Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FIDEL FLORES,
PETITIONER,

-v-

BOBBY LUMPKIN,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONS DIVISION,
RESPONDENT.

On petition for writ of certiorari from the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOL. I OF II

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APPENDIX A –

Fifth Circuit Court of Appeals Opinion and Judgment, Affirming District Court's Denial of Flores' Petition for Writ of Habeas Corpus, entered July 7, 2023. (*Flores v. Lumpkin*, Case No. 21-20579).

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 7, 2023
Lyle W. Cayce
Clerk

No. 21-20579

FIDEL FLORES,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-2252

Before KING, JONES, and DUNCAN, *Circuit Judges*.

KING, *Circuit Judge*:

A Texas jury found Fidel Flores guilty of aggravated sexual assault of a child under the age of six, and he was sentenced to forty-five years' imprisonment. Flores challenged his conviction both on direct appeal and through state habeas proceedings, but the Texas courts denied his requests for relief. The United States District Court for the Southern District of Texas denied his subsequent federal habeas petition and his request for a certificate of appealability. This court granted Flores' application for a certificate of appealability on one issue: whether trial counsel rendered unconstitutionally

ineffective assistance by failing to object to expert and lay opinion testimony regarding the truthfulness of G.P., the complainant. For the reasons articulated herein, we AFFIRM the district court's denial of Flores' habeas petition.

I.

A.

In October 2012, G.P., the complainant, told his mother that he was experiencing rectal pain, and she twice took him to his pediatrician, Dr. Ciro Porras, for examination. During the second visit, G.P. told the pediatrician that Flores—G.P.'s uncle—had "put a stick in his bottom several times." Upon hearing this, Dr. Porras concluded that G.P. had been sexually abused and reported the abuse to police and Child Protective Services. Flores was charged with a single count of aggravated sexual assault of a child.

At trial, the State presented testimony from numerous witnesses. G.P.'s mother testified that Flores previously lived with her, her husband, and G.P. in a one-bedroom apartment and, beginning in 2011, would babysit G.P. on the days that she worked. Around April 2012, G.P. began complaining of rectal pain and started exhibiting anger and aggression toward Flores. In May 2012, G.P. told his mother that he did not want to stay with Flores and that Flores was hurting him.

G.P.'s mother arranged for alternate childcare but, fearing deportation and lacking the resources to move, did not report the abuse. In September 2012, however, Flores picked up G.P. from school because his normal caretaker was unavailable. The next morning, G.P. told his mother that Flores had hurt him again and that he was hurting "on the inside." She took G.P. to Dr. Porras on October 2, 2012, but she did not mention G.P.'s reports of abuse. Dr. Porras testified that he observed an area of thinning on the complainant's anus. He diagnosed constipation, of which G.P. had no

prior history, and prescribed a stool softener. G.P.'s mother took him to Dr. Porras again on October 23, 2012, because of continuing rectal pain. Dr. Porras' examination of the complainant revealed a small anal fissure, or tear, and G.P. told Dr. Porras about the abuse, at which point Dr. Porras contacted the relevant authorities. Soon after, Child Protective Services contacted Flores about the allegations, and he eventually left for El Salvador, though he voluntarily returned to the United States after speaking with a Houston police officer about the charge.

The jury heard testimony over two days of trial from nine witnesses, including G.P. himself. Flores contends that the trial testimony of multiple expert and lay witnesses offered direct opinions as to the truthfulness of children generally and G.P. specifically, which is impermissible under Texas law. *See Yount v. State*, 872 S.W.2d 706, 712 (Tex. Crim. App. 1993) (en banc) ("[Texas Rule of Evidence] 702 does not permit an expert to give an opinion that the complainant or class of persons to which the complainant belongs is truthful."). He argues that the following statements of seven witnesses all crossed this line:

First, the State asked Dr. Porras if G.P.'s disclosures to another witness were "consistent with" what G.P. had told Dr. Porras during his examination. He replied, "Yes, it was." He also testified that he "had reason to believe that there was some sort of a sexual encounter."

Second, the State asked the investigating police officer why it was "important to you as an officer investigating a sexual assault crime" that G.P. was able to provide "sensory details." The officer replied, "Those kind of details are important because they lend to the credibility of the outcry."

Third, the State asked a former forensic interviewer at the Children's Assessment Center why it was "important to you as a forensic interviewer" that G.P. was able to provide "sensory details." She responded, "Just adds

validity to what the child has experienced. But also . . . it would be difficult to describe something that is memorized as opposed to having a sensory [*sic*] attached to it." The State then asked her whether G.P. was consistent in his telling of the abuse, to which she responded, "Yes."

Fourth, the State asked several questions to a staff psychologist at the Children's Assessment Center. When asked whether there was "any specific type of emotion you would expect to see with a kid to think that you should be able to believe their word," she responded, "No. I've seen all sorts of emotions from kids on the stand." When asked to list "some factors that would be important to you to determine reliability or validity of the disclosure" by children, she answered, "[T]hings that are of importance would be sensory details. If a child can describe what they felt, what they smelled, what they heard, what they saw, things of that nature, then you don't really need the context of the importance of the sexual act to describe that." She also testified,

> Children can lie about a lot of things in their lives, but sexual abuse is not typically one of them. It is one of the most shameful, embarrassing things for a child to talk about. It's not something that would ever be chosen as a form of lying just for fun. It's not a fun experience for children. And oftentimes, their lives significantly change in a negative way.

When asked whether "kids know how to lie about things that they don't have knowledge of, such as sex," she responded,

> No. . . . A child to make up something that they have no knowledge of—because a child that young shouldn't know anything about that. So, it wouldn't make sense that they'd even be able to conjure up an incident, you know, such as sexual abuse to come up with something to lie about.

And when asked "if a kid doesn't know what anal sex is or anal penetration, . . . it's not within his wheelhouse to even try to make something up about it, is that what you're saying," she said, "Yes."

Fifth, the State asked G.P.'s psychotherapist at the Children's Assessment Center whether G.P.'s actions in "play therapy" were "the kinds of things that five, six year olds come in and just fake to go through the motions." She responded, "No. Absolutely he seemed very authentic."

Sixth, the State asked G.P.'s mother whether the statements she heard G.P. make to his father, to his mother's friend, and to Dr. Porras were "consistent with" what G.P. had told her. Each time, she responded, "Yes." She also testified that she "believed the words of the child because he was only four years old. And the words that he was saying to [her] were terrible."

Seventh, the State asked Flores whether G.P. "has been consistent about the type of sexual abuse with every single witness that has testified here." He responded, "Yes, I've heard that he's always said the same thing."

Flores' trial counsel did not object to any of this testimony. However, he objected in other instances to testimony that he argued impermissibly opined on G.P.'s credibility. Sometimes these objections were sustained, and other times they were overruled.

On August 20, 2015, the jury found Flores guilty of aggravated sexual assault of a child under the age of six, and he was sentenced to forty-five years' imprisonment.

B.

Flores unsuccessfully appealed his sentence and then filed a state application for a writ of habeas corpus. He claimed that his trial counsel had unconstitutionally deprived him of effective assistance by, *inter alia*, failing

to object to inadmissible expert and lay testimony concerning truthfulness and to jury instructions that did not require a unanimous verdict for conviction. The state habeas trial court entered recommended findings of fact and conclusions of law regarding this claim, finding that trial counsel's failure to object to witness testimony on truthfulness was not deficient, as it was part of his trial strategy, and that Flores was not prejudiced by his trial counsel's performance; however, the trial court recommended that habeas relief be granted because trial counsel did not object to the jury instruction concerning unanimity.

The Texas Court of Criminal Appeals ("TCCA") nonetheless denied state habeas relief in a written order. Regarding the jury instructions, the TCCA stated that the trial court incorrectly analyzed the case "under the appellate standard of review for jury charge issues rather than the *Strickland* standard." More generally, the TCCA ruled that Flores had "not satisfied the prejudice component of his ineffective assistance of trial counsel claim."

Flores subsequently filed a federal habeas petition in the Southern District of Texas that listed four grounds for relief, including his claim that trial counsel repeatedly failed to object to inadmissible testimony concerning truthfulness. Applying the Antiterrorism and Effective Death Penalty Act's ("AEDPA") deferential standard of review, the district court denied his petition in a summary judgment. Regarding Flores' claim concerning witness testimony, the court determined that "trial counsel set forth a thorough explanation of his actions, his reasons for those actions, and how the actions fit his trial strategies." Though this strategy was ultimately unsuccessful, the court concluded that such assistance was not unconstitutionally ineffective. The district court also denied Flores a certificate of appealability ("COA").

Flores then motioned this court for a COA with respect to two of his habeas claims: his claim that trial counsel failed to object to inadmissible

testimony concerning truthfulness, and his claim that trial counsel failed to object to jury instructions that did not require a unanimous verdict. This court granted the motion in part, granting Flores a COA concerning his claim that "his trial counsel was ineffective for failing to object to improper expert and lay testimony commenting on the victim's truthfulness."

II.

Because the district court denied Flores' habeas petition in a summary judgment, we review the district court's factual and legal conclusions *de novo*. *Guy v. Cockrell*, 343 F.3d 348, 351 (5th Cir. 2003).

The parties agree that Flores' claim is subject to the deferential standard set out in AEDPA because it was adjudicated by Texas courts on the merits. *See Harrington v. Richter*, 562 U.S. 86, 99 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."). Under that standard, a federal court may not grant habeas corpus relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under AEDPA, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). A state court's findings of fact must be presumed correct unless the petitioner rebuts

the presumption "by clear and convincing evidence," 28 U.S.C. § 2254(e)(1), and its application of clearly established law is not unreasonable unless it is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

III.

Flores contends that the TCCA erroneously applied *Strickland v. Washington*, 466 U.S. 668 (1984), which provides the benchmark for constitutionally ineffective assistance of counsel, in its denial of his habeas petition. Under *Strickland*, Flores must satisfy a two-part test and show that (1) "his counsel provided deficient assistance," and (2) "there was prejudice as a result." *Richter*, 562 U.S. at 104; *see also Strickland*, 466 U.S. at 687.

We may review these prongs in either order, and a failure to satisfy one part of the test dooms the entire claim. *See Bouchillon v. Collins*, 907 F.2d 589, 595 (5th Cir. 1990) ("[T]he *Strickland* decision does not require us to analyze these criteria in any particular order; if we can dispose of this case on the prejudice prong the *Strickland* Court urged that we do so."). Concluding that Flores cannot satisfy the prejudice prong under its onerous standard of review, we do not reach the deficiency prong of the test.

A.

To establish prejudice under *Strickland*, a defendant must demonstrate "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; *see also id.* ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). But Flores must show more, because under AEDPA our review of a state court's application of *Strickland* is "doubly" deferential. *See Richter*, 562 U.S. at 105 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)); *Anaya v. Lumpkin*, 976 F.3d

545, 554 (5th Cir. 2020) (viewing the prejudice prong "with the requisite double deference").

To satisfy this doubly deferential standard of review, we must be convinced that "every reasonable jurist would conclude that it is reasonabl[y] likely" that Flores would have been acquitted had his trial counsel objected to the contested testimony. *Adekeye v. Davis*, 938 F.3d 678, 684 (5th Cir. 2019); *see also Fears v. Lumpkin*, No. 20-40563, 2022 WL 3755783, at *5 (5th Cir. Aug. 30, 2022). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Adekeye*, 938 F.3d at 684 (quoting *Richter*, 562 U.S. at 102).

B.

Flores argues that his trial was a contest of credibility—his credibility against the credibility of G.P.—and that there is a reasonable probability that, without the inclusion of inadmissible credibility testimony by lay and expert witnesses, the result of the proceedings would have been different. He thinks that "[t]rial counsel's repeated failure to properly object to this testimony had the effect of repeatedly hammering home for the jury the 'most important piece of evidence to know [is] if that child is being truthful.'"

But as this court has previously explained, such testimony is arguably cumulative evidence of G.P.'s credibility—and therefore harmless—where the jury had other opportunities to assess the complainant's credibility itself. *Fears*, 2022 WL 3755783, at *6. Here, the jury heard from G.P. directly, providing it with the opportunity to evaluate his demeanor in court firsthand and to compare his trial testimony to the earlier statements other witnesses alleged that he made. Because "[o]ne rationally could conclude that the bolstering evidence gave the jury nothing it didn't already have," *id.*, whether trial counsel's supposed error prejudiced Flores is debatable by reasonable jurists.

Furthermore, the jury was provided with more than enough evidence to convict Flores without the challenged testimony, and we are unable to say that every reasonable jurist would believe it reasonably likely that Flores would have been acquitted if trial counsel had objected. Under Texas law, a sexual assault conviction "is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred." TEX. CODE CRIM. PROC. ANN. art. 38.07(a). G.P. testified at trial and told multiple people—including his mother and his pediatrician—about the assaults well within one year of their taking place. The jury could have convicted Flores on this testimony alone, which is detrimental to Flores' prejudice argument.

The jury was presented with other evidence supporting Flores' conviction as well. Dr. Porras testified at length about his multiple examinations of G.P., and the jury was presented with G.P.'s medical records from these visits, which together support the jury's guilty verdict. The medical records and testimony show that in early October 2012, Dr. Porras observed thinning of a portion of G.P.'s rectum, which could have resulted from constipation or penetration. He diagnosed G.P. with constipation and prescribed Miralax, a stool softener, in addition to a robust treatment plan. G.P. returned later that month, at which point Dr. Porras observed a tear in G.P.'s anal lining, which, for Dr. Porras, "raise[d] a big red flag that this is actually a case of potential sexual abuse." This led to Dr. Porras' diagnosis of sexual abuse. In December 2012, Dr. Porras again treated G.P. and observed "complaints related to genitalia and anus" that he suspected were "related to psychological trauma of the incident." In addition to the medical evidence, the jury could have considered Flores' flight to El Salvador after finding out that there were sexual abuse allegations against him as an acknowledgment of wrongdoing.

Ultimately, we are unconvinced that every reasonable jurist would believe it reasonably likely that Flores would have been acquitted absent the challenged testimony. AEDPA's demanding standard of review thus requires us to defer to the TCCA's decision, and we AFFIRM the judgment of the district court.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 7, 2023
Lyle W. Cayce
Clerk

No. 21-20579

FIDEL FLORES,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-2252

Before KING, JONES, and DUNCAN, *Circuit Judges*.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

APPENDIX B –

Fifth Circuit Court of Appeals Order Granting in Part and Denying in Part Flores' Application for Certificate of Appealability, entered May 17, 2022 (*Flores v. Lumpkin*, Case No. 21-20579).

United States Court of Appeals for the Fifth Circuit

No. 21-20579

FIDEL FLORES,

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 Southern District of Texas
USDC No. 4:20-CV-2252

ORDER:

Fidel Flores, Texas prisoner # 02018090, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 petition challenging his conviction for aggravated sexual assault of a child under 14. Flores contends that (1) his trial counsel was ineffective for failing to object to improper expert and lay testimony commenting on the victim's truthfulness; (2) his trial counsel was ineffective for failing to object to the trial court's erroneous jury instruction on unanimity; and (3) the cumulative effect of counsel's unprofessional errors entitles him to relief from his

conviction. For the following reasons, the COA is granted in part and denied in part.

To obtain a COA, Flores must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), by "show[ing] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted); 28 U.S.C. § 2253(c)(2).

With respect to his claims that counsel failed to object to the jury instruction on unanimity and that he warrants relief based on the cumulative effect of counsel's asserted errors, Flores fails to make the requisite showing, and a COA is accordingly DENIED as to those issues. Flores has shown, however, that reasonable jurists could debate the disposition of his claim that counsel was ineffective for failing to object to expert and lay opinion testimony regarding the victim's truthfulness, and a COA is GRANTED on that issue only. The Clerk's Office will establish a briefing schedule that includes the respondent.

/s/ Carl E. Stewart
CARL E. STEWART
United States Circuit Judge

APPENDIX C –

U.S. District Court's Final Judgment and Memorandum Opinion and Order, entered September 28, 2021 (*Flores v. Lumpkin*, Civil Action No. H-20-2252).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FIDEL FLORES,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. H-20-2252
	§	
BOBBY LUMPKIN,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

For the reasons stated in this Court's *Memorandum Opinion and Order* of even date, this lawsuit is **DISMISSED WITH PREJUDICE**.

This is a **FINAL JUDGMENT**.

SIGNED at Houston, Texas, on this the 28th day of September, 2021.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FIDEL FLORES,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. H-20-2252
	§	
BOBBY LUMPKIN,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Petitioner, a state inmate represented by counsel, filed this habeas petition challenging his state conviction under 28 U.S.C. § 2254. Respondent filed a motion for summary judgment (Docket Entry No. 10), to which petitioner filed a response in opposition (Docket Entry No. 15).

Having considered the motion, the response, the pleadings, the record, and the applicable law, the Court **GRANTS** the motion for summary judgment and **DISMISSES** this case for the reasons shown below.

I. BACKGROUND AND CLAIMS

A jury found petitioner guilty of aggravated sexual assault of a child under the age of six and assessed a forty-five year sentence. The conviction was affirmed on appeal, *Flores v. State*, No. 14-15-00754-CR (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd), and discretionary review was refused. Petitioner's application for state habeas relief was denied.

Petitioner timely filed the instant federal habeas petition, claiming that trial counsel was ineffective in failing to

1. object to inadmissible expert and lay witness testimony concerning truthfulness;

2. object to the jury instructions not requiring a unanimous verdict;

3. object to extraneous bad acts evidence presented by the State without notice; and

4. present available mitigating punishment evidence.

Respondent argues that these claims have no merit and should be dismissed.

II. STATEMENT OF FACTS

In affirming petitioner's conviction, the intermediate state court of appeals set forth the following statement of facts in its opinion:

> Appellant is complainant's uncle; appellant's brother is complainant's father. Appellant lived with complainant, complainant's mother, and complainant's father in their one-bedroom apartment during the time frame relevant to the allegations in this case.
>
> Complainant's mother began working three days a week beginning in 2011. On the days she worked, complainant's mother left appellant as the sole caretaker of complainant. There were no problems initially, but beginning in March 2012 complainant started complaining of rectal pain and began exhibiting anger and aggression towards appellant.
>
> On May 29, 2012, complainant—who was four years old at the time—told his mother that he did not want to stay with appellant during the day. When asked why, complainant replied that appellant would put a "stick" in his "culito"—the term complainant used to refer to his anus.

> Complainant's mother told his father about complainant's outcry but complainant's father did not believe that appellant had sexually assaulted complainant. Complainant's father refused to evict appellant from the apartment. Complainant's mother left complainant with appellant the next day because she did not have anybody else to watch him, but she promptly made alternate childcare arrangements for complainant.
>
> Appellant picked complainant up from school one day near the end of September 2012 because the person who would normally pick complainant up was unavailable. The next morning complainant told his mother that appellant had sexually assaulted him again the previous afternoon.
>
> Complainant's mother took complainant to his pediatrician on October 2, 2012. Complainant's mother told the pediatrician that complainant had been complaining of rectal pain for three months. The pediatrician observed that complainant had a small tear and an area of thinning in the anus. The pediatrician believed the rectal pain was a result of constipation and prescribed a stool softener. Complainant's demeanor was normal and neither complainant nor complainant's mother mentioned sexual abuse at that time.
>
> Complainant's mother took complainant to the pediatrician again on October 23, 2012, because of continuing rectal pain. During that appointment, complainant told the pediatrician that appellant had "put a stick in his bottom several times." The pediatrician reported the abuse to police and to Child Protective Services.
>
> Appellant was charged with a single count of aggravated sexual assault of a child. The jury found appellant guilty and the trial court assessed punishment at 45 years' imprisonment.

Flores, at *2–3 (footnote omitted).

Petitioner disputes the appellate court's statement that the pediatrician observed a small anal tear on October 2, 2012. Petitioner correctly notes that the medical records show that the tear was not observed until October 23, 2012, and that the medical record dated October 2, 2012, made no mention of an anal tear. (7 RR 38.) However, Dr. Porras testified

at trial that, during his physical examination of the complainant's anal area on October 2, 2012, he observed a small tear with an area of thinning. (3 RR 146–147.) He prescribed a stool softener in the event the complainant was experiencing constipation. *Id.*, p. 149. Porras further testified that, during his subsequent physical examination of the complainant on October 23, 2012, he observed a small fissure in the complainant's anal area. *Id.*, p. 155. These alleged discrepancies, however, are not relevant to the Court's disposition of petitioner's habeas claims.

III. LEGAL STANDARDS

A. Habeas Review

This petition is governed by provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, federal habeas relief cannot be granted on legal issues adjudicated on the merits in state court unless the state adjudication was contrary to clearly established federal law as determined by the Supreme Court, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court. *Harrington v. Richter*, 562 U.S. 86, 98–99 (2011); *Williams v. Taylor*, 529 U.S. 362, 404–05 (2000); 28 U.S.C. §§ 2254(d)(1), (2). A state court decision is contrary to federal precedent if it applies a rule that contradicts the governing law set forth by the Supreme Court, or if it confronts a set of facts that are materially indistinguishable from such a decision and arrives at a result different from the Supreme Court's precedent. *Early v. Packer*, 537 U.S. 3, 7–8 (2002).

However, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102. As stated by the Supreme Court in *Richter*,

> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal.

Id., at 102–103 (emphasis added; internal citations omitted).

The AEDPA affords deference to a state court's resolution of factual issues. Under 28 U.S.C. § 2254(d)(2), a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless it is objectively unreasonable in light of the evidence presented in the state court proceeding. *Miller–El v. Cockrell*, 537 U.S. 322, 343 (2003). A federal habeas court must presume the underlying factual determination of the state court to be correct, unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Miller–El*, 537 U.S. at 330–31. This presumption of correctness extends not only to express factual findings, but also to implicit or unarticulated findings which are necessary to the state court's conclusions of mixed law and fact. *Murphy v. Davis*, 901 F.3d 578, 597 (5th Cir. 2018).

B. Deferential Review

Petitioner contends that this Court need not apply the AEDPA deferential standard of review to the state courts' decisions regarding three of his four claims. In support, he states that the Texas Court of Criminal Appeals issued a written order on collateral review expressly denying relief on the jury charge issue, which was only one of his four habeas claims. He argues that, because the court did not deny relief "on the merits" as to his other three habeas claims, this Court can review those claims *de novo*.

Petitioner's argument is incorrect, as it takes the state courts' actions out of context. The state trial court recommended that habeas relief be granted as to petitioner's claim regarding the jury charge; however, it rejected petitioner's other habeas claims. The Texas Court of Criminal Appeals, upon review of the trial court's recommendation, disagreed with the trial court and issued an order to that effect on June 24, 2020. (Docket Entry No. 12-19, p. 1.) The Texas Court of Criminal Appeals *also* contemporaneously issued an order denying habeas relief as to the application for state habeas relief. (Docket Entries No. 12-15, p. 1, "Denied with written order," issued June 24, 2020; No. 12-16, p. 1, same.) Consequently, the Texas Court of Criminal Appeals denied relief on the merits as to all four of petitioner's habeas claims, and the AEDPA standard of review apply to all claims in this proceeding.

C. Summary Judgment

In deciding a motion for summary judgment, the district court must determine whether the pleadings, discovery materials, and the summary judgment evidence show that there is

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Once the movant presents a properly supported motion for summary judgment, the burden shifts to the nonmovant to show with significant probative evidence the existence of a genuine issue of material fact. *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000).

While summary judgment rules apply with equal force in a section 2254 proceeding, the rules only apply to the extent that they do not conflict with the federal rules governing habeas proceedings. Therefore, section 2254(e)(1), which mandates that a state court's findings are to be presumed correct, overrides the summary judgment rule that all disputed facts must be construed in the light most favorable to the nonmovant. Accordingly, unless a petitioner can rebut the presumption of correctness of a state court's factual findings by clear and convincing evidence, the state court's findings must be accepted as correct by the federal habeas court. *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002), *overruled on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004).

IV. ANALYSIS

A federal habeas petitioner's claim that he was denied effective assistance of counsel is measured by the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a petitioner must establish both constitutionally deficient performance by counsel and actual prejudice as a result of counsel's deficient performance.

Id. at 687. The failure to demonstrate either deficient performance or actual prejudice is fatal to an ineffective assistance claim. *Green v. Johnson*, 160 F.3d 1029, 1035 (5th Cir. 1998).

A counsel's performance is deficient if it falls below an objective standard of reasonableness. *Strickland*, at 688. In determining whether counsel's performance was deficient, judicial scrutiny must be highly deferential, with a strong presumption in favor of finding that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy. *West v. Johnson*, 92 F.3d 1385, 1400 (5th Cir. 1996). To overcome this presumption, a petitioner must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). Actual prejudice from a deficiency is shown if there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland*, at 694.

Claims of ineffectiveness are considered mixed questions of law and fact and are analyzed under the "unreasonable application" standard of section 2254(d)(1). *See Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010). Where, as here, the state court adjudicated the merits of an ineffective assistance claim, this Court must review petitioner's claims under the "doubly deferential" standards of both *Strickland* and § 2254(d). *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). In such cases, the "pivotal question" for this Court is not whether defense counsel's performance fell below *Strickland*'s standards, but whether the state

court's application of *Strickland* was unreasonable. *Harrington v. Richter*, 562 U.S. 86, 101, 105 (2011).

Petitioner claims that trial counsel was ineffective in the following instances.

A. Testimony as to truthfulness

Petitioner claims that trial counsel failed to object to inadmissible expert and lay witness testimony concerning the complainant's truthfulness.

Trial counsel submitted the following affidavit on state collateral review, responding to petitioner's claim as follows:

> During [petitioner's] trial, the State repeatedly sought to introduce testimony that I felt was improper in light of the Texas Court of [Criminal] Appeals' longstanding holding from *Yount v. State* that Rule 702 of the Texas Rules of Evidence does not permit an opinion that the complainant, or class of persons to which the complainant belongs, is truthful. *Yount v. State*, 872 S.W.2d 706, 712 (Tex. Crim. App. 1993). Of course such testimony is not permitted and is inherently harmful because it "does more than 'assist the trier of fact to understand the evidence or to determine a fact in issue' but rather, it *decides* an issue *for* the jury." *Yount*, 872 S.W.2d at 709 (emphasis from original).
>
> As the record reflects, I attempted to keep this harmful testimony out by objecting several times throughout the trial. Indeed, knowing how harmful this testimony would be in our trial, it was my strategy to keep it out in some instances. Despite my repeated objections and complaints to the trial court, the State unfairly, and in direct violation of binding precedent, kept offering the inadmissible evidence. And as the Court of Appeals recognized, at various points, the trial court erred in letting the inadmissible expert testimony into evidence.
>
> The Court of Appeals ultimately decided that the trial court's errors, in letting inadmissible expert testimony into evidence, did not harm [petitioner] because the same or similar testimony was admitted, without objection, at other points in the record. It was my intention and strategy to keep this harmful evidence out, as evidenced by my repeated objections in some instances. I also d[i]d not

object in several instances because I did not believe the testimony to be that damaging. For example, the complainant's mother testified, after objection to the question, that she believed the child because the allegations "were terrible." In my opinion, the witness never gave an opinion as to the character or veracity of the child *per se*; instead, her testimony was based on the nature of the outcry and not on the believability of the child. Moreover, the mother never took the child to the police until three months later and [after] a second outcry. In addition, the complainant's mother never mentioned the allegations to Dr. Porras on two occasions and the child never mentioned the violation to Dr. Porras the first visit. The child also appeared calm at the first visit. Finally, despite hearing the first outcry, the complainant's mother left the child alone with the defendant on one occasion and never had the defendant removed from the home. In other words, her opinion at trial was not consistent with her actions before that testimony.

The testimony of the pediatrician involving believability of the child was likewise not that damaging. The testimony of the pediatrician was not an opinion to the complainant's truthfulness, so I did not object. I did object to some questions relating to consistency being and [*sic*] indicator of truthfulness, but I felt that the questions did not specifically inquire about this child's truthfulness. In fact, I wanted the doctor to make this assessment because in fact this child was not so consistent. For example, the child did not mention both incidents allegedly committed by the defendant at all times. Also, the consistency in this case was suspicious in my opinion and indicated the mother's rehearsal of complainant. More importantly, the doctor changed his initial opinion that complainant suffered from constipation not sexual abuse. The opinion by the doctor only changed when he heard the child's complaint and was not based on medical diagnoses[.] I wanted to emphasize to the jury the medical diagnoses did not support the doctor or child's testimony regarding sex abuse.

Another reason I did not always object to testimony relating to credibility of complainant is because I did not believe the testimony always relate [*sic*] to credibility *per se* or constituted of [*sic*] characteristics of child abuse of a victim in general. The strategy I employed in the defense of my client also dictated my decision to object. I definitely intended to use the complainant's father as a witness to establish the child was not believable and did not want the judge to exclude that testimony. I intended to argue that the State did the same thing if the State objected to the testimony of the father. I also intended to use the second outcry that I felt was suspicious because it was supposedly

> made to the mother the same outcry witness in the first complaint by the child and served her purpose to remove defendant from the home. Furthermore, I felt I objected to the objectionable believability testimony and do not feel I waved any objections later given the fact that the testimony was different in nature. Also, I did not want to object repeatedly in front of the jury and felt the judge would overrule my objections to all potential credibility evidence. Instead, I wanted the jury to see the prosecutor's blatant disregard of the evidence and court rulings.
>
> While indeed I did not feel the testimony elicited by the State or its questions of witnesses involving believability of the complainant was always proper, I also felt that it was not harmful and sought to introduce such evidence myself through the child's father. I do not remember specifically each witness in this case. It has been three years since the trial and I have suffered a heart attack, experienced open-heart surgery, a carotid artery surgery, and four heart procedures.
>
> In conclusion, I indeed vigorously objected to believability evidence in general. I do not feel I was not deficient [*sic*] in representing my client if I failed to object to some questions I should have objected to. I clearly had a strategic purpose in not objecting in some instances. However, this case posed substantial obstacles. The medical evidence indicated some violation of the child had occurred and the child accused my client in a forceful manner. Also, the defendant fled the country when the accusations were raised by the child. In addition, the prosecution, directly and indirectly, aggressively posed credibility questions to witnesses even after the Court sustained my objections to those credibility questions.

(Docket Entry No. 12-18, pp. 301–03.) Trial counsel also answered specific questions posed by petitioner and the prosecution, as ordered by the trial court. *Id.*, pp. 303–308.

In rejecting petitioner's ineffective assistance claim, the trial court on collateral review made the following relevant findings of fact:

> 8. On September 16, 2019, trial counsel, Ralph Martinez, filed an affidavit responding to the applicant's claims [of ineffective assistance of trial counsel].

9. The trial court finds the affidavit of Ralph Martinez to be credible.

10. [T]he applicant claims he was denied the effective representation of counsel at trial when trial counsel failed to object to inadmissible expert and lay opinion evidence regarding truthfulness.

11. Trial counsel objected to this evidence several times throughout the trial.

12. At times, the trial court sustained trial counsel's objections. At times, the trial court overruled his objections. At times, trial counsel did not object.

13. Trial counsel did not always object because he wanted to show the witnesses were consistently fabricating and failing to disclose evidence they disclosed other times.

14. The State charged the applicant with conduct committed on or about June 1, 2012.

15. During trial, the State presented evidence that the complainant was sexually abused on at least two occasions: one around the end of May 2012, and one in late September 2012.

16. It was trial counsel's trial strategy to show that the complainant was consistent in his disclosures about the abuse because he was consistently lying. Trial counsel's theory was that the complainant had been coached and manipulated by his mother who wanted the applicant out of the house. Trial counsel wanted to show that the complainant consistently failed to disclose the uncharged offense (the offense that occurred in late September 2012).

17. Trial counsel did not object to pediatrician Dr. Giro Porras'[s] testimony that what the complainant told the officer was consistent with what the complainant said earlier because consistency does not equate to credibility. Trial counsel's strategy was to show the complainant was consistently lying and that he was coached by others like his mother and child protection workers.

18. Trial counsel did not object to Dr. Giro Porras'[s] testimony that there was reason to believe some sort of sexual encounter occurred because trial counsel wanted to show that regardless of any observation, no notation of sexual abuse was made by the doctor or reported to authorities. Additionally, the doctor never said that the applicant was identified as the person who committed the alleged assault.

19. Trial counsel did not object to Officer Montoyis Knotts'[s] testimony that sensory details are important because such details lend to the credibility of the outcry because trial counsel did not take it as a comment on the complainant's credibility. Trial counsel's position was that details show memorization by the complainant and manipulation by the mother and child abuse investigators. Additionally, trial counsel wanted to show that despite the details, the complainant never mentioned the uncharged incident he reported to his mother.

20. Trial counsel did not object to Tasha Roger-James's testimony that sensory details are important because such details "add validity to what the child has experienced[;] it would be difficult to describe something that is memorized as opposed to having a sensory attached to it" because trial counsel did not believe the answer made sense. He did not want to highlight the answer by objecting to it.

21. Trial counsel did not object to Tasha Roger-James's testimony that the complainant was consistent in telling of his abuse because to trial counsel, consistency meant being consistent in telling a false story, consistent in not disclosing the uncharged abuse, and memorization and manipulation, not credibility.

22. Because he did not find the answer harmful, trial counsel did not object to Dr. Danielle Madera's testimony that there is no specific type of emotion she would expect to see with a child to think that someone should be able to believe the child's word.

23. Trial counsel did not object to Dr. Madera's testimony that sensory details are important in determining the reliability or validity of the disclosure because Dr. Madera was not specifically talking about the complainant. Additionally, Dr. Madera said that she did not have work experience in that area.

24. Trial counsel objected to Dr. Madera's testimony that in her experience, children do not typically lie about sexual abuse, but the trial court overruled the objection. Trial counsel did not want to move to strike Dr. Madera's answer because he did not want to highlight it.

25. Trial counsel did not object to Dr. Madera's testimony that children don't know how to lie about things such as sex, because Dr. Madera did not testify that the complainant did not have that knowledge or that the knowledge wasn't given to him by his mother.

26. Trial counsel did not object to Staci Passe's testimony that the complainant seemed authentic because he wanted to argue that the complainant was authentic and traumatized yet never reported the uncharged incident.

27. Trial counsel did not object to the complainant's mother's testimony that the complainant was consistent because consistent to him meant consistent in telling a false story, consistent in not disclosing the uncharged abuse, and showed memorization and manipulation, not credibility.

28. Trial counsel did not object to the complainant's mother's testimony that what the complainant told Dr. Porras was the same thing he told her because Dr. Porras heard it from the mother and child, yet never noted sex abuse in his report or reported it. Trial counsel felt he could show the doctor did not believe the allegations.

29. Trial counsel believes that he objected to the complainant's mother's testimony that she believed the complainant, but he was overruled.

30. Trial counsel did not object to the complainant's mother's testimony that she believed the complainant.

31. Trial counsel wanted to show the complainant said penetration with a stick and later show that was not supported by the medical evidence.

32. Trial counsel did not object when the applicant testified that the complainant had been consistent regarding the type of sexual abuse with each witness that testified at trial because it was consistent with his trial strategy that consistent meant consistent in telling a false story,

> consistent in not disclosing the uncharged abuse, and memorization and manipulation not credibility.

(Docket Entry No. 12-18, pp. 329–332, record citations omitted.) The state court also made the following relevant conclusions of law:

> 6. This Court finds that the applicant fails to show trial counsel's repeated failure to object to the inadmissible expert and lay testimony concerning truthfulness of the complainant, and of the class of persons to which the complainant belongs, constitutes deficient performance by counsel.
>
> 7. After consideration of the totality of the evidence, this Court finds that trial counsel's repeated failure to object to the inadmissible testimony did not prejudice the defense.

Id., p. 337. The Texas Court of Criminal Appeals denied habeas relief. (Docket Entry No. 12-15, p. 1, No. 12-16, p. 1.)

Petitioner argues first that this Court need not accord deference to the state court's findings as to this claim because no merits determination was made by the Texas Court of Criminal Appeals. As the Court noted earlier, petitioner's argument is incorrect, as the Texas Court of Criminal Appeals denied habeas relief, thus rejecting on the merits all of petitioner's habeas claims. That it issued a specific order as to one of the four claims does not negate the overriding fact that it denied *all* of petitioner's claims. Thus, this Court will apply the AEDPA standards of deferential review to all of petitioner's claims.

Petitioner argues next that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. He further contends that counsel's failure to object to the inadmissable expert witness

testimony did not constitute a reasonable trial strategy. These complaints are little more than disagreements with the state court's determinations and decision, and do not meet petitioner's burden of proof under AEDPA. The record shows that trial counsel set forth a thorough explanation of his actions, his reasons for those actions, and how the actions fit his trial strategies. The trial court found counsel's affidavit testimony to be credible, and determined that petitioner failed to establish deficient performance or prejudice under *Strickland*. That a trial strategy was ultimately unsuccessful or a different attorney would have used a different trial strategy does not establish ineffective assistance of counsel. *See Martinez v. Dretke*, 99 F. App'x 538, 543 (5th Cir. 2004).

The Texas Court of Criminal Appeals rejected petitioner's claims for habeas relief on collateral review. Petitioner fails to show that the state court's determination was contrary to, or involved an unreasonable application of, *Strickland* or was an unreasonable determination of the facts based on the evidence in the record. Respondent is entitled to summary judgment dismissal of this claim for ineffective assistance of counsel.

B. Jury instructions

Petitioner also complains that trial counsel should have objected to the jury instructions because they did not require a unanimous verdict. According to petitioner, had counsel raised the objection, the results of his trial would have been different or his conviction would have been reversed on direct appeal. (Docket Entry No. 7, pp. 70–71.)

Petitioner challenged the validity of the jury charge on direct appeal. He argued that the jury charge erroneously allowed a non-unanimous verdict, and that the error should be reviewed under the constitutional harm standard of Texas Rule of Appellate Procedure ("TRAP") 44.2(a).

The intermediate state court of appeals agreed that evidence of two separate instances of sexual abuse had been presented at trial, and that the charge failed to require the jury to agree unanimously on which of the two instances the verdict was based. *Flores v. State*, 513 S.W.3d 146, 154 (Tex. App. – Houston [14th Dist.] 2016, writ ref'd). The court noted that a constitutional unanimity violation is subject to the constitutional harm standard of TRAP 44.2(a) when properly preserved by a timely and specific objection at trial. If, as here, no objection is made, the constitutional unanimity component of the complaint is forfeited, and the defendant must demonstrate egregious harm to warrant a reversal. *Id.* at 158. The court reviewed the evidence and determined that no harm had been shown:

> Although the jury charge in this case permitted a non-unanimous verdict, the evidence presented combined with the jury's rejection of appellant's defense demonstrates that *appellant did not suffer actual harm*. *See Arrington*, 451 S.W.3d at 845 ("Although the instructions failed to identify the particular acts necessary to support each count, the evidence in the entire record and the analytical meaning of the jury's verdicts in the aggregate show that the erroneous instructions did not cause actual harm to appellant.").

Id. at 161, emphasis added.

Subsequently, on state habeas review, petitioner argued that trial counsel was ineffective in failing to raise a constitutional unanimity objection to the jury charge. Relying

on the intermediate appellate court's opinion, petitioner argued that, had counsel objected, the result of the proceedings would have been different. In agreeing with petitioner, the state trial court made the following relevant findings of fact on habeas review:

> 36. [T]he applicant claims he was denied the effective representation of counsel at trial when trial counsel failed to object to the jury instructions that did not require a unanimous verdict.
>
> 37. Trial counsel did not assert any objections to the court's jury charge.
>
> 38. The applicant challenged the jury charge on direct appeal.
>
> 39. The appellate court found that the jury charge erroneously allowed for a non-unanimous verdict.
>
> 40. The Texas Constitution requires jury unanimity in all felony cases, and Texas statute requires jury unanimity in all criminal cases.
>
> 41. Guaranteeing jury unanimity is ultimately the responsibility of the trial judge, and the trial judge is therefore obligated to submit a charge that does not allow for the possibility of a non-unanimous verdict.
>
> 42. Trial counsel must timely and specifically object to a jury charge that allows for the possibility of a non-unanimous verdict in order to preserve the Texas constitutional right to a unanimous verdict on appeal.
>
> 43. When an erroneous jury charge allowing a non-unanimous verdict is properly preserved, the constitutional harm standard under [TRAP] 44.2(a) applies.
>
> 44. Under the constitutional harm standard, the court of appeals *must* reverse [a] judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

45. Because trial counsel did not object to the jury charge the court of appeals did not apply the constitutional harm standard but instead applied the egregious harm standard.

46. For error to be egregious, it must have affected the very basis of the case, deprived the accused of a valuable right, or vitally affected a defensive theory.

47. The appellate court found that although the jury charge allowed for a non-unanimous verdict, the record demonstrates that the applicant did not suffer egregious harm.

* * * *

61. The appeals court held that "it is very unlikely that any member of the jury believed that the second incident took place but that the first did not."

(Docket Entry No. 12-18, pp. 337–339, citations omitted, emphasis in original.) The state trial court also made the following relevant findings, labeled as conclusions of law:

9. This Court finds that trial counsel's failure to timely and specifically object to the erroneous jury charge that permitted a non-unanimous verdict constituted deficient performance by counsel.

10. This Court finds that trial counsel's failure to object to the erroneous jury charge prejudiced the defense by allowing a jury instruction that allowed a non-unanimous verdict from the jury.

11. The court finds that had trial counsel timely and specifically objected to the erroneous jury charge, the court of appeals would have applied [TRAP] 44.2(a).

* * * *

13. The court finds that despite the appeals court finding that it was "unlikely that different members of the jury convicted the [applicant] based on different instances of conduct" a reasonable doubt still exists

> that one or more jurors did convict based on different instances of conduct.
>
> 14. The court finds that had the appeals court applied analysis under [TRAP] 44.2(a) the existence of a reasonable doubt as to the unanimity of the jury verdict would have required the court of appeals to reverse the conviction.
>
> * * * *
>
> 18. As such the court finds that but for trial counsel's deficient performance regarding his failure to timely and specifically object to the erroneous jury charge allowing a non-unanimous jury verdict the outcome of his appeal would have been different resulting in a reversal of his conviction in the trial court.

Id., pp. 342–343, original emphasis. The state trial court then made the following recommendation to the Texas Court of Criminal Appeals:

> In light of these findings, it is the recommendation of this Court that Mr. Flores's application for a writ of habeas corpus be GRANTED, and that Flores's conviction, sentence, and certification be ordered set aside for disposition in accordance with the laws of the United States of America and the State of Texas.

Id., p. 343.

The Texas Court of Criminal Appeals, however, was not of like mind. The court did not adopt the trial court's findings and recommendation as to the jury charge issue, and denied relief in a separate written order:

> Applicant was convicted of super aggravated sexual assault of a child under six and sentenced to forty-five years' imprisonment. The Fourteenth Court of Appeals affirmed his conviction. *Flores v. State*, 513 S.W.3d 146 (Tex. App.—Houston [14th Dist.] Nov. 29, 2016, pet. ref'd.). Applicant filed this application for a writ of habeas corpus in the county of conviction, and the

> district clerk forwarded it to this Court. See TEX. CODE CRIM. PROC. art. 11.07.
>
> Applicant contends that trial counsel was ineffective because counsel did not object to the jury instructions which did not require an unanimous verdict. The trial court determined that trial counsel's performance was deficient and that Applicant was prejudiced. However, the trial court analyzed the case under the appellate standard of review for jury charge issues rather than the *Strickland* standard, which focuses on harm at trial.
>
> Based on the Court's review of the record, this Court finds that Applicant has not satisfied the prejudice component of his ineffective assistance of trial counsel claim. *Strickland v. Washington*, 466 U.S. 668 (1984). Therefore, we deny relief.

(Docket Entry No. 12-19, p. 1.) The court issued the written order in conjunction with an order denying petitioner's application for habeas relief. (Docket Entry No. 12-15, p. 1, No. 12-16, p. 1.)

The pivotal question for this Court under AEDPA is not whether trial counsel's failure to object fell below *Strickland*'s standards or caused actual prejudice, but whether the state court's application of *Strickland* was unreasonable. Moreover, the AEDPA standard of review looks not to whether the Texas Court of Criminal Appeals erred in not adopting the trial court's findings, but whether its own application of *Strickland* was unreasonable or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence in the record.

To establish actual prejudice under *Strickland*, a petitioner must establish that, but for counsel's deficient performance, there is a reasonable probability that the results of the proceeding would have been different. The Texas Court of Criminal Appeals essentially

found that actual prejudice was not established, in that petitioner failed to show that, but for trial counsel's failure to object, there is a reasonable probability that the results of the trial would have been different. The court's application of *Strickland* was reasonable. Moreover, petitioner does not establish actual prejudice in terms of his trial results. Had the charge been corrected to add a proper unanimity instruction, it is purely speculative at this point whether the verdict would have been different.[1]

Petitioner argues that the Texas Court of Criminal Appeals misapplied *Strickland* by limiting "the proceeding" to trial proceedings without encompassing appellate proceedings. According to petitioner, he established actual prejudice under *Strickland* because, but for counsel's failure to object to the jury charge, he would have prevailed on appeal by virtue of TRAP 44.2(a). In support, he cites *Strickland*, 466 U.S. at 694, *Lee v. United States*, 137 S. Ct. 1958, 1969–70 (2017), and *Little v. Johnson*, 162 F.3d 855, 860–61 (5th Cir. 1998), for their use of the terms "the outcome," "criminal prosecution as a whole," and "ultimate result," respectively, in reference to the actual prejudice prong. However, in none of the cases did the court apply those terms in the manner intended by petitioner. Although

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[1]The state trial court found that "counsel's failure to object to the erroneous jury charge prejudiced the defense by allowing a jury instruction that allowed a non-unanimous verdict from the jury." (Docket Entry No. 12-18, p. 342, No. 10.) This finding, however, was not a finding of actual prejudice under *Strickland*, as the trial court did not find that, but for counsel's failure to object to the jury charge, there is a reasonable probability that the results of the trial (or proceeding) would have been different. The state trial court addressed prejudice in No. 18: "[T]he court finds that but for trial counsel's deficient performance regarding his failure to timely and specifically object to the erroneous jury charge allowing a non-unanimous jury verdict the outcome of his appeal would have been different resulting in a reversal of his conviction in the trial court." *Id.*, p. 343. This did not constitute a finding of actual prejudice as to the trial proceedings.

petitioner's view might be relevant to a *Strickland* claim premised on trial counsel's failure to preserve error for appeal, petitioner raised no such claim here.

Even if this Court were to accept petitioner's definition of "actual prejudice" – that is, "but for trial counsel's failure to object to the jury charge, there is a reasonable probability that the results of the appeal would have been different" – habeas relief would not be warranted under AEDPA. The intermediate state court of appeals did not address whether petitioner's conviction would have been reversed under TRAP 44.2(a) had counsel objected to the jury charge. According to petitioner, this Court must look to the state trial court's finding that his appeal would have been reversed on appeal under TRAP 44.2(a) had counsel "simply objected" to the jury charge. (Docket Entry No. 15, p. 16.) However, AEDPA deference to a state trial court's findings does not apply where, as in this case, they were expressly rejected by, or are directly inconsistent with, the highest state court's resolution of the case. *See Williams v. Quarterman*, 551 F.3d 352, 358 (5th Cir. 2008).

Neither petitioner nor the record establishes that, but for trial counsel's failure to object to the jury charge, there is a reasonable probability that the results of the appeal would have been different. TRAP 44.2(a) does not provide for automatic reversal of a conviction in light of constitutional error. To the contrary, the rule requires a harm analysis, in that reversal is warranted "unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." Although not in context of a constitutional harm analysis, the intermediate state court of appeals found that:

> Although the jury charge in this case permitted a non-unanimous verdict, the evidence presented combined with the jury's rejection of appellant's defense demonstrates that *appellant did not suffer actual harm*. *See Arrington*, 451 S.W.3d at 845 ("Although the instructions failed to identify the particular acts necessary to support each count, the evidence in the entire record and the analytical meaning of the jury's verdicts in the aggregate show that the erroneous instructions did not cause actual harm to appellant.").

Flores at 161, emphasis added.

The Texas Court of Criminal Appeals on collateral review expressly denied this claim for habeas relief. Petitioner fails to show that the state court's determination was contrary to, or involved an unreasonable application of, *Strickland* or was an unreasonable determination of the facts based on the evidence in the record. Respondent is entitled to summary judgment dismissal of petitioner's claim for ineffective assistance of counsel.

C. Extraneous offense

Petitioner contends that trial counsel should have objected to testimony that he gave gifts to the complainant, because it suggested petitioner was "grooming" the complainant for sexual favors. Specifically, he argues counsel failed to object to (1) testimony from the complainant's mother that petitioner gave him gifts and that the complainant was happy to receive them; (2) the complainant's testimony that petitioner gave him gifts; and (3) Dr. Madera's testimony that "grooming" can include gifts.

In responding to this allegation of ineffective assistance, trial counsel testified in his affidavit that, "I did not think that was objectionable. Complaint [*sic*] was close to petitioner

and the gifts showed it. There was nothing said that supported "grooming." (Docket Entry No. 12-18, p. 307.)

In rejecting petitioner's claim, the state trial court made the following relevant findings of fact on collateral review:

> 33. [T]he applicant claims he was denied the effective representation of counsel at trial when trial counsel failed to object to extraneous bad-act evidence which was not noticed by the State.
>
> 34. The applicant fails to show [that] purchasing gifts constitutes a bad act.
>
> 35. Trial counsel did not object to testimony that the applicant purchased gifts for the complainant because he did not think it was objectionable. The complainant and the applicant were close and the gifts showed [it]. Trial counsel did not believe there was anything that supported grooming.

(Docket Entry No. 12-18, pp. 336–337, record citations omitted.) The trial court also made the following relevant finding as a conclusion of law:

> 8. This Court finds that the applicant fails to show trial counsel's failure to object to the unnoticed extraneous bad act evidence of buying gifts constituted deficient performance by counsel.

Id., pp. 341–342. The Texas Court of Criminal Appeals denied habeas relief. (Docket Entry No. 12-15, p. 1, No. 12-16, p. 1.)

The state trial court expressly found that petitioner failed to show that purchasing gifts was a bad act. Moreover, the record shows that Dr. Madera did not testify that *petitioner* was grooming the complainant by buying him gifts. To the contrary, the record shows that the complainant was petitioner's nephew, and that they had a pre-existing family relationship.

Trial counsel reasonably declined to object to the complained-of evidence, and no deficient performance is shown. Nor does petitioner show that, but for counsel's failure to object, there is a reasonable probability that the result of the trial would have been different. Petitioner establishes neither deficient performance nor prejudice under *Strickland.*

The state court on collateral review rejected petitioner's claims for habeas relief. Petitioner fails to show that the state court's determination was contrary to, or involved an unreasonable application of, *Strickland* or was an unreasonable determination of the facts based on the evidence in the record. Respondent is entitled to summary judgment dismissal of petitioner's claim for ineffective assistance of counsel.

D. Mitigation evidence

Petitioner contends that trial counsel was ineffective in failing to present mitigating evidence at punishment through the testimony of available friends and members of his family. In his application for state habeas relief, petitioner submitted several affidavits from members of his family, presenting proposed testimony as to petitioner's general character or examples of his good character. (Docket Entry No. 12-18, Exhibit 6.)

In his affidavit submitted on state habeas review, trial counsel testified in relevant part as follows:

> (j) [Petitioner] and his family provided me no mitigating evidence of value except testimony by family members. I wanted to limit punishment witnesses because his family, the mitigation witnesses I knew about also knew the circumstances and reasons for [petitioner's] flight when the charges were made. By not calling these witnesses I felt I would minimize this evidence.

> Also, [petitioner] did not work or have any social outlets. [Petitioner] also spent significant time with complainant, and I did not want to emphasize this.
>
> (k) The real obstacles in this case were significant. Firstly, [petitioner] fled the jurisdiction when he heard of the allegations against him. Secondly, [petitioner] spent significant time with the complainant while alone with him. Thirdly, medical evidence, to some extent, supported the allegations. Fourthly, the allegations by the child were strong and confidently made.
>
> * * * *
>
> 23. [Family members] knew the circumstances of [petitioner's] flight and I was afraid to "open the door" to it.

(Docket Entry No. 12-18, pp. 305, 307.)

In rejecting petitioner's claim that trial counsel was ineffective at the punishment hearing, the trial court on collateral review made the following relevant findings of fact:

> 62. [T]he applicant claims he was denied the effective representation of counsel due to trial counsel's failure to present mitigating evidence during the punishment phase of trial.
>
> 63. In order to investigate potential mitigating evidence, trial counsel interviewed the applicant's family members and asked for employment, church, and social organization records.
>
> 64. Trial counsel does not recall their names, but the applicant provided him with the names of three family members who could testify on his behalf.
>
> 65. Although these family members were available to testily on the applicant's behalf, trial counsel did not call them because they knew the circumstances of the applicant's flight from the country after charges were filed, and trial counsel did not want to risk "opening the door."
>
> 66. Trial counsel's reasons for not calling these witnesses was reasonable.

67. Trial counsel called the applicant's daughter, Diana Rubio, to testify during the punishment phase of trial.

68. Diana Rubio testified that the applicant was 59 years old, did not have a prior criminal record, worked before becoming disabled, has been in this country for approximately 30-35 years, was under a doctor's care, that he had had no incidents since being out on bond, and that she did not think he would be a future threat to children.

69. Trial counsel does not recall being made aware of the following potential witnesses: (1) Will Blanco; (2) Leonor Damian; (3) Janie Flores; (4) Abel Cisneros; (5) Jasmine Escobar; (6) Jessica Flores; (7) Margarita Blanco; (8) Rosa Espitia; (9) Benigno Flores; (10) Ruberto [*sic*] Blanco; or (11) Maria Ortiz.

70. Will Blanco, Abel Cisneros, Ruberto [*sic*] Blanco, Maria Oritz [*sic*], Margarita Blanco, Rosa Espitia, and Janie Flores are all members of the applicant's family.

71. The applicant fails to show that he made trial counsel aware of these potential witnesses prior to trial.

72. The applicant fails to show that trial counsel would have been able to call them without opening the door to the circumstances regarding the applicant fleeing the country.

(Docket Entry No. 12-18, pp. 333–340, record citations omitted.) The state trial court also made the following relevant conclusions of law:

15. The applicant fails to show trial counsel was ineffective for failing to investigate potential mitigating witnesses because the applicant only provided trial counsel with the names of three family members that could potentially testify during punishment and trial counsel had strategic reasons for not calling these witnesses.

16. The applicant fails to show trial counsel was ineffective for not calling additional witnesses during punishment.

> 17. The applicant fails to show that trial counsel's failure to present available mitigating punishment evidence constituted deficient performance by counsel.

Id., p. 342. The Texas Court of Criminal Appeals denied habeas relief. (Docket Entry No. 12-15, p. 1, No. 12-16, p. 1.)

Trial counsel testified that he did not call members of petitioner's family to testify at punishment because he feared it would "open the door" to unfavorable testimony that petitioner fled the United States when the criminal charges were filed. The state trial court found that counsel's decision was reasonable trial strategy. That trial counsel did not want to provide the State an opportunity to emphasize petitioner's flight was reasonable. Petitioner's disagreement with the trial court's findings does not constitute grounds for habeas relief under AEDPA. Nor does petitioner establish that, but for counsel's failure to call the omitted witnesses at punishment, there is a reasonable probability that his sentence would have been significantly less harsh. *See Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993). Petitioner demonstrates neither deficient performance nor prejudice under *Strickland*.

The state court on collateral review rejected petitioner's claims for habeas relief. Petitioner fails to show that the state court's determination was contrary to, or involved an unreasonable application of, *Strickland* or was an unreasonable determination of the facts based on the evidence in the record. Respondent is entitled to summary judgment dismissal of petitioner's claim for ineffective assistance of counsel.

V. CONCLUSION

Respondent's motion for summary judgment (Docket Entry No. 10) is **GRANTED** and this lawsuit is **DISMISSED WITH PREJUDICE**. Any and all pending motions are **DENIED AS MOOT**. A certificate of appealability is **DENIED**.

Signed at Houston, Texas, on this the 28th day of September, 2021.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX D –

Texas Court of Criminal Appeals Order Denying Flores' State Application for a Writ of Habeas Corpus, entered June 24, 2020 (*Ex Parte Flores*, WR-89,810-01).

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-89,810-01

EX PARTE FIDEL FLORES, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 1454998-A IN THE 230TH DISTRICT COURT
FROM HARRIS COUNTY**

***Per curiam*. NEWELL and WALKER, JJ. dissent.**

O R D E R

Applicant was convicted of super aggravated sexual assault of a child under six and sentenced to forty-five years' imprisonment. The Fourteenth Court of Appeals affirmed his conviction. *Flores v. State*, 513 S.W.3d 146 (Tex. App.—Houston [14th Dist.] Nov. 29, 2016, pet. ref'd.). Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. *See* TEX. CODE CRIM. PROC. art. 11.07.

Applicant contends that trial counsel was ineffective because counsel did not object to the jury instructions which did not require an unanimous verdict. The trial court determined that trial counsel's performance was deficient and that Applicant was prejudiced. However, the trial court

analyzed the case under the appellate standard of review for jury charge issues rather than the *Strickland* standard, which focuses on harm at trial.

Based on the Court's review of the record, this Court finds that Applicant has not satisfied the prejudice component of his ineffective assistance of trial counsel claim. *Strickland v. Washington*, 466 U.S. 668 (1984). Therefore, we deny relief.

Delivered: June 24, 2020
Do not publish

APPENDIX E –

230th District Court's (State Trial Court) Findings of Fact and Conclusions of Law on Flores' State Application for a Writ of Habeas Corpus, entered October 29, 2019 (*Ex Parte Flores*, Cause No. 1454998-A).

f-12

Cause No. 1454998-A

EX PARTE	§	**IN THE DISTRICT COURT**
	§	
	§	**230th JUDICIAL DISTRICT**
	§	
FIDEL FLORES	§	**HARRIS COUNTY, TEXAS**

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has considered the application for writ of habeas corpus, the affidavit of Ralph Martinez, and the official court records in the above captioned cause. The Court finds that there are no controverted, unresolved facts which require further evidentiary hearing and recommends that relief be granted based on the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The applicant, Fidel Flores, is confined pursuant to the judgment and sentence of the 230th District Court of Harris County, Texas, in cause number 1454998.

2. A jury found the applicant guilty of super aggravated sexual assault of a child and the trial court assessed punishment at 45 years confinement in the Texas Department of Criminal Justice – Institutions Division.

3. Ralph Martinez represented the applicant at trial.

4. The Fourteenth Court of Appeals affirmed the applicant's conviction. *Flores v. State*, 513 S.W.3d 146 (Tex. App.—Houston [14th Dist.] Nov. 29, 2016, pet. ref'd.).

5. the Mandate of affirmance was issued on April 7, 2017.

6. On June 4, 2018, the applicant filed the instant application for a writ of habeas corpus alleging he was denied the effective representation of counsel at trial.

7. Bryan Garris represents the applicant in the instant proceedings.

8. On September 16, 2019, trial counsel, Ralph Martinez, filed an affidavit

responding to the applicant's claims. *See* Affidavit of Ralph Martinez.

9. The trial court finds the affidavit of Ralph Martinez to be credible.

As to Applicant's Ground One

10. In his first ground for relief, the applicant claims he was denied the effective representation of counsel at trial when trial counsel failed to object to inadmissible expert and lay opinion evidence regarding truthfulness. Applicant's Writ at 6-7.

11. Trial counsel objected to this evidence several times throughout the trial. *See* Affidavit of Ralph Martinez.

12. At times, the trial court sustained trial counsel's objections. At times, the trial court overruled his objections. At times, trial counsel did not object.

13. Trial counsel did not always object because he wanted to show the witnesses were consistently fabricating and failing to disclose evidence they disclosed other times. *Id.*

14. The State charged the applicant with conduct committed on or about June 1, 2012. *Flores*, 513 S.W.3d at 154-55.

15. During trial, the State presented evidence that the complainant was sexually abused on at least two occasions: one around the end of May 2012, and one in late September 2012. *Id.* at 155.

16. It was trial counsel's trial strategy to show that the complainant was consistent in his disclosures about the abuse because he was consistently lying. Trial counsel's theory was that the complainant had been coached and manipulated by his mother who wanted the applicant out of the house. Trial counsel wanted to show that the complainant consistently failed to disclose the uncharged offense (the offense that occurred in late September 2012). *See* Affidavit of Ralph Martinez.

17. Trial counsel did not object to pediatrician, Dr. Ciro Porras' testimony that what the complainant told the officer was consistent with what the complainant said earlier because consistency does not equate to credibility. Trial counsel's strategy was to show the complainant was consistently lying and that he was coached by others like his mother and child protection workers. *Id.*

18. Trial counsel did not object to Dr. Ciro Porras' testimony that there was reason to believe some sort of sexual encounter occurred because trial counsel wanted to show that regardless of any observation, no notation of sexual abuse was made by the doctor or reported to authorities. Additionally, the doctor never said that the applicant was identified as the person who committed the alleged assault. *Id.*

19. Trial counsel did not object to Officer Montoyis Knotts' testimony that sensory details are important because such details lend to the credibility of the outcry because trial counsel did not take it as a comment on the complainant's credibility. Trial counsel's position was that details show memorization by the complainant and manipulation by the mother and child abuse investigators. Additionally, trial counsel wanted to show that despite the details, the complainant never mentioned the uncharged incident he reported to his mother. *Id.*

20. Trial counsel did not object to Tasha Roger-James's testimony that sensory details are important because such details "add validity to what the child has experienced . . . it would be difficult to describe something that is memorized as opposed to having a sensory attached to it" because trial counsel did not believe the answer made sense. He did not want to highlight the answer by objecting to it. *Id.*

21. Trial counsel did not object to Tasha Roger-James's testimony that the complainant was consistent in telling of his abuse because to trial counsel, consistency meant being consistent in telling a false story, consistent in not disclosing the uncharged abuse, and memorization and manipulation, not credibility. *Id.*

22. Because he did not find the answer harmful, trial counsel did not object to Dr. Danielle Madera's testimony that there is no specific type of emotion she would expect to see with a child to think that someone should be able to believe the child's word. *Id.*

23. Trial counsel did not object to Dr. Madera's testimony that sensory details are important in determining the reliability or validity of the disclosure because Dr. Madera was not specifically talking about the complainant. Additionally, Dr. Madera said that she did not have work experience in that area. *Id.*

24. Trial counsel objected to Dr. Madera's testimony that in her experience, children do not typically lie about sexual abuse, but the trial court overruled the objection. Trial counsel did not want to move to strike Dr. Madera's answer because he did not want to highlight it. *Id.*

25. Trial counsel did not object to Dr. Madera's testimony that children don't know how to lie about things such as sex, because Dr. Madera did not testify that the complainant did not have that knowledge or that the knowledge wasn't given to him by his mother. *Id.*

26. Trial counsel did not object to Staci Passe's testimony that the complainant seemed authentic because he wanted to argue that the complainant was authentic and traumatized yet never reported the uncharged incident. *Id.*

27. Trial counsel did not object to the complainant's mother's testimony that the complainant was consistent because consistent to him meant consistent in telling a false story, consistent in not disclosing the uncharged abuse, and showed memorization and manipulation, not credibility. *Id.*

28. Trial counsel did not object to the complainant's mother's testimony that what the complainant told Dr. Porras was the same thing he told her because Dr. Porras heard it from the mother and child, yet never noted sex abuse in his report or reported it. Trial counsel felt he could show the doctor did not believe the allegations. *Id.*

29. Trial counsel believes that he objected to the complainant's mother's testimony that she believed the complainant, but he was overruled. *Id.*

30. Trial counsel did not object to the complainant's mother's testimony that she believed the complainant. (III R. R. at 99-100).

31. Trial counsel wanted to show the complainant said penetration with a stick and later show that was not supported by the medical evidence. *See* Affidavit of Ralph Martinez.

32. Trial counsel did not object when the applicant testified that the complainant had been consistent regarding the type of sexual abuse with each witness that testified at trial because it was consistent with his trial strategy – that consistent meant consistent in telling a false story, consistent in not disclosing the uncharged abuse, and memorization and manipulation not credibility. *Id.*

As to Applicant's Ground Two

33. In his second ground for relief, the applicant claims he was denied the effective representation of counsel at trial when trial counsel failed to object to extraneous bad-act evidence which was not noticed by the State. Applicant's Writ at 8.

34. The applicant fails to show purchasing gifts constitutes a bad act.

35. Trial counsel did not object to testimony that the applicant purchased gifts for the complainant because he did not think it was objectionable. The complainant and the applicant were close and the gifts showed that. Trial counsel did not believe there was anything that supported grooming. *See* Affidavit of Ralph Martinez.

As to Applicant's Ground Three

36. In his third ground for relief, the applicant claims he was denied the effective representation of counsel at trial when trial counsel failed to object to the jury instructions that did not require a unanimous verdict. Applicant's Writ at 10.

37. Trial counsel did not assert any objections to the court's jury charge (IV R. R. at 219-220).

38. The applicant challenged the jury charge on direct appeal. *Flores*, 513 S.W.3d at 154.

39. The appellate court found that the jury charge erroneously allowed for a non-unanimous verdict. *Id.* at 157.

40. The Texas Constitution requires jury unanimity in all felony cases, and Texas statute requires jury unanimity in all criminal cases. *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005) (citing *Francis v. State*, 36 S.W.3d 121, 126 (Womack, J., concurring) (citing Tex. Const. art. V, § 13; Tex.Code Crim. Proc. Ann. arts. 36.29(a), 37.02, 37.03, 45.034–45.036)).

41. Guaranteeing jury unanimity is ultimately the responsibility of the trial judge, and the trial judge is therefore obligated to submit a charge that does not allow for the possibility of a non-unanimous verdict. *Cosio v. State*, 353 S.W.3d 766, 776 (Tex. Crim. App. 2011).

42. Trial counsel must timely and specifically object to a jury charge that allows for the possibility of a non-unanimous verdict in order to preserve the Texas constitutional right to a unanimous verdict on appeal. *Id.*

43. When an erroneous jury charge allowing a non-unanimous verdict is properly preserved, the constitutional harm standard under Texas Rule of Appellate Procedure 44.2(a) applies. *Id.*

44. Under the constitutional harm standard, the court of appeals *must* reverse

judgment of conviction or punishment unless the court determines *beyond a reasonable doubt* that the error did not contribute to the conviction or punishment. Texas Rule of Appellate Procedure 44.2(a).

45. Because trial counsel did not object to the jury charge the court of appeals did not apply the constitutional harm standard but instead applied the egregious harm standard. *Flores*, 513 S.W.3d at 158 (citing *Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015)).

46. For error to be egregious, it must have affected the very basis of the case, deprived the accused of a valuable right, or vitally affected a defensive theory. *Id.*; *Cosio*, 353 S.W.3d at 777.

47. The appellate court found that although the jury charge allowed for a non-unanimous verdict, the record demonstrates that the applicant did not suffer egregious harm. *Flores*, 513 S.W.3d. at 161.

48. During trial, the State presented evidence from multiple witnesses that the complainant was sexually abused on at least two occasions: one around the end of May 2012, and one in late September 2012. *Id.* at 155.

49. The jury charge identified four alternative means by which the State could prove commission of the offense, all of which occurred on or about the 1st day of June 2012. *See* Jury Charge in 1454998.

50. The State further argued that complainant's medical symptoms were "consistent and contemporaneous with a child saying he is being anally raped over and over again." *Flores*, 513 S.W.3d at 156.

51. From this evidence the jury could have concluded that more than one incident of sexual abuse occurred. *Id.*

52. The jury charge also stated:

> You are further instructed that the State is not bound by the specific date which the offense, if any, is alleged to have been committed, but that a conviction may be had upon proof beyond a reasonable doubt that the offense, if any, was committed at any time within the period of limitations. There *is no limitation period applicable* to the offense of aggravated sexual assault of a child.

See Jury Charge in 1454998.

53. The State reinforced that the offense date did not matter in closing argument. *Flores*, 513 S.W.3d at 156.

54. During trial the State presented evidence that complainant made his initial outcry to his mother at the end of May 2012. *Id.*

55. There was little medical evidence that complainant was sexually assaulted in or around May 2012. Most of the evidence consisted of testimony from complainant and those who heard him describe the incident. *Id.* at 159.

56. Complainant testified that appellant assaulted him only on one occasion. *Id.*

57. Testimony supporting the late September 2012 sexual assault came in the form of testimony from complainant's mother, complainant's pediatrician, and an investigating police officer. *Id.*

58. Complainant's mother described a second outcry by complainant. *Id.*

59. Complainant's pediatrician, reviewing complainant's medical records, testified that complainant "reports that in October sexual assault involving rectal penetration with a stick and touching of the genitalia by his uncle." *Id.*

60. The police officer that interviewed complainant testified that complainant told him the incident happened "more than once" and that the officer believed the incident had occurred close in time to his interview of complainant in the pediatrician's office in late October 2012. *Id.*

61. The appeals court held that "it is very unlikely that any member of the jury believed that the second incident took place but that the first did not. *Id.* at 160.

As to Applicant's Ground Four

62. In his fourth ground for relief, the applicant claims he was denied the effective representation of counsel due to trial counsel's failure to present mitigating evidence during the punishment phase of trial. Applicant's Writ at 12.

63. In order to investigate potential mitigating evidence, trial counsel interviewed the applicant's family members and asked for employment, church, and social organization records. *See* Affidavit of Ralph Martinez.

64. Trial counsel does not recall their names, but the applicant provided him with the names of three family members who could testify on his behalf. *Id.*

65. Although these family members were available to testify on the applicant's behalf, trial counsel did not call them because they knew the circumstances of the applicant's flight from the country after charges were filed, and trial counsel did not want to risk "open[ing] the door". *Id.*

66. Trial counsel's reasons for not calling these witnesses was reasonable.

67. Trial counsel called the applicant's daughter, Diana Rubio, to testify during the punishment phase of trial. (VI R. R. at 5-6).

68. Diana Rubio testified that the applicant was 59 years old, did not have a prior criminal record, worked before becoming disabled, has been in this country for approximately 30-35 years, was under a doctor's care, that he had had no incidents since being out on bond, and that she did not think he would be a future threat to children. (VI R. R. at 6-10).

69. Trial counsel does not recall being made aware of the following potential witnesses: (1) Will Blanco; (2) Leonor Damian; (3) Janie Flores; (4) Abel Cisneros; (5) Jasmine Escobar; (6) Jessica Flores; (7) Margarita Blanco; (8) Rosa Espitia; (9) Benigno Flores; (10) Ruberto Blanco; or (11) Maria Ortiz. *See* Affidavit of Ralph Martinez.

70. Will Blanco, Abel Cisneros, Ruberto Blanco, Maria Oritz, Margarita Blanco, Rosa Espitia, and Janie Flores are all members of the applicant's family. Applicant's Memorandum in Support of Application for Writ of Habeas Corpus, at page 41-42.

71. The applicant fails to show that he made trial counsel aware of these potential witnesses prior to trial.

72. The applicant fails to show that trial counsel would have been able to call them without opening the door to the circumstances regarding the applicant fleeing the country.

CONCLUSIONS OF LAW

1. The Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy . . . the assistance of counsel for his defense." U.S. CONST. amend. VI; amend. XIV. This Sixth Amendment provision provides more than just the presence of counsel alongside the accused, but rather, provides for the right to the effective assistance of counsel – envisioning counsel playing a role that is critical to

the ability of the adversarial system to produce just results. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

2. To prevail on a claim of ineffective assistance of trial counsel, an applicant must establish by a preponderance of evidence that: 1) trial counsel's performance was deficient; and 2) that this deficient performance deprived applicant of a fair trial. *Id.* at 687.

3. *Strickland* requires that judicial scrutiny of counsel's performance must be highly deferential, and that a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* at 689. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.*

4. Under the first prong of *Strickland*, an applicant must show that trial counsel's performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 698.

5. Under the second prong of *Strickland*, the applicant must show that the deficient performance prejudiced the defense. *See Strickland*, 466 U.S. at 687. This requires establishing that there is a reasonable probability that but for the trial counsel's deficient performance, the outcome of the case would have been different. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex.Crim.App. 2002.

Regarding Ground One

6. This Court finds that the applicant fails to show trial counsel's repeated failure to object to the inadmissible expert and lay testimony concerning truthfulness of the complainant, and of the class of persons to which the complainant belongs, constitutes deficient performance by counsel.

7. After consideration of the totality of the evidence, this Court finds that trial counsel's repeated failure to object to the inadmissible testimony did not prejudice the defense.

Regarding Ground Two

8. This Court finds that the applicant fails to show trial counsel's failure to object to the unnoticed extraneous bad act evidence of buying gifts

constituted deficient performance by counsel.

Regarding Ground Three

9. This Court finds that trial counsel's failure to timely and specifically object to the erroneous jury charge that permitted a non-unanimous verdict constituted deficient performance by counsel.

10. This Court finds that trial counsel's failure to object to the erroneous jury charge prejudiced the defense by allowing a jury instruction that allowed a non-unanimous verdict from the jury.

11. The court finds that had trial counsel timely and specifically objected to the erroneous jury charge, the court of appeals would have applied Texas Rule of Appellate Procedure 44.2(a).

12. Texas Rule of Appellate Procedure 44.2(a) provides that the court of appeals *must* reverse judgment of conviction or punishment unless the court determines *beyond a reasonable doubt* that the error did not contribute to the conviction or punishment.

13. The court finds that despite the appeals court finding that it was "unlikely that different members of the jury convicted the [applicant] based on different instances of conduct" a reasonable doubt still exists that one or more jurors did convict based on different instances of conduct.

14. The court finds that had the appeals court applied analysis under Texas Rule of Appellate Procedure 44.2(a) the existence of a reasonable doubt as to the unanimity of the jury verdict would have required the court of appeals to reverse the conviction.

Regarding Ground Four

15. The applicant fails to show trial counsel was ineffective for failing to investigate potential mitigating witnesses because the applicant only provided trial counsel with the names of three family members that could potentially testify during punishment and trial counsel had strategic reasons for not calling these witnesses.

16. The applicant fails to show trial counsel was ineffective for not calling additional witnesses during punishment.

17. The applicant fails to show that trial counsel's failure to present available mitigating punishment evidence constituted deficient performance by counsel.

Lastly

18. As such the court finds that but for trial counsel's deficient performance regarding his failure to timely and specifically object to the erroneous jury charge allowing a non-unanimous jury verdict the outcome of his appeal would have been different resulting in a reversal of his conviction in the trial court.

In light of these findings, it is the recommendation of this Court that Mr. Flores's application for a writ of habeas corpus be GRANTED, and that Flores's conviction, sentence, and certification be ordered set aside for disposition in accordance with the laws of the United States of America and the State of Texas.

ORDER

The Clerk of this Court is ORDERED to prepare a transcript of all papers in cause 1454998-A, and to transmit the same to the Texas Court of Criminal Appeals as provided by Art. 11.07 of the Texas Code of Criminal Procedure. **The transcript shall include a coversheet noting that this Court recommends that relief be GRANTED.** This record should include the following:

1) the application for Writ of Habeas Corpus;

2) the Court's Order;

3) the appellate record in cause number 145998;

4) the applicant's Memorandum in Support of Application for Writ of Habeas Corpus original memorandum and exhibits;

5) the applicant's Supplemental Memorandum of Law Addressing Affidavit Filed by Trial Counsel;

6) the applicant's submitted Exhibits 1-10;

7) the affidavit of trial counsel, Ralph Martinez;

8) the Trial Court's Findings of Fact, Conclusions of Law and Order;

9) a copy of the reporter's records and clerk's records for the district court trial;

10) all affidavits, memoranda, exhibits, and other documents submitted by the parties;

11) the State's Proposed Findings of Fact and Conclusions of Law and Order;

12) the Applicant's Proposed Findings of Fact and Conclusions of Law and Order; and

13) any written objections to the Trial Court's Findings of Fact and Conclusions of Law.

THE CLERK is further ORDERED to send a copy of this order to counsel for the applicant, Bryan Garris, 300 Main Street, Suite 300, Houston, Texas 77002, bryan@txdefense.net; and to counsel for the State of Texas, Jill F. Burdette, 500 Jefferson, Suite 600, Houston, Texas 77002, Burdette_Jill@dao.hctx.net.

Signed and entered on this the 29th day of October, 2019.

HONORABLE JUDGE PRESIDING
Chris Morton, Judge
230th Criminal District Court

DISTRICT COURT OF HARRIS COUNTY TEXAS