminal Appeals was dressing an ineffective assistance claim in light of a Supreme Court caselaw that has been mentioned by counsel, and the Lafler stuff, et cetera. In that particular case, they said they would determining, okay, what's the standard going to be in Texas. They determined what the standard was going to be in Texas in that track, the Supreme Court standard. And they referred it back down to the Court of Appeals or the trial court to make findings -- the trial court make findings in light of that law. Okay.

And in that particular case, Judge, the trial court found that there was, and this is on the remand opinion, which is the 2013 WL one. The Court found that, quote, there was no reasonable probability that the defendant would have accepted an offer of eight years in prison, regardless of that advice, because the goal was probation rather than incarceration. Okay.

I see in regards to State's Exhibit Number 1 wherein, the defendant, through his counsel, said, hey, what matters to me is the registration. I'd rather spend 20 years in prison than register as a sex offender. Okay. The defendant now disavows that, but, again, sour grapes. So we would represent to the Court that, hey, he wasn't going to take that, even had he known because he didn't want to register as a sex offender.

And finally, he now says that I would have taken the deal, but you know, I'm still not guilty. And if I would have pled guilty, I would have been taking -- pleading guilty because I wanted the deal, but here is the problem with that. The State's plea offer wasn't, oh, plead guilty, but not really. We weren't offering an Alford plea. We weren't offering a no contest plea, so their whole argument is groundless. The State wants him to admit he's guilty because he is guilty. If

that's not what he's doing, that is not the agreement and the State wasn't going the have it, and we don't have to. At that point, it's withdrawn. You must admit you're guilty.

A number of times the State says, okay, you know, plead guilty, but we are going to go the Alford way or you're going to do no contest way is rare. And as the attorney in the case, as I already represented, we weren't going to do that. He was going to plead guilty because he was guilty. Anything else, not happening.

As such, their new trial motion should be denied because they just don't have the grounds.

Thank you.

THE COURT: Very well.

Do you want to rebut?

MS. BURNETT: Your Honor, and I believe we said most of it in our preliminary statement. I believe one of the cases that Mr. Schulz has cited has been overruled by the Moussazadeh case as to the importance of the parole eligibility and the difference between parole attainment and parole believability and that's all I wanted to point out. I don't want to abuse the Court who has given up an entire morning of her docket for us.

THE COURT: That's okay. No worries. Thank you very much.

Based on the evidence and argument of counsel, I am going to deny your motion for new trial.

Do you have an order?

MR. SCHULZ: She does.

MS. BURNETT: May I approach, Your Honor?

THE COURT: Yes, please.

MS. BURNETT: Thank you, Your Honor.

THE COURT: Thank you very much.

MR. SCHULZ: State thanks the Court.

THE COURT: Thank you very much. Okay. Today is the 19th, right?

MS. BURNETT: Yes, ma'am.

THE COURT: There you go. Thank you very much. You have a great day and a great weekend, Ms. Burnett. You may be excused.

Mr. Schulz, I'm sorry. You're still here with me.

(Proceedings concluded.)

STATE OF TEXAS)

COUNTY OF EL PASO)

I, Anita D. Garcia, Official Court Reporter in and for the 171st District Court of El Paso County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $ 176.25 and was paid/will be paid by El Paso County.

WITNESS MY OFFICIAL HAND this the 8th day of April, 2015.

/s/ Anita D. Garcia
ANITA GARCIA, Texas CSR# 8444
171st District Court
El Paso, TX 79901 (915) 546-2100
Expires: December 31, 2016

REPORTER'S RECORD
VOLUME 6 OF 7 VOLUME
TRIAL COURT CAUSE NO. 2013-D-4142
COURT OF APPEALS NO. 08-14-00242-CR

STATE OF TEXAS,	)	IN THE DISTRICT COURT
	)	
vs.	)	EL PASO COUNTY, TEXAS
	)	
PATRICK L. MARTINEZ.	)	171ST JUDICIAL DISTRICT

I, Anita D. Garcia, Official Court Reporter in and for the 171st District Court of El Paso County, State of Texas, do hereby certify that the following exhibits constitute true and complete duplicates of the original exhibits, excluding physical evidence, offered into evidence during the Motion for New Trial, September 19, 2014, in the above-entitled and numbered cause as set out herein before the Honorable Bonnie Rangel, Judge of the 171st Judicial District Court of El Paso County, Texas.

I further certify that the total cost for the preparation of this Reporter's Record is $ 176.25 and was paid/will be paid by __El Paso County_____.

WITNESS MY OFFICIAL HAND this the 8th day of April, 2015.

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