APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 15, 2024
Lyle W. Cayce
Clerk

No. 23-40552

IN RE KEVIN FAHRNI,

Petitioner.

Petition for Writ of Mandamus to the
United States District Court
for the Eastern District of Texas
USDC No. 5:17-CV-170

UNPUBLISHED ORDER

Before SMITH, SOUTHWICK, and WILSON, *Circuit Judges.*

PER CURIAM:

Kevin Fahrni, Texas prisoner # 1941419, has filed in this court a pro se petition for a writ of mandamus. His motion to supplement the mandamus petition is GRANTED.

Fahrni was convicted by a jury of aggravated sexual assault of a child, and he is currently serving a 50-year sentence. The state appellate court affirmed his conviction. *See Fahrni v. State*, 473 S.W.3d 486, 491–503 (Tex. App. 2015). Fahrni filed a 28 U.S.C. § 2254 application challenging this conviction, but the district court dismissed it as untimely, and a judge of this court denied a certificate of appealability.

In his mandamus petition, Fahrni contends that the state and federal habeas courts refused to address the merits of his assertion that there was no

evidence to support an element of the offense, even though the claim was properly raised and would entitle him to relief. In addition, he argues that the state habeas court violated his due process rights by failing to hold an evidentiary hearing. Fahrni asks this court to set aside his criminal conviction and sentence or, alternatively, to order the federal district court to make appropriate findings on relevant issues after giving Fahrni an opportunity to respond and then to enter an order granting habeas relief.

"Mandamus is an extraordinary remedy that should be granted only in the clearest and most compelling cases." *In re Willy*, 831 F.2d 545, 549 (5th Cir. 1987). A party seeking mandamus relief must show both that he has no other adequate means to obtain the requested relief and that he has a "clear and indisputable" right to the writ. *Id.* (internal quotation marks and citation omitted). The condition that a party have no other means to obtain relief is "designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–81 (2004); *see also Willy*, 831 F.2d at 549 (stating that mandamus is not a substitute for appeal).

As noted above, the district court has already denied relief on Fahrni's § 2254 application. To the extent that he is challenging this dismissal, Fahrni has already done so by seeking a certificate of appealability, and mandamus relief is not appropriate. *See Willy*, 831 F.2d at 549. Moreover, our mandamus authority does not extend to directing a district court to reconsider a ruling in a closed case. *Cf. Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) (limiting mandamus authority to issuance of writs "in aid of a jurisdiction already acquired by appeal" or "to those cases which are within [our] appellate jurisdiction though no appeal has been perfected"). To the extent that Fahrni's mandamus petition may also be read as a request that we order the state courts to vacate his conviction and sentence, our mandamus authority does not extend to directing state officials in the

performance of their duties and functions. *Cf. Moye v. Clerk, DeKalb Cnty. Super. Ct.*, 474 F.2d 1275, 1276 (5th Cir. 1973) (holding that federal courts lack "the general power to issue writs of mandamus to direct state courts and their judicial officers in the performance of their duties where mandamus is the only relief sought").

Fahrni's petition may also be read as a request that this court grant him habeas relief in the first instance. Although 28 U.S.C. § 2241(a) provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions," other changes to the habeas corpus laws wrought by the Antiterrorism and Effective Death Penalty Act of 1996 cast doubt on whether circuit judges still possess the authority to entertain an original habeas corpus petition under § 2241. *See Felker v. Turpin*, 518 U.S. 651, 660–61 & n.3 (1996). Under our precedent, any such authority rests in the hands of individual circuit judges, not the court of appeals itself. *See Zimmerman v. Spears*, 565 F.2d 310, 316 (5th Cir. 1977). Each member of this panel declines to exercise original jurisdiction remaining in individual circuit judges. *See id.*

The petition for a writ of mandamus is DENIED.

APPENDIX B

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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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

December 17, 2021

Mr. Kevin Fahrni

No. 21-40030 Fahrni v. Lumpkin
USDC No. 5:17-CV-170

Dear Mr. Fahrni,

We will take no action on your motion for reconsideration because it is untimely. The time for filing a motion for reconsideration under 5TH CIR. R. 27 has expired.

Also, your attorney has not withdrawn from this case. Any motions or documents submitted in this case can only be filed by your attorney.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Gardner

By: _____
Christina A. Gardner, Deputy Clerk
504-310-7684

cc: Mr. Franklyn Ray Mickelsen Jr.
Mr. Nathan Tadema

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21-40030

KEVIN FAHRNI,

Petitioner-Appellant

VERSUS

BRYAN COLLIER, Director, Texas Department of Criminal Justice, Correctional Division,

Respondent-Appellee

MOTION RULE 60B note:204

HERE COMES KEVIN FAHRNI, pro se, filing this motion in good faith. Attorney of record, Franklyn Mickelsen, decided not to proceed any further on this case. Petitioner asserts honest mistakes that created a miscarriage of justice.

Petitioner filed his 11.07 petition May 01, 2017, having few days of Equitable Tolling. October 04, 2017, petitioner proceeding pro-se, filed a Motion For Equitable Tolling of 10 months or sufficient time. The Motion was "GRANTED" based on evidence of attorney's misconduct. It was not "lack of communication" but "No Communication" at all between the attorney and petitioner. If the U.S. District Court recognized attorney's lack of communication does not constitute extraordinary circumstances justifying equitable tolling, then the Granting of the Petitioner's Motion for Equitable Tolling by the Magistrate Judge should constitute a finding of an Abuse of Discretion. The Petitioner's §2254 writ was filed 135 days outside of statute of limitation, but Due-

~~Appendix W~~

C-1

Diligence is not at issue here when "Sufficient Time" was "GRANTED". The Granting of Petitioner's Motion for Equitable Tolling is what caused the Petitioner to be Time Barred, which is a miscarriage of justice. If the Magistrate Judge had not Granted the Motion the procedural background would not have been complicated. Defining the word ONCE as a time-frame and looking for Due Diligence, (filing of the Motion for Equitable Tolling is Due Diligence in-and-of itself.) is not a reasonable solution. The Petitioner would know he had minimum days left to file the §2254 writ and not sufficient time. From the time the motion was granted to the time Petitioner's §11.07 writ was denied adds up to 7 months. This is way more than the 135 days that was used by Mr. Mickelsen, who agreed to investigate, prepare, and file the §2254 writ on behalf of the Petitioner strictly because and due to the fact that the Motion For Equitable Tolling was "GRANTED". Mr. Mickelsen focused on the Ex Post Facto Clause issue, stating it was a good question of law. Petitioner relied on Calder v. Bull 4th category that states "less or different testimony." The State and Federal Courts are Tunnel-Visioned to refer only to "less testimony", avoiding the context of "Different Testimony."

Also, the petitioner has been pursuing an Actual Innocence claim pro-se in State and Federal courts' amending the petition pro-se. Texas Court of Criminal Appeals recognized the claim and denied the 11.07 petition without Facts and Conclusion of Law on insufficient evidence. Same in the U.S. District Federal Court. The amended issue of insufficient evidence to support a conviction

was accepted but never addressed by a respondent/appellee or Court.

Petitioner prays this Honorable Court will reconsider and "GRANT" a Certificate of Appealability on the issue of Equitable Tolling with a finding of Abuse of Discretion, and "GRANT" Certificate of Appealability on the Ex Post Facto issue on the fact that Petitioner relied on Calder v. Bull, 4th category and not a new rule or law, as the State had claimed, to be Teague Barred. The Petitioner would also like for this Honorable Court to "GRANT" a Certificate of Appealability on an Actual Innocence claim of Insufficient Evidence. The issue has been exhausted in the highest State court and the U.S. District federal court, with no opinion rendered. The record will support a finding that the petitioner was convicted in the State of Texas on character evidence from another State without the required evidence by the law of Texas, to support a conviction. The request to "GRANT" Certificate of Appealability is not to harass or vex the Court, but so that justice can prevail.

Respectfully Submitted,

Kevin Fahrni

Kevin Fahrni
TDCJ #1941419
Estelle Unit
264 FM 3478
Huntsville, Texas
77320-3322

mailed TDCJ mailbox:
December 5, 2021

APPENDIX D

United States Court of Appeals for the Fifth Circuit

No. 21-40030

KEVIN FAHRNI,

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 Eastern District of Texas
USDC No. 5:17-CV-170

ORDER:

Kevin Fahrni, Texas prisoner # 1941419, filed a 28 U.S.C. § 2254 petition challenging his conviction for aggravated sexual assault of a child. The district court found that Fahrni's petition was untimely and that he had not shown that equitable tolling should apply. Alternatively, it determined that Fahrni's claim of an ex post facto violation lacked merit. The petition was dismissed with prejudice, and Fahrni now seeks a certificate of appealability (COA) to challenge that dismissal. He argues that the district court erred in denying him the benefit of equitable tolling, and he reiterates his ex post facto claim.

To obtain a COA, Fahrni must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When, as here, a district court denies relief on procedural grounds and, alternatively, on the merits, the COA movant "must show *both* that jurists of reason could debate the validity of the procedural [] ruling *and* that those same jurists could debate the validity of the merits ruling." *Cardenas v. Stephens*, 820 F.3d 197, 201 (5th Cir. 2016); *see Slack*, 529 U.S. at 484. Fahrni has failed to make the requisite showing. Accordingly, his motion for a COA is DENIED.

Don R. Willett

DON R. WILLETT
United States Circuit Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

KEVIN FAHRNI,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO. 5:17-CV-00170-RWS-CMC
	§	
v.	§	
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Defendant.	§	

ORDER

Petitioner Kevin Fahrni, proceeding with counsel, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court referred this matter to United States Magistrate Judge Caroline Craven pursuant to 28 U.S.C. § 636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges. The Magistrate Judge issued a Report and Recommendation on September 16, 2020, recommending the petition be denied as barred by the applicable statute of limitations (Docket No. 32). Fahrni timely filed objections to the Magistrate Judge's Report (Docket No. 33). For the reasons set forth below, the Court **OVERRULES** Fahrni's objections (Docket No. 33) and **DENIES** the petition (Docket No. 1).

A. Fahrni's Objections

In his objections to the Magistrate Judge's Report and Recommendation (Docket No. 33), Fahrni contends that the Magistrate Judge previously granted his motion requesting "equitable tolling" or "sufficient time" in which to file his § 2254 motion. Docket No. 33 at 2. Fahrni argues that "the Magistrate Judge did not provide a specified time in which [he] could file his federal

petition" in that order, and, if the Magistrate Judge intended to deny Fahrni additional time in which to file his federal petition, the Magistrate Judge should have stated so clearly in that order. *Id.* at 3. Fahrni submits that his request for ten months of "sufficient 'equitable tolling' clearly was a request for a ten-month extension to filing the federal petition once his state habeas claim was exhausted." *Id.* at 4. Accordingly, Fahrni argues that the Magistrate Judge erred in recommending that his petition be denied as barred by the applicable statute of limitations. *Id.* at 6–7.

Assuming, without finding, that Fahrni could somehow reasonably rely on the Magistrate Judge's order granting the motion for equitable tolling, liberally construed as a motion to stay, Fahrni did not act with due diligence in getting his federal petition on file. *See Manning v. Epps*, 688 F.3d 177, 184 n.2 (5th Cir. 2012). The Magistrate Judge's order specifically instructed Fahrni to file his federal petition once state collateral review was completed. Docket No. 2. As outlined in the Report and Recommendation, Fahrni's state writ of habeas corpus was denied on May 2, 2018. Docket No. 32. Yet, Fahrni's federal petition was not filed until September 19, 2018, and only after the Magistrate Judge entered an order on August 30, 2018, inquiring as to the status of exhaustion. Docket No. 3. This was four months past the completion of state collateral review and was only done at the behest of the Court. *See Melancon v. Kaylo*, 259 F.3d 401, 408 (5th Cir. 2001) (holding that petitioner had not shown reasonable diligence because he "waited more than four months to file his federal habeas petition"); *Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999) (per curiam) (holding that petitioner had not shown reasonable diligence because "he did not file his § petition until approximately six months after learning of the denial of his state postconviction application," and "[d]id not explain the six-month delay between being notified about his state application and filing his federal petition"); *Koumjian v. Thaler*, 484 F. App'x 966,

969,-70 (5th Cir. 2012) (per curiam) not designated for publication (holding that petitioner had not shown reasonable diligence because the delay in filing exceeded four and a half months).

The record reflects that Fahrni did not retain § 2254 counsel until June 11, 2018, over a month after state habeas review was completed. Fahrni had sufficient time to retain counsel before the completion of state habeas review to ensure his federal petition was promptly filed upon the completion of state habeas review or could have filed the petition himself to later be amended if need be. Fahrni ignored the language of the order of the Magistrate Judge requiring him to file his federal petition once state habeas review was completed. Fahrni is not entitled to equitable tolling and this petition is time-barred.

B. Fahrni's Petition

Alternatively, Fahrni's petition (Docket No. 1) lacks merit. As outlined in the Magistrate Judge's Report, the only live habeas claim remaining is Fahrni's *ex post facto* claim.[1] Fahrni argues the application of Article 38.37 of the Texas Code of Criminal Procedure violates the Ex Post Facto Clause because the statute broadened the admissibility of extraneous offenses in 2013 after the commission of the instant offense in 2008, thereby retroactively altering the evidence landscape for Fahrni's trial by allowing extraneous offense evidence that would not have been admissible at the time Fahrni committed his crime in 2008. Petition, Civil Action No. 5:18-CV-119 (Docket No. 1). Respondent argues Article 38.37 does not change the testimony required in order to convict and the claim should be denied. In addition, Respondent argues such a claim asks the Court to create new precedent and is thus barred from consideration by the Supreme Court's opinion in *Teague v. Lane*. 489 U.S. 288 (1989).

[1] Fahrni makes no objection to the portion of the Report and Recommendation stating the only live claim remaining is the *ex post facto* claim.

Title 28 U.S.C. § 2254 authorizes a district court to entertain a petition for writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment if the prisoner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). The court may not grant relief on any claim that was adjudicated in state court proceedings unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court reaches a conclusion opposite to a decision reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a materially indistinguishable set of facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). An application of clearly established federal law is unreasonable if the state court identifies the correct governing legal principle, but unreasonably applies that principle to the facts. *Id.* An unreasonable application of law differs from an incorrect application; thus, a federal habeas court may correct what it finds to be an incorrect application of law only if this application is also objectively unreasonable. *Id.* at 409-411. "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." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) (citation omitted). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* The Supreme Court has noted that this standard is difficult to meet "because it was meant to be." *Id.*

In addition, this court must accept as correct any factual determination made by the state courts unless the presumption of correctness is rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e). The presumption of correctness applies to both implicit and explicit factual

findings. *See Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001) ("The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact.").

On appeal, Fahrni argued the trial court erred in allowing evidence of extraneous offenses under Article 38.37 of the Texas Code of Criminal Procedure. The Sixth Court of Appeals summarized the history surrounding Article 38.37 as follows:

> Rule 404 of the Texas Rules of Evidence forbids the admission of other crimes, wrongs, or acts of a defendant – extraneous-offense evidence – to prove his character for the purpose of showing that he acted in accordance with that character on some particular occasion. TEX. R. EVID. 404(b), 60 TEX. B.J. 1129, 1134 (1997); *Graves v. State*, 452 S.W.3d 907, 913 (Tex. App. – Texarkana 2014, pet ref'd). However, such evidence may be admissible if introduced for purposes other than character conformity. *See* TEX. R. EVID. 404(b), 60 TEX. B.J. 1129, 1134 (1997); *De La Paz v. State*, 279 S.W.3d 336, 343, 345 (Tex. Crim. App. 2009); *Montgomery v. State*, 810 S.W.2d 372, 387-88 (Tex. Crim. App. 1990) (op. on reh'g). Further, Rule 405 generally limits the methods by which character evidence, when admissible, may be proven. TEX. R. EVID. 405, 60 TEX. B.J. 1129, 1134 (1997).
>
> In 1995, the Legislature enacted Article 38.37 of the Texas Code of Criminal Procedure, which renders "evidence of [a defendant's] other crimes, wrongs, or acts" admissible, notwithstanding Rules 404 and 405, in the prosecution of that defendant for certain criminal offenses, including aggravated sexual assault of a child. In its original form, when Fahrni was alleged to have sexually assaulted Sarah, only extraneous offenses committed against the complaining child victim were admissible under Article 38.37. *See* TEX. CODE CRIM. P. ANN. art. 38.37, § 1(b) (West Supp. 2014). In 2011, the Legislature amended Article 38.37 and expanded its scope by adding new criminal offenses to the list of prosecutions in which it applies. Specifically, the amendment made Article 38.37 applicable in prosecutions of the offenses of sexual performance by a child, trafficking in children, and compelling prostitution of a child. The enacting provision of the 2011 amendment established its effective date as September 1, 2011, and stated, "The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed." In 2013, the Legislature again amended Article 38.37 by adding current Section 2, which, notwithstanding Rules 404 and 405, makes evidence of certain extraneous offenses committed by the defendant, including aggravated sexual assault of and indecency with a child, admissible "for any bearing the evidence has on relevant

> matters; including the character of the defendant and acts performed in conformity with the character of the defendant." *See* TEX. CODE CRIM. P. Ann. art. 38.37, § 2 (West Supp. 2014). Thus, after the 2013 amendments went into effect on September 1, 2013, evidence of certain extraneous offenses committed by the defendant against a non-complaining child victim became admissible under Article 38.37. Like the 2011 amendment, the 2013 amendment had no retroactive effect.

Fahrni v. State, 06-14-00148-CR (Docket No. 24-3). The Sixth Court of Appeals found the 2011 enactment provision inapplicable as the 2011 amendment did not change the law regarding the admissibility of evidence of extraneous offenses against a non-complaining child victim. *Id.* at 10. After concluding the Legislature intended "criminal proceeding" to mean trial, the Sixth Court of Appeals found the 2013 amendment applicable to the instant case and found the trial court did not err in allowing the extraneous offense evidence of a non-complaining child victim. *Id.* at 15.

On state habeas review, Fahrni alleged the following with respect to Article 38.37: (1) his due process rights were violated when the trial court erroneously admitted the testimony of extraneous offenses in contradiction to the 2011 amendment to Article 38.37, (2) the trial court violated his constitutional rights against *ex post facto* law by admitting extraneous offenses based on the 2013 amendment to Article 38.37, (3) the trial court's admission of evidence of sex offenses committed in Arkansas against another child violated his presumption of innocence under his due process rights, and (4) he was denied fundamental fairness. *Ex parte Fahrni*, WR-87,675-01, pgs. 68-74 (Docket No. 24-41). In its findings of fact and conclusions of law, the state trial court denied these claims as not cognizable on habeas review as they were rejected on direct appeal. Findings of Fact and Conclusions of Law at 41 (Docket No. 24-40). The Texas Court of Criminal Appeals ultimately denied the writ without written order on findings of trial court without a hearing. Action Taken Sheet (Docket No. 24-25).

Although the state court never expressly rejected Fahrni's claim of an *ex post facto* violation, there is a rebuttable presumption that the federal claim was adjudicated on the merits

when the state court addresses some claims, but not others, in its opinion. *See Johnson v. Williams*, 568 U.S. 289, 293 (2013) (held that the federal claim at issue presumed to have been adjudicated on the merits by the California courts, that the presumption was not adequately rebutted, and that the restrictive standards set out in § 2254(d)(2) apply. Fahrni makes no attempt to rebut the presumption and, in fact, cites to § 2254(d)(2) as the standard.

A state is prohibited from enacting an *ex post facto* law. U.S. CONST., art. 1, § 10. "The critical question [for an *ex post facto* violation] is whether the law changes the legal consequences of acts completed before its effective date." *Carmell v. Texas*, 529 U.S. 513, 520 (2000) (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)). The Ex Post Facto Clause prohibits any law that: (1) makes an act done before the passing of the law, which was innocent when done, criminal; (2) aggravates a crime and makes it greater than it was when it was committed; (3) changes the punishment and inflicts a greater punishment for the crime than when it was committed; or (4) alters the legal rules of evidence and requires less or different testimony to convict the defendant than was required at the time the crime was committed. *Carmel*, 529 U.S. at 522.

Fahrni asserts his *ex post facto* claim falls under the fourth type, the type that "alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender." *Calder v. Bull*, 3 U.S. 386, 90-91 (1798). Article 38.37 expanded the admissibility of evidence of extraneous offenses against children in a trial involving a sexual offense of a child. In essence, changes to Article 38.37 of the Texas Code of Criminal Procedure allowed one of Fahrni's prior sexual assault victims to testify about his extraneous offenses committed against her, where this testimony likely would have been excluded under Article 38.37 as it existed at the time of the offense in the instant case. Fahrni cites to *Carmell v. Texas*, 529 U.S. 513 (2000), in support of his claim.

Texas appellate courts, however, have repeatedly denied challenges to the use of extraneous offense evidence authorized by article 38.37. *See, e.g., Ryder v. State*, 514 S.W.3d 391 (Tex. App. – Amarillo 2017, pet. ref'd); *Robisheaux v. State*, 483 S.W.3d 205 (Tex. App.—Austin 2016, pet. ref'd); *Baez v. State*, 486 S.W.3d 592 (Tex. App.—Austin 2015, pet. ref'd), *cert. denied*, 137 S.Ct. 303 (2016). The courts have reasoned that 38.37(2)(b) "does not allow extraneous offense evidence to be offered as substantive evidence of guilt. The State must still satisfy its burden of proof as to each element of the offense." *Baize,* 486 S.W.3d at 600. The statute "allows testimony regarding other extraneous offenses to show character conformity. The statute neither changes the State's burden of proof to support a conviction for sexual assault of a child nor lessens the amount of evidence required to sustain a conviction." *Dominguez v. Texas*, 467 S.W.3d 521, 526 (Tex. App.—San Antonio 2015, pet. ref'd); *see also McCulloch v. State*, 39 S.W.3d 678 (Tex. App.—Beaumont 2001, pet. ref'd) (finding no *ex post facto* violation with original version of article 38.37 allowing evidence of similar offenses against the same complainant to be admissible to show defendant's propensity to commit the act or to show conformity to character).

To be clear, "laws that alter the legal rules of evidence to require less evidence to obtain a conviction constitute one category of prohibited *ex post facto* laws." *Stewart v. Davis*, 2018 WL 9943425, *16 (W.D. Tex. 2018) (citing *Collins v. Youngblood*, 497 U.S. 37, 42 (1990)). "However, changes to rules of evidence do not violate the Ex Post Facto Clause when the changes do not subvert the presumption of innocence or allow a jury to find a defendant guilty on a lesser standard than beyond a reasonable doubt." *Id.* (citing *Beazell v. Ohio*, 269 U.S. 167, 170-71 (1925)). Contrary to Fahrni's argument, *Carmell* can be distinguished as the statute at issue there required less evidence on which to convict. *McCulloch*, 39 S.W.3d at 683. "The statute at issue in *Carmell* defined the evidence by which a conviction was 'supportable.'" *Id.* The evidence under

article 38.37 is merely probative and not required for the conviction of the offense. The state must still prove each element of the offense charged and this cannot be done by offering the extraneous offense alone.

Moreover, *Carmell* did not clearly establish that a statute that allows testimony regarding other extraneous offenses to show character conformity but does not change the burden of proof to support a conviction for sexual assault of a child nor lessen the amount of evidence required to sustain a conviction constitutes an *ex post facto* violation. On federal habeas review, the core inquiry is whether the state court's denial of the claim was "contrary to, or involved an unreasonable application of, *clearly established Federal law*." 28 U.S.C. § 2254(d) (emphasis added). Because the Supreme Court has not specifically addressed this issue, the denial of Fahrni's state habeas petition cannot be contrary to clearly established federal law. Because the Court would have to expand the application of the Ex Post Facto Clause and *Carmell* to grant relief in this case, any relief contemplated by this Court is *Teague*-barred. *Teague v. Lane*, 489 U.S. 288 (1989). Accordingly, Fahrni's objections (Docket No. 33) are **OVERRULED** and his petition (Docket No. 1) is **DENIED**.

So ORDERED and SIGNED this 11th day of December, 2020.

Robert W Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

APPENDIX F

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

KEVIN FAHRNI	§	
VS.	§	CIVIL ACTION NO. 5:17-CV-170 5:18-CV-119[1]
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner, Kevin Fahrni, proceeding with counsel, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The above-styled action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Factual & Procedural Background

This case has a complicated procedural background. On October 4, 2017, petitioner, proceeding *pro se* at that time, filed a motion entitled "Motion for Equitable Tolling" (docket entry no. 1) in civil action 5:17-CV-170. Petitioner asked for ten months "equitable tolling" to prepare and file his § 2254 writ. *Id.* Petitioner explained that a retained attorney filed his state application for writ of habeas corpus with only two days left to file the § 2254 motion before the procedural deadline of May 3, 2017. *Id.* Petitioner explained that another retained counsel was hired ten months prior to the deadline but failed to communicate with him and failed to file his state

[1]The two cases were consolidated on August 30, 2019 (docket entry no. 12). 5:17-CV-170 is the lead case.

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application for writ of habeas corpus. *Id.* Because of this failure, petitioner states he was forced to fire the first attorney and retain another attorney to get the state writ of habeas corpus on file with only two days left to file the federal petition. *Id.* Petitioner attached exhibits which supported these claims. *Id.*

On October 10, 2017, the undersigned liberally construed the Motion for Equitable Tolling as a Motion to Stay and granted the motion (docket entry no. 2). In the order, the undersigned instructed petitioner to file his federal petition once state collateral review was completed. *Id.*

Receiving no communication from petitioner or any counsel, the undersigned entered another order August 30, 2018, giving petitioner thirty days to update the Court as to the status of exhaustion of his state court remedies (docket entry no. 2). Petitioner responded on September 18, 2018 outlining the following:

1. Mr. Fahrni appealed his sentence and it was affirmed August 31, 2015.

2. A Petition for Discretionary Review was refused February 3, 2016.

3. On May 10, 2017, an application for writ of habeas corpus 11.07 was filed in state court and was denied on May 02, 2018.

4. A Motion for Reconsideration was dismissed on June 6, 2018.

5. Mr. Fahrni retained Mick Mickelson "attorney at law", 2600 State Street, Dallas, Texas 75204 - to investigate and filed § 2254 petition on his behalf, June 11, 2018.

6. Petitioner received a copy of the brief to be filed by Mick Mickelson August 30, 2018.

7. Mr. Fahrni responded to Mick Mickelson requesting that small changes be made to the brief in order to make it more adequate to the facts of the case, and also offered to make arrangements to have Mr. Mick Mickelson paid in full for his service upon the filing of the §

2254 petition.

Id. Petitioner asked the Court to accept the filing as timely, procedural and within the requirements of the Court and stated it was possible the § 2254 petition may have already been filed. *Id.*

The next day, September 19, 2018, attorney Franklyn Ray Mickelsen filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in civil action 5:18-CV-119. On October 11, 2018 and November 5, 2018, petitioner, still proceeding *pro se* in civil action 5:17-CV-170, filed a Motion for Disclosure of The Grand Jury Transcript (docket entry no. 6) and a Motion to Amend his § 2254 petition (docket entry no. 7). On August 30, 2019, the undersigned entered an order consolidating the two cases (docket entry no. 12). The undersigned then entered an order on September 3, 2019, denying petitioner's motion for disclosure of the grand jury transcript as premature and granting petitioner's motion to amend (docket entry no. 13). On September 13, 2019, the undersigned then entered an order to show cause (docket entry no. 17).

The Petition

Petitioner asserts two points of error:

1. The application of Article 38.37 of the Texas Code of Criminal Procedure violates the Ex Post Facto Clause because the statute broadened the admissibility of extraneous offenses in 2013 after the commission of the instant offense in 2008, thereby retroactively altering the evidentiary landscape for Fahrni's trial by allowing extraneous offense evidence that would not have been admissible at the time Fahrni committed his crime in 2008;

2. Texas courts violated his due process rights by not conducting an evidentiary hearing to determine whether a hearing impairment prevented Fahrni from hearing trial testimony.

Petition, Civil Action No. 5:18-CV-119 (docket entry no. 1).

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The Response

Respondent filed a Response to the petition for writ of habeas corpus on December 20, 2019, arguing the petition is time-barred and, alternatively, lacking in merit (docket entry no. 23). As to the statute of limitations defense, respondent argues the petition is untimely by 135 days. *Id.* Respondent argues the Motion for Equitable Tolling, liberally construed as a Motion to Stay, did not toll the limitations period. *Id.* Respondent states federal precedent confirms the motion (or granting thereof) does not satisfy the AEDPA limitations period. Respondent additionally argues that even if the Court treated petitioner's motion to stay as the initiation of his § 2254 proceedings, petitioner did not raise the instant claims until his filing on September 19, 2018. Finally, Respondent argues petitioner is not entitled to equitable tolling as he has failed to act diligently in filing his federal petition.

The Reply

On January 9, 2020, counsel filed a Reply to the Response (docket entry no. 26). On January 14, 2020, petitioner himself filed a Reply to the Response (docket entry no. 27). The undersigned then entered an Order on January 14, 2020, requiring petitioner to notify the Court as to whether it is his intent to proceed *pro se* in this action or with counsel (docket entry no. 28). Petitioner responded on January 30, 2020, notifying the Court it was his intent to proceed with counsel (docket entry no. 29). The response filed January 14, 2020 was then struck from the record on February 3, 2020.

In his Reply, counsel for petitioner argues the undersigned's order granting petitioner's stay, stayed the statute of limitations and ordered petitioner to file his § 2254 petition once he completed state collateral review. Reply (docket entry no. 26). Counsel states the order did not specify a date

or deadline to file the § 2254 petition. *Id.* Counsel concedes it was not until this Court ordered petitioner to update the Court as to the status of exhaustion that counsel filed the petition four months after his state application for writ of habeas corpus was denied. *Id.* Counsel argues petitioner is entitled to equitable tolling as he reasonably relied on the undersigned's order granting the stay. *Id.*

As to the merit-based claims, counsel only addresses the *ex post facto* claim, appearing to drop the second claim arguing the Texas courts violated due process for failing to grant an evidentiary hearing on the issue of whether he was improperly denied an interpreter for the hearing impaired. *Id.*

Analysis

Statute of Limitations

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (the Act), Pub. L. 104-132, 110 Stat. 1218, on April 24, 1996. Title I of the Act applies to all federal petitions for habeas corpus filed on or after its effective date. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Because petitioner filed the instant petition after its effective date, the Act applies to his petition.

Title I of the Act substantially changed the way federal courts handle habeas corpus actions. One of the major changes is a one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). The one year period is calculated from the latest of either (A) the date on which the judgment of conviction became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which an impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the Supreme Court initially recognizes a new

constitutional right and makes the right retroactively applicable to cases on collateral review; or (D) the date on which the facts supporting the claim became known or could have become known through the exercise of due diligence. *See id.* § 2244(d) (1)(A)-(D).

In the present case, the state court records show petitioner was found guilty by a jury in the 5th District Court of Bowie County, Texas and was sentenced to a fifty year term of imprisonment on June 6, 2014. *The State of Texas v. Kevin Fahrni*, Case Number 10F0484-005. Verdict, pg. 207, Sentence, pg. 220 (docket entry no. 24-14). Petitioner filed a direct appeal which was affirmed in August of 2015. *Fahrni v. State*, No. 06-14-00148-CR, 473 S.W.3d 486 (Tex. App. – Texarkana, 2015, pet. ref'd) (docket entry no. 24-3). Petitioner then filed a petition for discretionary review which was refused on February 3, 2016. *Fahrni v. State*, PD-1265-15 (Tex. Crim. App. 2016) (docket entry no. 24-12).

Petitioner challenged his conviction through a state application for writ of habeas corpus on May 1, 2017. *Ex parte Fahrni*, WR-87,675-01, pgs. 59-162 (docket entry no. 24-41). The state writ was denied without written order on findings of the trial court without a hearing on May 2, 2018. *Id.*, pg. 1 (docket entry no. 24-25). Petitioner filed a Motion for Reconsideration on May 29, 2018 which was dismissed on June 6, 2018. *Id.*, pg. 1 (docket entry no. 24-32).

Petitioner's conviction became final when the time for filing a petition for writ of certiorari with the Supreme Court expired on May 3, 2016 (90 days after the refusal of the petition for discretionary review). *See Broussard v. Thaler*, 414 F. App'x 686, 687 (5th Cir. 2001). Absent statutory tolling, petitioner's deadline to file his federal petition for writ of habeas corpus was May 3, 2017.

Statutory Tolling

The Act expressly and unequivocally provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). Thus, a state petition for habeas relief is "pending" for the Act's tolling purposes on the day it is filed through (and including) the day it is resolved. *See Windland v. Quarterman*, 578 F.3d 314, 317 (5th Cir. 2009).

Petitioner's state application for writ of habeas corpus was filed May 1, 2017 and was pending until May 2, 2018, thus tolling the federal statute of limitations for 367 days. *See Windland v. Quarterman*, 578 F.3d 314, 317-18 (5th Cir. 2009) (stating the rule for calculating how long a state petition was pending). With this tolling, the federal filing deadline expired May 7, 2018.[2]

As argued by respondent, a Motion for Equitable Tolling does not constitute a filing of a federal habeas petition. *See Hardaway v. Davis*, 684 F. App'x 444, 447 (5th Cir. 107) (quoting *Holman v. Gilmore*, 126 F.3d 876, 880 (7th Cir. 1997)); *see also Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997) ("[A] habeas petition is pending only after a petition for a writ of habeas corpus

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[2]May 5, 2018 fell on a Saturday making the due date the following Monday, May 7, 2018. Although petitioner filed a Motion for Reconsideration on May 29, 2018, it was quickly dismissed on June 6, 2018. Texas law prohibits the filing of motions for reconsideration or rehearing of habeas petitions. TEX. R. APP. P. 79.2(d). And, while the Fifth Circuit has determined that the "one-year statute of limitations is tolled during the period in which a Texas habeas petitioner has filed such a motion," petitioner's Motion for Reconsideration was filed after the statute of limitations period had run and there was nothing to toll. *See Hatcher v. Quarterman*, 2007 WL 1053311(N.D. Tex. Apr. 9, 2007) (citing *Gordon v. Dretke*, 107 F. App'x 404 (5th Cir. Aug. 10, 2004) (noting that as the motion for reconsideration was not filed until after the one-year period had expired the petition was untimely unless there was a basis for equitable tolling (not designated for publication) and *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (analogous holding that a state writ application filed after the period of limitation had expired does not toll the limitation period), *cert. denied*, 532 U.S. 963 (2001)).

itself is filed.") (internal quotation marks omitted); *Lookingbill v. Cockrell*, 293 F.3d 256, 264 (5th Cir. 2002) (noting that petitioner proceeding *pro se* did not toll the limitations period by filing a motion to appoint counsel and should have filed a skeletal petition and supplemented it later). Contrary to petitioner's argument, the undersigned's order granting a stay was merely staying the federal proceedings while petitioner exhausted his state court remedies. Order (docket entry no. 2). The Order specifically instructed petitioner *to file his federal writ of habeas corpus once state collateral review was completed* which, in this case, occurred on May 2, 2018. Order (docket entry no. 2). Petitioner's Motion for Equitable Tolling, liberally construed as a Motion to Stay, does not constitute a federal habeas petition. Furthermore, even if it was petitioner's belief that he initiated § 2254 proceedings with the Motion for Equitable Tolling, petitioner did not raise any points of error in this motion. The first time petitioner raised any federal habeas claims was on September 19, 2018 when he finally filed his federal petition. It is well settled that claims raised after the initiation of federal habeas proceedings do not relate back to the initiation of those proceedings. *Mayle v. Felix*, 545 U.S. 644 (2005); *United States v. Gonzales*, 592 F.3d 675, 680 (5th Cir. 2009). Thus, petitioner's September 19, 2018 petition was filed 135 days too late.

Equitable Tolling

The Supreme Court has held that the AEDPA's one-year limitations period "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). The exception, however, is available "only 'in rare and exceptional circumstances.'" *United States v. Riggs*, 314 F.3d 796, 800 n. 9 (5th Cir. 2002) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). The party seeking equitable tolling bears the burden of demonstrating that equitable tolling is appropriate. *United States v. Petty*, 530 F.3d 361, 365 (5th Cir. 2008).

In filing his Motion for Equitable Tolling, liberally construed as a Motion to Stay, petitioner appears to assume he is entitled to equitable tolling based on his counsel's neglect in getting the state application for writ of habeas corpus on file. However, an attorney's lack of communication or neglect does not constitute extraordinary circumstances justifying equitable tolling. *Holland*, 560 U.S. at 651-52; *see also Palacios v. Stephens*, 723 F.3d 600, 604-05 (5th Cir. 2013) ("[P]etitioner's seeking to establish due diligence must exercise diligence even when they receive inadequate legal representation."). Petitioner's pleadings and exhibits demonstrate petitioner's keen awareness of the AEDPA limitations period yet, rather than file the state application for writ of habeas corpus himself, petitioner chose to fire counsel and take the time to retain another attorney to file the state application for writ of habeas corpus for him with only two days left of the federal filing deadline.[3] Even if petitioner believed he would be better served with counsel, there is no reason why petitioner could not file the state application for writ of habeas corpus himself; once he retained counsel, counsel could amend or supplement as needed. The record reflects a known delay of four to eleven months in filing the state application for writ of habeas corpus and does not demonstrate due diligence.

Furthermore, to the extent petitioner argues he is entitled to equitable tolling because he somehow "reasonably" relied on the undersigned's order granting a motion to stay, the undersigned disagrees. Even assuming, without finding, petitioner could have relied on the language of the order as granting his request for equitable tolling and actually staying the federal deadline, petitioner still

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[3]Petitioner states he hired the first attorney on June 14, 2016 and then fired him on April 6, 2017 due to "no communication or response during this entire time period." In a letter attached as an exhibit to his Motion for Equitable Tolling, petitioner shows he knew as early as January 2017 of the potential looming time-bar. Exhibit 1.

has not demonstrated he used due diligence in getting the federal petition on file. *See Manning v. Epps*, 688 F.3d 177, 184 n. 2 (5th Cir. 2012). The order specifically instructed petitioner to file his federal writ of habeas corpus *once state collateral review was completed*. Petitioner's state writ of habeas corpus was denied on May 2, 2018. The record reflects petitioner did not file anything with this Court until the undersigned entered an order inquiring as to the status of exhaustion on August 30, 2018. Petitioner's federal petition was still not filed until September 19, 2018. This was four months past the completion of state collateral review and was only done at the behest of the Court. *See Melancon v. Kaylo*, 259 F.3d 401, 408 (5th Cir. 2001) (holding that petitioner had not shown reasonable diligence because he "waited more than four months to file his federal habeas petition"); *Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999) (per curiam) (holding that petitioner had not shown reasonable diligence because he "did not file his § 2254 petition until approximately six months after learning of the denial of his state postconviction application," and "d[id] not explain the six-month delay between being notified about his state application and filing his federal petition"); *Koumjian v. Thaler*, 484 F. App'x 966, 969-70 (5th Cir. 2012) (per curiam) (not designated for publication) (holding that petitioner had not shown reasonable diligence because the delay in filing exceeded four and a half months).[4]

Moreover, if petitioner is arguing he "reasonably" relied on the ten month extension he originally requested, petitioner still did not meet his own deadline. Petitioner filed his Motion for Equitable Tolling, liberally construed by the undersigned as Motion to Stay, on October 10, 2017. Adding ten months from the date of filing made the federal petition due August 10, 2017. As

[4]Even if petitioner assumed collateral review was completed once his Motion for Reconsideration was dismissed, petitioner still did not file his federal petition in this Court promptly after June 6, 2018 as ordered.

outlined above, petitioner did not file his federal petition for writ of habeas corpus until September 19, 2018 and only did so after the Court inquired into the status of exhaustion. In fact, petitioner admits in his response to this Court's order that he did not retain counsel to file the federal writ until June 11, 2018. None of these actions demonstrate reasonable diligence. There is nothing in this Court's order of October 10, 2017 order that could be reasonably construed as authorizing an indefinite suspension of the statute of limitations. The order clearly instructs petitioner to file his federal writ once state collateral review was completed. Petitioner has simply failed to show he is entitled to equitable tolling and this petition should be dismissed as time-barred.[5]

Recommendation

Petitioner's request for habeas corpus relief pursuant to 28 U.S.C. § 2254 should be dismissed with prejudice as time-barred.

Objections

Within fourteen (14) days after receipt of the Magistrate Judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the Magistrate Judge. 28 U.S.C. § 636(b)(1)(c).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen (14) days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by

[5]To the extent petitioner complains the Court did not set a firm deadline in the October 10, 2017 order, the Court reminds petitioner that there is now way for this Court to know when and if petitioner completed state collateral review which is why the Court ordered petitioner to file his federal writ once state collateral review was completed.

the district court except on grounds of plain error. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 24th day of September, 2020.

CAROLINE M. CRAVEN
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

KEVIN FAHRNI, petitioner	§	
	§	CIVIL ACTION NO. 5:17-CV-170
V.	§	
LORIE DAVIS, Director Texas Department of Criminal Justice, Correctional Institutions Division, respondent	§	

MOTION FOR COURT ORDER

COMES NOW KEVIN FAHRNI, pro se, requesting this Honorable Court to ORDER the Director to respond to Issues no. 3, 4, 5, and 6 raised in the §2254 habeas corpus writ. These issues were exhausted in the State courts. The Texas Supreme Court acknowledged sixteen (16) issues for the trial court to do the Facts and Conclusion of Law. Trial court only addressed the first twelve (12) and ultimately the Texas Court of Criminal Appeals denied the writ without a hearing that should/would include these four (4) Issues but did not. Therefore, these four issues have not been answered to and also were not included in the finding of facts and conclusion of law.

ISSUE THREE: Insufficient evidence to support the element of penetration in the indictment.

ISSUE FOUR : Ineffective Assistance of Counsel for failing to raise the issue of a third party guilt from the preserved in-camera hearing that was preserved for an appeal

ISSUE FIVE : Ineffective Assistance of Appellate Counsel for failing to raise the issues of the in-camera hearing that was p preserved for an appeal./

ISSUE SIX : Code of Criminal Procedure Article 38.37 Section 2 is unconstitutional.

The petitioner prays that this Honorable Court will make the 'ORDER' for the Director to respond to the Issues; Three, Four, Five, and Six that have completely avoided but exhausted. They were presented and unanswered. Issue Three is based on the quantum of evidence the Director stated supported the conviction in Issue One.

Mailed T.D.C.J. Mailbox

January 6, 2020

Kevin Fahrni

Kevin Fahrni
Estelle Medical Unit
264 FM 3478
Huntsville, Texas
7732-3322

APPENDIX H

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#7

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

KEVIN FAHRNI petitioner,	§	
V.	§	CIVIL ACTION NO. 5:17-cv-170
LORIE DAVIS DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, - CORRECTIONAL INSTITUTIONAL DIVISION respondent,	§	

MOTION TO AMEND
WRIT OF HABEAS CORPUS §2254 PETITION

COMES NOW, KEVIN FAHRNI, pro-se, requesting to amend this Petition of Habeas Corpus, filed last September 19, 2018 with the following grounds for the reasons that The Court of Criminal Appeals of Texas 'order' stated, "Applicant raises sixteen grounds for review" ~~"Applicant raises sixteen grounds for review~~" and "The trial court shall also make any other findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of Applicant's claims for habeas corpus relief." (EXHIBIT 1). The trial court only found facts and conclusions of law to the first twelve (12) grounds and not to the four (4) amended grounds, numbers thirteen (13) through sixteen (16) of the §11.07 application, resulting in a decision by the Texas Supreme Court to deny without written order and without a hearing.

Ground Thirteen: Insufficient evidence to support the element of penetration in the indictment.

Ground Fourteen: Ineffective Assistance of Appellate Counsel for failing to raise the issue of a third party guilt from the preserved in-camera hearing.

Ground Fifteen: Ineffective Assistance of Appellate Counsel for failing to raise the issues of the in-camera hearing that was preserved for an appeal.

Ground Sixteen: Code of Criminal Procedure Article 38.37 Section 2 -- is unconstitutional.

The Petitioner prays that this Court will allow the Writ of Habeas Corpus to be amended.

Respectfully submitted,

October 29, 2018
Mailed in TDCJ Mailbox

Kevin Fahrni

Kevin Fahrni
TDCJ #1941419
Estelle Unit
264 FM 3478
Huntsville, Texas
77320-3322

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

FILED

OCT 10 2017

Clerk, U.S. District Court
Texas Eastern

KEVIN FAHRNI §

VS. § CIVIL ACTION NO. 5:17-CV-170

§

DIRECTOR, TDCJ-CID

ORDER

Pending before the Court is Petitioner's Motion for Equitable Tolling (docket entry no. 1), liberally construed as a Motion to Stay. Petitioner filed the above-referenced motion for equitable tolling in order to timely file his federal petition. Petitioner seeks a stay of ten months to file his state writ of habeas corpus and exhaust his state court remedies. The motion is meritorious and should be granted. It is, therefore,

ORDERED that Petitioner's Motion for Equitable Tolling (docket entry no. 1), liberally construed as a Motion to Stay is **GRANTED**. Petitioner is further **ORDERED** to file his federal writ of habeas corpus pursuant to 28 U.S.C. § 2254 once he has completed state collateral review.

SIGNED this 10th day of October, 2017.

Caroline M. Craven

CAROLINE M. CRAVEN
UNITED STATES MAGISTRATE JUDGE

I-1

APPENDIX J

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Writ No. 10F0484-005-A
Trial Cause No. 10F0484-005

KEVIN FAHRNI	§	IN THE TEXARKANA
vs.	§	U.S. DISTRICT COURT
THE STATE OF TEXAS	§	EASTERN DIVISION

MOTION FOR EQUITABLE TOLLING

To the Honorable Presiding Judge:

COMES NOW, KEVIN FAHRNI, Proceeding Pro se in the above referenced writ number and cause of action, asking this Court to Consider and Grant ten (10) months or sufficient Equitable Tolling Time, to prepare and file a §2254 writ. Under the time constraints of Four (4) weeks, Attorney Randle Smolarz filed the §11.07 writ of habeas corpus on May 1, 2017 with only two (2) days left to file the §2254 writ before the procedural deadline of May 3, 2017. Mr. Fahrni had retained Attorney Martin Braddy June 14, 2016, ten (10) months prior to this deadline. Due to no communication or response during this entire time period, Mr. Fahrni was forced to fire Martin Braddy so that he could retain alternate counsel and to file a grievance with the State Bar of Texas, April 6, 2017.

Due to the misconduct by Martin Braddy, the Tolled Time of two (2) days has created a hardship on the petitioner to inquire into legal representation for the §2254 writ.

Exhibits enclosed:

(1) Letter written to Martin Braddy, January 20, 2017, stating that he was retained seven (7) months ago and has not responded to the Client.

(2) Letter discharging Mr. Martin Braddy as Client's attorney, April 6, 2017.

(3) Letter from the State Bar of Texas.

(4) Letter written to the State Bar of Texas requesting the status of the investigation of Mr. Braddy's misconduct.

(5) Email from Michael Mowla.

Prayer

Wherefore, Premises Considered, Petitioner prays this Court will Grant this Motion For Equitable Tolling, after the appropriate findings of the facts.

Declaration

I, Kevin Fahrni, am the Petitioner, and being currently incarcerated in the Estelle Unit of TDCJ, declare under penalty of perjury that, according to my belief, the facts stated in the foregoing Motion are True and Correct.

Respectfully Submitted,

Date Signed: September 24, 2017

Signature of Petitioner: Kevin Fahrni

Kevin Fahrni
TDCJ #1941419
Estelle Unit
264 FM 3478
Huntsville, Texas
77320-3322

APPENDIX K

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OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
OFFICIAL BUSINESS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711
STATE OF TEXAS
PENALTY FOR
PRIVATE USE

PRESORTED FIRST-CLASS

U.S. POSTAGE >> PITNEY BOWES
ZIP 78701 $ 000.26[8]
02 4W
0001401603 JUN 07 2018

6/6/2018
FAHRNI, KEVIN **Tr. Ct. No. 10F0484-005-A** **WR-87,675-01**
Pursuant to Texas Rules of Appellate Procedure, Rule 79.2 (d), applicant's Motion for Reconsideration/Rehearing has been dismissed.

Deana Williamson, Clerk

E-1-3a

KEVIN FAHRNI
ESTELLE UNIT - TDC # 1941419
264 FM 3478
HUNTSVILLE, TX 77320-3322

EMIWNAB 77320

Appendix K

APPENDIX L

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

5/2/2018
FAHRNI, KEVIN **Tr. Ct. No. 10F0484-005-A** **WR-87,675-01**

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

Deana Williamson, Clerk

KEVIN FAHRNI
ESTELLE UNIT - TDC # 1941419
264 FM 3478
HUNTSVILLE, TX 77320-3322

Appendix # L

APPENDIX M

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Filed 04/12/2018 2:29 PM
Jill Harrington
District Clerk
Bowie County, Texas
Teresa Tipps, Deputy

CAUSE NO. 10F0484-005A

EX PARTE	§	**IN THE 5th DISTRICT COURT**
	§	
	§	
	§	
	§	
KEVIN FAHRNI	§	**BOWIE COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On this day, the Court considered Applicant's Application for Writ of Habeas Corpus, together with Memorandum, filed pursuant to art. 11.07, Texas Code of Criminal Procedure. Having reviewed Applicant's Application and Memorandum, the Affidavit of trial counsel, applicable law and the Record, the Court makes the following Findings of Fact and Conclusions of Law.

A. BACKGROUND

1. Following a jury trial in this matter, Applicant was found guilty of the offense of Aggravated Sexual Assault of a Child and sentenced to fifty years in the Texas Department of Criminal Justice – Institutional Division.
2. Applicant appealed his conviction to the Sixth Court of Appeals, which affirmed his conviction.
3. Applicant filed his Application for Writ of Habeas Corpus, together with Memorandum in Support.
4. By Order dated March 7, 2018, the Court of Criminal Appeals directed the trial court to make findings of fact and conclusions of law.

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5. Pursuant to the Order of the trial court, trial counsel filed an Affidavit responding to the allegations in Applicant's Application for Writ of Habeas Corpus.

B. GROUNDS FOR RELIEF

Ground One: The trial court violated Applicant's due process and confrontation rights because the trial court was aware of Applicant's hearing impairment and did not take steps to protect those rights.

For his first ground, Applicant contends trial counsel notified the trial court that Applicant has a hearing impairment, but Applicant was never asked if he could hear the trial, and no steps were taken to assist him in hearing, understanding or comprehending the trial. Applicant contends he is 80% deaf in the left ear and 40% deaf in the right ear.

The Court makes the following findings:

1. Texas Code of Criminal Procedure Article 38.31 (a) provides:

   If the court is notified by a party that the defendant is deaf and will be present at an arraignment, hearing, examining trial, or trial, or that a witness is deaf and will be called at a hearing, examining trial, or trial, the court shall appoint a qualified interpreter to interpret the proceedings in any language that the deaf person can understand, including but not limited to sign language. On the court's motion or the motion of a party, the court may order testimony of a deaf witness and the interpretation of that testimony by the interpreter visually, electronically recorded for use in verification of the transcription of the reporter's notes. The clerk of the court shall include that recording in the appellate record if requested by a party under Article 40.09 of this Code.

2. Texas Code of Criminal Procedure Article 38.31(b) provides:

   Following the filing of an indictment, information, or complaint against a deaf defendant, the court on the motion of the defendant shall appoint a qualified interpreter to interpret in a language that the defendant can understand, including but not limited to sign language, communications concerning the case between the defendant and defense counsel. The interpreter may not disclose a communication between the defendant and defense counsel or a fact that came to the attention of the interpreter while interpreting those communications if defense counsel may not disclose that communication or fact.

3. Texas Code of Criminal Procedure Article 38.31(g)(1) provides that in this Code,

"Deaf person" means a person who has a hearing impairment, regardless of whether the person also has a speech impairment, that inhibits the person's comprehension of the proceedings or communication with others.

4. The Reporter's Record does not reflect that Applicant ever requested the appointment of an interpreter.

5. The Clerk's Record does not reflect a written motion filed by Applicant requesting the appointment of an interpreter.

6. The Reporter's Record reflects only two instances wherein Applicant's trial counsel referenced Applicant's purported hearing impairment. The first reference to Applicant's purported hearing impairment occurred at the final pre-trial hearing prior to jury selection when Applicant's trial counsel called Applicant to the stand to testify, outside of the presence of the jury, of the offers made by the State and rejected by him. When the Court asked Applicant to take the stand, trial counsel responded, "Your Honor, he has a hearing problem." R.R. Volume 3, Page 16. Thereafter, Applicant took the stand, and trial counsel asked him a number of questions, which he answered. There is no indication in the Record that he had trouble hearing the questions asked by his counsel or that the purported hearing impairment inhibited his comprehension of the proceedings or communications with others. R.R. Vol. 3, Page 17-19.

   The next reference to Applicant's purported hearing impairment occurred during jury selection when trial counsel stated:

   Kevin Fahrni has a genetic hearing disability. He was born with it. It got progressively worse until maybe his teen, adolescent years. It leveled off, but he is about 80% deaf in his left ear and about 40 in his right. It's caused him to have a bit of a speech impediment. And I know that it seems almost silly to ask this question, but the reason I bring this up is when I was a kid my mother had a second cousin name of Mo Elliott and he was, had a speech impediment and was sort of crippled a little bit, and I can remember when I saw Mo, that impediment and that disability just overcame- - I mean that was what I was concentrated on. And so Kevin's going to be in this trial and possibly testify and possibly not, depending on how things go, but is there anybody that has- -or that thinks that the speech impediment might cause some type of bias or give less weight to his testimony because of that reason? (No response) And I didn't think so, but I just, you know, felt like it was something that I needed to, needed to cover.

   R.R. Vol. 3, P.116.

7. Applicant again took the stand, outside the presence of the jury, for the purpose of stating on the record his decision not to testify. Trial counsel asked him a number of questions, which he answered. During the dialogue, there is no indication Applicant had trouble hearing trial counsel's questions. Applicant answered all of the questions.

During the questioning, trial counsel asked, "Can you hear me okay, Kevin?" to which Applicant responded, "Yes, sir." R.R. Vol. 5, P 84-85.

8. There is no medical evidence offered to establish the degree of Applicant's purported hearing loss.

9. Other than the reference to Applicant having a "hearing problem" immediately prior to voir dire and the reference to the jury that he has a "hearing disability" resulting in Applicant being 80% deaf in one ear and 40% deaf in his other," there is no notice to the Court that Applicant is a "deaf person," as defined in Texas Code of Criminal Procedure 38.31(g)(1).[1]

10. Further, Based on Applicant's ability to hear trial counsel's questions and to answer the questions, as reflected in the Reporter's Record, the Court finds any purported hearing impairment did not inhibit his comprehension of the proceedings or communication with others.

11. The Court finds, that based on Applicant's conduct at trial, it was not apparent at trial, that the Applicant could not hear or understand the proceedings.

12. The Court finds Applicant's right to due process and right to confrontation were not violated by the trial court's failure to appoint an interpreter.

Ineffective assistance of counsel

To obtain habeas corpus relief for ineffective assistance of counsel under the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), an applicant must show that counsel's performance "was deficient and that a probability exists, sufficient to undermine our confidence in the result, that the outcome would have been different but for counsel's deficient performance." *Ex Parte White*, 160 S.W.3d 46, 49 (Tex. Crim. App. 2004). Moreover, "applicant must overcome the 'strong presumption that counsel's conduct fell within the wide range of professional assistance.'" *Ex Parte Chandler,* 182 S.W.3d 350, 354 (Tex.Crim.App. 2005). "[S]trategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengable." *Strickland*, 466 U.S. at 690.

[1] In his Memorandum, Applicant states that counsel notified the trial court of the hearing impairment at a pre-trial hearing at least three years prior to the trial. However, the Court has not located that notice in the Reporter's Record, and Applicant does not provide a citation to the Reporter's Record.

A. Ground Two: Ineffective assistance of counsel not to pursue basic precautions to ensure Applicant's constitutional rights of due process and confrontation were not violated.

13. The Court incorporates by reference the findings from Ground One herein.

14. It is not evident from the Record that Applicant was unable to hear witness testimony. To the contrary, there is no indication in the Record that Applicant was unable to hear witness testimony.

15. Applicant has not pointed to any testimony that he did not hear during the trial and has not stated what would have been done differently if he had heard the testimony he broadly alleges he did not hear.

16. Both trial counsel were aware of Applicant's hearing impairment, and during trial preparation, the issue of his ability to hear the proceedings was discussed several times.

17. On all occasions, Applicant responded to his counsel that his ability to read lips, coupled with his partial hearing, would allow him to understand the proceedings.

18. On one occasion, Applicant was asked if he needed some sort of device so he could better hear the proceedings, and he responded, "I don't think so." Accordingly, trial counsel did not request an interpreter or amplification device.

19. Trial counsel did not fall below an objective standard of reasonableness based on their failure request an interpreter.

20. The Court finds there is not a reasonable probability the outcome of the trial would have been different if trial counsel had requested the appointment of an interpreter.

B. Ground Seven: The remoteness and lack of timing cause counsel to be ineffective assistance of counsel because it did not have adequate time and opportunity to adequately investigate the allegations in Arkansas.[2]

21. Trial counsel filed a Motion to Suppress the prior allegations in Arkansas, and the evidence was not suppressed.

22. The Court finds Applicant has failed to show trial counsel were ineffective.

C. Ground Eight: Applicant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments because of substantial delay prejudiced Applicant.

[2] Applicant's claim in Ground Seven is unclear; however, to the extent possible, the Court makes its findings.

Applicant contends he did not receive a speedy trial, and trial counsel failed to file a Motion for Speedy Trial. He further contends that trial counsel were ineffective for not pushing for a ruling or hearing on his Motion to Suppress extraneous offenses, presumably because a ruling prior to September 1, 2013 would have been under prior law, resulting in exclusion of the extraneous offenses. He contends trial counsel were ineffective for not being apprised of the new law and pushing for trial prior to its effective date. The Court makes the following findings:

Lie 23. Delay was a trial strategy discussed with Applicant on several occasions.

Bullshit 24. Counsel could not foresee changes in the law.

25. Prior to the relevant amendment in the law, there was a purported stipulation[3] in place that the State would not introduce evidence of the prior allegation in the guilt/innocence phase unless the defense "put it at issue."

Lie 26. During trial preparation, Applicant suggested that trial counsel introduce the prior allegation in the belief it would help his case, but trial counsel moved to keep it out, which the State purportedly stipulated to.

Court ruling. 27. The law with regard to extraneous offenses changed after the purported stipulation was agreed to.

No trial commenced 28. Even if the trial court had ruled on the Motion to Suppress prior to September 1, 2013, it could have reconsidered its ruling in light of the change in law.

Not mine - ask about my speedy trial motion

29. Delay of the trial was trial strategy, and counsel was not ineffective in doing so. (Counsel denied my request for speedy trial - I was unemployed (lost job);

30. The Court finds no merit to this claim.

D. Ground Eleven: Ineffective Assistance of Counsel not to have asked for a mistrial after the State's voir dire.

Applicant contends trial counsel was ineffective for failing to move for a mistrial after the State purportedly misstated the standard of "beyond a reasonable doubt" during voir dire. The Court makes the following findings:

[3] The parties agreed to set the Motion to Suppress for hearing, if necessary.

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31. By Applicant's own admission, trial counsel objected to the State's discussion of reasonable doubt.

32. The Court gave instructions curing the State's alleged misstatement.
The state mistated beyond a reasonable doubt after courts instruction,,

33. At the time of the alleged misstatement, no veniremen had been selected for the jury.

34. Trial counsel addressed the standard of "beyond a reasonable doubt" in both the opening statement and the closing statement.

35. Trial counsel did not fall below an objective standard of reasonableness based on their failure to request a mistrial.

36. The Court finds no merit to this claim.

Admission of Extraneous Offenses

A. **Ground Three: Due Process violation occurred when the trial court erroneously admitted the testimony of the extraneous offenses in contradiction to the 2011 amendment to Article 38.37.**

B. **Ground Four: The trial court violated Applicant's US and State Constitutional rights against Ex Post Facto Law admitting extraneous offenses based on the 2013 amendment to Article 38.37.**

C. **Ground Five: The trial court's admission of evidence of sex offenses committed in Arkansas against another child violated Applicant's presumption of innocence under the due process rights.**

D. **Ground Six: Applicant's Fundamental Fairness of Due Process was violated.**

Grounds three, four, five and six pertain to the admission of extraneous evidence at trial, pursuant to Article 38.37 of the Texas Code of Criminal Procedure. In connection with grounds three, four, five and six, the Court makes the following findings:

37. On appeal, Applicant contended that the trial court erred in allowing evidence of extraneous offenses under Article 38.37 of the Texas Code of Criminal Procedure.

38. The Court of Appeals held that since the trial of the case commenced after September 1, 2013, evidence of an extraneous offense against a non-complaining child victim was admissible under Section 2 of Article 38.37 and that the trial court did not abuse its discretion in admitting the extraneous offense under Article 38.37, Section 2.

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39. It is well settled that an allegation that was rejected on direct appeal is not cognizable via a writ of habeas corpus. *Ex parte Acosta,* 672 S.W.2d 470, 472 (Tex.Crim.App. 1984).

40. Based on the foregoing, the court finds Applicant's claims in connection with admission of extraneous offenses should be denied.

Ground Nine: Constitutional right to confront Applicant's accuser Kandice Kimmel, forensic interview was violated. Kandice Kimmel made the statements that the indictment was based on.

For his ninth ground, Applicant contends his constitutional right to confront his accuser, Kandice Kimmel, the forensic interviewer was violated. The court makes the following findings:

41. Again, this issue was raised on direct appeal. The Court of Appeals determined that no error was preserved regarding the cross-examination of Kimmel and overruled this point of error.

42. Therefore, this claim is not cognizable via a writ of habeas corpus, and the Court finds it should be denied.

Ground Ten: Applicant's constitutional right was violated when the trial court disallowed cross-examination of Detective Green.

Applicant contends a summary report "contains a statement no witness said, and the only witness to cross-examine is the one who wrote it."[4] Applicant contends he had the right to confront the witness that "fabricated" the evidence. The Court makes the following findings:

43. Applicant failed to establish evidence was fabricated.

44. Applicant was allowed to cross-examine Detective Green, although the Court sustained the State's objection to Applicant attempting to cross-examine the witness with his statement about another witness's statement.

45. The trial court did not err in sustaining the objection.

46. Applicant could have raised this issue on appeal, and his failure to do so bars him from raising it on habeas corpus.

47. The Court finds this ground is without merit.

[4] Applicant's claim is not completely clear, but to the extent possible, the Court makes its findings.

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Ground Twelve: The cumulative effect of the constitutional violations denied Applicant a fair trial and resulted in a conviction not worthy of confidence.

48. Because the Court did not find any constitutional violations, it finds no merit to ground twelve and recommends it be denied.

The Court directs the Clerk of this Court to forward the Findings of Fact and Conclusions of Law, together with any other documents not previously forwarded, to the Court of Criminal Appeals.

Signed: April 12, 2018.

2:25 pm, April 12, 2018
Unique Digital Signature Identifier:
265590419473355170-1523561107446

BILL MILLER, JUDGE
5TH JUDICIAL DISTRICT, BOWIE COUNTY

APPENDIX N

99

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-87,675-01

EX PARTE KEVIN FAHRNI, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 10F0484-005-A IN THE 5TH DISTRICT COURT
FROM BOWIE COUNTY**

Per curiam.

ORDER

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of aggravated sexual assault of a child and sentenced to fifty years' imprisonment. The Sixth Court of Appeals affirmed his conviction. *Fahrni v. State*, 473 S.W.3d 486 (Tex. App.—Texarkana 2015).

Applicant raises sixteen grounds for review. He contends, among other things, that his trial counsel rendered ineffective assistance because he did not obtain an interpreter so Applicant could hear the proceedings and participate in his defense.

Applicant has alleged facts that, if true, might entitle him to relief. *Strickland v. Washington*,

466 U.S. 668 (1984); *Ex parte Cockrell*, 424 S.W.3d 543 (Tex. Crim. App. 2014). In these circumstances, additional facts are needed. As we held in *Ex parte Rodriguez*, 334 S.W.2d 294, 294 (Tex. Crim. App. 1960), the trial court is the appropriate forum for findings of fact. The trial court shall order trial counsel to respond to Applicant's claim of ineffective assistance of counsel. The trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d). In the appropriate case, the trial court may rely on its personal recollection. *Id.*

It appears that Applicant is represented by counsel. If the trial court elects to hold a hearing, it shall determine if Applicant is represented by counsel, and if not, whether Applicant is indigent. If Applicant is indigent and wishes to be represented by counsel, the trial court shall appoint an attorney to represent Applicant at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

The trial court shall make findings of fact and conclusions of law as to whether the performance of Applicant's trial counsel was deficient and, if so, whether counsel's deficient performance prejudiced Applicant. Guided by *Cockrell*,[1] the court shall make specific findings addressing Applicant's claim that he was unable to hear the proceedings and counsel took no action. The trial court shall also make any other findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of Applicant's claims for habeas corpus relief.

This application will be held in abeyance until the trial court has resolved the fact issues. The issues shall be resolved within 90 days of this order. A supplemental transcript containing all affidavits and interrogatories or the transcription of the court reporter's notes from any hearing or deposition, along with the trial court's supplemental findings of fact and conclusions of law, shall be forwarded to this Court within 120 days of the date of this order. Any extensions of time must

[1] *Ex parte Cockrell*, 424 S.W.3d 543 (Tex. Crim. App. 2014).

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be requested by the trial court and shall be obtained from this Court.

Filed: March 7, 2018
Do not publish

APPENDIX O

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WRIT NO. 1680484-005-A

KEVEN LYNN FAHRNI	§	IN THE DISTRICT COURT
	§	
vs.	§	5TH JUDICIAL DISTRICT
	§	
STATE OF TEXAS	§	BOWIE COUNTY, TEXAS

MOTION TO AMEND
WRIT OF HABEAS CORPUS 11.07 APPLICATION

COMES NOW, KEVEN FAHRNI #1944419, pro-se, requesting to amend this Writ of Habeas Corpus, filed last May 01, 2017, with the following grounds for the reasons that Mr. Fahrni had retained professional legal representation of Mr. David A. Schulman of Austin, Texas, April 2016 to June 2016, then of Mr. Martin Braddy of Sulphur Springs, Texas, July 2016 to April 2017, whom squandered away the majority of Federal Writ time in this case and never notified Mr. Fahrni of his ultimate decision to stop working on the 11.07 writ. Mr. Braddy is currently under investigation by the State Bar of Texas. These unfortunate events are what led up to and caused the tight time constraint of three (3) weeks for Mr. Randle Smolarz to prepare and submit the 11.07 Writ in order to prevent Mr. Fahrni from being time barred at the Federal 22.54 level. Subsequently, Mr. Randle Smolarz did not raise all relevant issues to the case at bar due to Mr. Fahrni requesting that he file the 11.07 Writ in a timely manner. Immediately after filing the 11.07 Writ Mr. Smolarz accepted employment with the District Attorney's Office.

Ground Thirteen: Insufficient evidence to support the element of penetration in the indictment.

Ground Fourteen: Ineffective Assistance of Appellate Counsel for failing to raise the issue of a third party guilt from the preserved in-camera hearing.

Ground Fifteen: Ineffective Assistance of Appellate Counsel for failing to raise the issues of the in-camera hearing that was preserved for an appeal.

Ground Sixteen: Code of Criminal Procedure Article 38.37 Section 2 -- is unconstitutional.

The petitioner prays that this Court will allow the Writ of Habeas Corpus to be amended.

Respectfully submitted,

Kevin Fahmi

Kevin Fahmi
TDCJ #1941419
Estelle Unit
264 FM 3478
Huntsville, Texas
77320-3322

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GROUND THIRTEEN:

Insufficient evidence to support the element of penetration in the indictment.

FACTS SUPPORTING GROUND THIRTEEN:

The instructions by the trial Court were (1) questions asked by the attorneys are not evidence; (2) you must not consider testimony to which an objection was sustained; and (3) your oath states that you will render a verdict only on the evidence submitted to you under my rulings. The jury did not abide by these instructions. The testimony alone, "I felt him like touch me between the legs," does not support penetration, which is one of the three elements required to support Aggravated Sexual Assault.

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GROUND FOURTEEN:

Ineffective Assistance of Appellate Counsel for failing to raise the issue of a third party guilt from the preserved In-Camera Hearing.

FACTS SUPPORTING GROUND FOURTEEN:

The statement made by Sarah towards the defendant in May 2005, was that around 1999-2000, the defendant stuck his finger in her vagina and she didn't know if she had just woken up or not, which is similar to the statement Sarah made towards her brother, who also lived in the defendant's home with Sarah from about 1998-2001. She stated that her brother would come into her room at night, touching her in certain places, she would wake up and he wasn't there any more. The brother was a juvenile at the time of this offense, that he was subsequently convicted of and served two years in a juvenile prison. All of this transpired after the allegations towards the defendant.

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GROUND FIFTEEN:

Ineffective Assistance of Appellate Counsel for failing to raise the issues of the In-Camera Hearing that was preserved for an appeal.

FACTS SUPPORTING GROUND FIFTEEN:

Sarah made allegations towards five (5) other people. Back in third grade, she would be approximately 8 years old, she alleged that she had been sexually assaulted on the school bus by two boys. The second allegation was thatea family friend, Brandon Wilson, did something to her that she says was not harmful, however, she never elaborated on what it was. The third allegation was made in Maryland towards Ryan Ackerson for staring at her in the wrong way and her having him fired from his job for it. The fourth allegation, that was against her brother, is covered in GROUND FOURTEEN. None of these allegations or occurrences should be shielded behind Texas Rules of Evidence 412 due to the fact that they are not sexual behavior on the part of Sarah.

GROUND SIXTEEN:

Code of Criminal Procedure Article 38.37 Section 2(2)(b) is unconstitutional.

FACTS SUPPORTING GROUND SIXTEEN:

Code of Criminal Procedure Article 38.37 Section 2 permits the disclosure of separate offenses of the defendant's sexual behavior, yet, Rule 412 prohibits the defendant from disclosing the same type of evidence of the witness's sexual behavior therefore, violating the rights of the defendant to have equal protection under the laws of Texas, which violates the equal protection clause guaranteed by the 14th Amendment of the United States Constitution.

APPENDIX P

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In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-14-00148-CR

KEVIN FAHRNI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 5th District Court
Bowie County, Texas
Trial Court No. 10F0484-005

Before Morriss, C.J., Moseley and Carter,* JJ.
Opinion by Justice Carter

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*Jack Carter, Justice, Retired, Sitting by Assignment

OPINION

Kevin Fahrni was convicted of aggravated sexual assault of a child[1] by a Bowie County jury. The jury assessed his punishment at fifty years' imprisonment in the Texas Department of Criminal Justice Correctional Institutions Division. On appeal, Fahrni complains that the trial court erred (1) in allowing evidence of extraneous offenses under Article 38.37 of the Texas Code of Criminal Procedure, (2) in allowing a sexual assault nurse examiner (SANE) to testify regarding out-of-court statements of the child victim, (3) in denying him the opportunity to cross-examine the State's expert witness regarding statements made by the child victim, and (4) in allowing improper jury argument by the State. Fahrni also complains that since there was no effective amendment of the indictment, the trial court erred in charging the jury on an offense date that varied from the date used in the original indictment. We find that the trial court did not abuse its discretion in its evidentiary rulings, that there was no improper jury argument by the State, and that the amendment to the indictment was effective. Therefore, we affirm the judgment of the trial court.

I. Background

Sandra, Sarah's[2] mother, began dating Fahrni while she was finishing nursing school. At the time, Sarah was around seven years old, and her brother, Sam, was around six. At Fahrni's suggestion, Sandra and her children moved into his house and resided with him for approximately

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[1]*See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i), (2)(B) (West Supp. 2014).

[2]Pursuant to Rule 9.10 of the Texas Rules of Appellate Procedure, the child victim will be referred to as "Sarah." *See* TEX. R. APP. P. 9.10. In order to further protect Sarah's identity, her mother will be referred to as "Sandra," her brother as "Sam," and her grandmother as "Sally." These are all fictitious names.

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four years, until October 2008. After graduating from nursing school, Sandra began working at a local hospital. In 2007, Sandra started working nights, and Fahrni took care of Sarah and Sam while their mother was at work. Sarah and Sam testified that when they would ask Fahrni if they could stay with their grandparents, Fahrni would refuse to let them.

Sarah testified that while her mother was at work, Fahrni would often wrestle on the ground with Sam and her. Acting like it was a game, Fahrni would pull their pants down and grab them on their butts. At other times while Sandra was at work, Fahrni would join Sarah and Sam in the swimming pool. While he was playing with them, Fahrni would pull their swim trunks or bottoms down their legs and touch their naked butts. Fahrni never played these games when Sandra was around. At the time these incidents occurred, Sarah was eleven years old, and Sam was nine.

One night while Sam was in his bedroom, Sarah was lying on the living room floor in her nightgown watching television. Fahrni was lying on the couch next to her, when she felt him touch her underneath her panties between her legs. Sarah testified that she felt his finger touch both the outside and inside of her sexual organ. She looked at him, and he said, "I thought you were asleep." He stopped and did not say anything else to her, and she got up and went to her room. She tried to tell her mother about the incident in the summer of 2008, but only told her that Fahrni was messing with her and did not tell her that anything sexual had happened. In late October 2008, Sarah told her grandmother, Sally, about the incident and made her promise not to tell anyone. However, Sally discussed the situation with her husband, and they reported the incident to the police a few days after Sarah's outcry.

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II. Extraneous Offenses

During the trial, the State called Sam as a witness. Sam testified that when his mother was at work, Fahrni would often wrestle with Sarah and him, pulling down their pants and grabbing their butts. He also testified that Fahrni would sometimes play with them in the pool and pull their swim trunks down their legs and touch their naked butts. He said that Fahrni would act like this was a game and that he never did those things when Sandra or anyone else was around.

The State also called Kathy,[3] the daughter of one of Fahrni's former girlfriends, to testify during the trial. Kathy testified that her mother had begun dating Fahrni when Kathy was approximately five years old. Kathy, her mother, and her brother moved into Fahrni's house and resided with him for five or six years. When her mother began working nights, Fahrni looked after Kathy. She testified that when she was about six or seven, Fahrni began touching her inappropriately while her mother was at work. She related that one night, after Fahrni had sent her brother to bed, she was lying on her mother's bed watching television when she felt Fahrni remove her underwear and stick his fingers in her vagina. She also testified that on a different night also when her brother was sleeping, she was sitting on Fahrni's lap in the living room when Fahrni tried to put his hand down the front of her pants. According to Kathy, she looked at him, and he said, "'I saw a bug.'" Although she tried to tell her mother about it at the time, she only told her that Fahrni had "French kissed" her. She explained that she was afraid of getting in trouble if she told her mother what really happened. Her mother confronted Fahrni, and Kathy did not recall him

[3]Pursuant to Rule 9.10 of the Texas Rules of Appellate Procedure, this child victim will be referred to as "Kathy." *See* TEX. R. APP. P. 9.10.

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touching her afterward. Several years later, and long after they had moved out of Fahrni's house, Kathy told her mother what really happened. Her mother reported the incident to law enforcement authorities.

A. The History of Article 38.37

Rule 404 of the Texas Rules of Evidence forbids the admission of other crimes, wrongs, or acts of a defendant—extraneous-offense evidence—to prove his character for the purpose of showing that he acted in accordance with that character on some particular occasion. TEX. R. EVID. 404(b), 60 TEX. B.J. 1129, 1134 (1997);[4] *Graves v. State*, 452 S.W.3d 907, 913 (Tex. App.—Texarkana 2014, pet. ref'd). However, such evidence may be admissible if introduced for purposes other than character conformity. *See* TEX. R. EVID. 404(b), 60 TEX. B.J. 1129, 1134 (1997); *De La Paz v. State*, 279 S.W.3d 336, 343, 345 (Tex. Crim. App. 2009); *Montgomery v. State*, 810 S.W.2d 372, 387–88 (Tex. Crim. App. 1990) (op. on reh'g). Further, Rule 405 generally limits the methods by which character evidence, when admissible, may be proven. TEX. R. EVID. 405, 60 TEX. B.J. 1129, 1134 (1997).

In 1995, the Legislature enacted Article 38.37 of the Texas Code of Criminal Procedure, which renders "evidence of [a defendant's] other crimes, wrongs, or acts" admissible, notwithstanding Rules 404 and 405, in the prosecution of that defendant for certain criminal

[4]The Texas Rules of Evidence were amended by orders of the Texas Supreme Court and the Texas Court of Criminal Appeals, effective April 1, 2015. The Texas Rules of Evidence cited in this opinion are the Rules in effect in June 2014, when this case was tried. To facilitate access to the text of the June 2014 version of the Rules, each citation to the Texas Rules of Evidence will be followed by a citation to the volume and page of the Texas Bar Journal in which the June 2014 version of the cited Rules first appeared.

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offenses, including aggravated sexual assault of a child.[5] In its original form and in its 2008 form, when Fahrni was alleged to have sexually assaulted Sarah, only extraneous offenses committed against the complaining child victim were admissible under Article 38.37. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37, § 1(b) (West Supp. 2014). In 2011, the Legislature amended Article 38.37 and expanded its scope by adding new criminal offenses to the list of prosecutions in which it applies. Specifically, the amendment made Article 38.37 applicable in prosecutions of the offenses of sexual performance by a child, trafficking in children, and compelling prostitution of a child.[6] The enacting provision of the 2011 amendment established its effective date as September 1, 2011, and stated, "The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed."[7] In 2013, the Legislature again amended Article 38.37 by adding the current Section 2, which, notwithstanding Rules 404 and 405, makes evidence of certain extraneous offenses committed by the defendant, including aggravated sexual assault of and indecency with a child, admissible "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant." *See* TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2 (West Supp. 2014). Thus, after the 2013 amendments went into effect on September 1, 2013, evidence of

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[5]*See* Act of May 28, 1995, 74th Leg., R.S., ch. 318, § 48, 1995 Tex. Gen. Laws 2734, 2748–49 (amended 2005, 2011, 2013) (current version at TEX. CODE CRIM. PROC. ANN. art. 38.37 (West Supp. 2014)).

[6]*See* Act of April 7, 2011, 82d Leg., R.S., ch. 1, § 2.08, 2011 Tex. Gen. Laws 1, 6 (amended 2013) (current version at TEX. CODE CRIM. PROC. ANN. art. 38.37 (West Supp. 2014)).

[7]*See* Act of April 7, 2011, 82d Leg., R.S., ch. 1, §§ 7.01–.02, 2011 Tex. Gen. Laws 1, 17 (amended 2013).

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certain extraneous offenses committed by the defendant against a non-complaining child victim became admissible under Article 38.37. Like the 2011 amendment, the 2013 amendment had no retroactive effect.[8]

B. Arguments of the Parties

On appeal, Fahrni contends that the trial court erred in admitting the testimony of Sam and Kathy under Article 38.37. He argues that since he is alleged to have committed the offense in 2008, the law applicable to his case is the law in effect in 2008. Fahrni bases his argument on the enacting paragraph of the 2011 amendment to Article 38.37, which provides that offenses committed before the effective date of that amendment—September 1, 2011—are governed by the law in effect on the date the offense was committed. The State argues that the 2011 amendment to Article 38.37 is irrelevant because it only concerned evidence of extraneous offenses involving the complaining victim, which is not implicated by the facts of this case. Rather, the State's argument continues, evidence of extraneous offenses involving a non-complaining child victim first became admissible under the 2013 amendment to Article 38.37. Therefore, the State contends, the 2013 amendment and its enacting paragraphs determine what law controls here. Finally, the State contends that Fahrni concedes on appeal that if the 2013 amendments apply, then the evidence of extraneous offenses was admissible.

C. Standard of Review

We review a trial court's ruling on the admissibility of extraneous-offense evidence under an abuse-of-discretion standard. *De La Paz*, 279 S.W.3d at 343; *Hernandez v. State*, 351 S.W.3d

[8]*See* Act of May 17, 2013, 83d Leg., R.S., ch. 387, §§ 2–3, 2013 Tex. Gen. Laws 1167, 1168.

156, 160 (Tex. App.—Texarkana 2011, pet. ref'd); *Duren v. State*, 87 S.W.3d 719, 728 (Tex. App.—Texarkana 2002, pet. struck). If the trial court's ruling is within the zone of reasonable disagreement, there is no abuse of discretion, and we uphold the trial court's ruling. *De La Paz*, 279 S.W.3d at 343–44; *Hernandez*, 351 S.W.3d at 160. We will not reverse the trial court if its decision to admit evidence is supported by the record since, under that scenario, there is no abuse of discretion. *Marsh v. State*, 343 S.W.3d 475, 478 (Tex. App.—Texarkana 2011, pet. ref'd). We give deference to the trial court's decision and may not substitute our decision for that of the trial court. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003); *Marsh*, 343 S.W.3d at 478. Furthermore, the trial court's evidentiary ruling will not be disturbed if it is correct on any theory of law applicable to that ruling. *De La Paz*, 279 S.W.3d at 344; *Hernandez*, 351 S.W.3d at 160–61; *Duren*, 87 S.W.3d at 728.

D. Applicability of the 2013 Amendment

At the trial of a defendant accused of, *inter alia*, aggravated sexual assault of a child, evidence of certain extraneous offenses committed by the defendant, including aggravated sexual assault of and indecency with a child, is admissible under Section 2 of Article 38.37 "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant." TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(a)(1)(C), (E), (2)(b) (West Supp. 2014).[9] Under Article 38.37, evidence of extraneous offenses against other children is admissible even if such evidence would be otherwise

[9]The Acts described by Sam would constitute evidence of indecency with a child. *See* TEX. PENAL CODE ANN. § 21.11(a)(2)(B) (West 2011). One act described by Kathy would constitute evidence of aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i), (2)(B) (West Supp. 2014).

inadmissible under Rules 404 or 405 of the Texas Rules of Evidence.[10] *See* TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(b); *Bradshaw v. State*, No. 06-14-00165-CR, 2015 WL 2091376, at *4 (Tex. App.—Texarkana May 5, 2015, pet. filed). However, the admission of evidence under Article 38.37 "is limited by Rule 403's balancing test, which permits admission of evidence as long as its probative value is not substantially outweighed by its potential for unfair prejudice." *Bradshaw*, 2015 WL 2091376, at *5; TEX. R. EVID. 403, 60 TEX. B.J. 1129, 1134 (1997).

As the State points out, evidence of extraneous offenses involving non-complaining child victims first became admissible under Article 38.37 through the 2013 amendment to that Article.[11] Fahrni challenges the applicability of the 2013 amendment, arguing that under the enacting provision of the 2011 amendment to Article 38.37, the applicable law was the law in effect at the time of the alleged commission of his offense. We agree with Fahrni that in 2008, when he was alleged to have committed the offense, Article 38.37 only allowed evidence of extraneous acts involving the defendant and the child victim. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37, § 1. However, we do not agree that the enacting provision of the 2011 amendment to Article 38.37 is applicable to the question of whether evidence of an extraneous offense involving a non-complaining child victim is admissible in this case. As the State points out, the 2011 amendment

[10]*See* TEX. R. EVID. 404, 405, 60 TEX. B.J. 1129, 1134 (1997). Rule 404 generally prohibits the use of character evidence to prove a person acted in accordance with a character trait. TEX. R. EVID. 404, 60 TEX. B.J. 1129, 1134 (1997). Rule 405 details specific methods of proving character when character evidence is admissible. TEX. R. EVID. 405, 60 TEX. B.J. 1129, 1134 (1997).

[11]*See* Act of May 17, 2013, 83d Leg., R.S., ch. 387, § 1, 2013 Tex. Gen. Laws 1167 (current version at TEX. CODE CRIM. PROC. ANN. art. 38.37, § 1 (West Supp. 2014)).

only made revisions to Section 1 of Article 38.37.[12] Section 1 only applies to the admissibility of evidence of extraneous offenses against the complaining child victim. TEX. CODE CRIM. PROC. ANN. art. 38.37, § 1(a), (b). As discussed above, the 2011 revisions to Section 1 expanded its applicability to include proceedings in which a defendant is being prosecuted for the offense of sexual performance by a child, trafficking in children, or compelling prostitution of a child, none of which is involved in this case.[13] By its own terms, the enacting paragraph of the 2011 amendment only applies to "[t]he change in law made by [the 2011] Act."[14] In this point of error, Fahrni complains of the admission of evidence of extraneous offenses against a non-complaining child victim. Since the 2011 amendment did not change the law regarding the admissibility of evidence of extraneous offenses against a non-complaining child victim, its enacting paragraph is inapplicable to this issue. Rather, the enacting provision of the 2013 amendment, which for the first time made evidence of extraneous offenses against a non-complaining child victim admissible under Article 38.37, applies to this issue.[15] Therefore, we must look to the pertinent provisions of

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[12]*See* Act of April 7, 2011, 82d Leg., R.S., ch. 1, § 2.08, 2011 Tex. Gen. Laws 1 (amended 2013).

[13]*See id.*

[14]*See* Act of April 7, 2011, 82d Leg., R.S., ch. 1, § 7.01, 2011 Tex. Gen. Laws 1 (amended 2013).

[15]The State contends that Fahrni has conceded on appeal that if the 2013 amendment applies, then the extraneous-offense evidence was admissible. We agree. However, this is not the same as conceding that the 2013 amendment is applicable in his case. As Fahrni points out, he argued at trial that since he was indicted in 2010, his criminal proceeding had commenced before the effective date of the 2013 amendment and, under the enacting provision of the 2013 amendment, the applicable law was the law in effect at that time. At most, Fahrni's brief may be read as conceding that if *Howland v. State*, 990 S.W.2d 274 (Tex. Crim. App. 1999), is controlling in construing the 2013 amendment, then the trial court did not err. However, we do not think that Fahrni has conceded that *Howland* is controlling or that the 2013 amendment is applicable to his case. The State, as the proponent of the evidence, has the burden to demonstrate its admissibility under Article 38.37. This burden includes showing that the amendment allowing evidence of an extraneous offense against a non-complaining child victim is applicable to this case.

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the 2013 amendment and their enacting paragraph to determine whether they are applicable in this case.

> "When the Legislature amends a statute, we presume the Legislature meant to change the law, and we give effect to the intended change." *Brown v. State*, 915 S.W.2d 533, 536 (Tex. App.—Dallas 1995), *aff'd*, 943 S.W.2d 35 (Tex. Crim. App. 1997). Likewise, we must presume the Legislature employed each word for a particular purpose and similarly omitted each word for a particular purpose. *Id.*; *see State v. N.R.J.*, 453 S.W.3d 76, 77 (Tex. App.—Fort Worth 2014, pet. filed) ("We presume that the legislature chooses a statute's language with care, deciding to include or omit words for a purpose."); *Mireles v. State*, 444 S.W.3d 679, 684 (Tex. App.—Houston [14th Dist.] 2014, pet. filed) (same).

Bradshaw, 2015 WL 2091376, at *4. With these principles in mind, "[w]e begin our analysis, as in every case of statutory construction, by looking at the plain and literal language of the provision." *Howland*, 990 S.W.2d at 276; *see also Ex parte Evans*, 964 S.W.2d 643, 646 (Tex. Crim. App. 1998).

The 2013 amendment to Article 38.37 redesignated the former Section 2 as Section 1(b) and added the current Sections 2 and 2-a.[16] The current Section 2 states that it "applies only to the *trial* of a defendant." TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2 (emphasis added). The enactment provision of the 2013 amendment states,

> The change in law made by this Act applies to the admissibility of evidence in *a criminal proceeding* that commences on or after the effective date of this Act[—September 1, 2013]. The admissibility of evidence in *a criminal proceeding* that commences before the effective date of this Act is covered by the law in effect when the proceeding commenced, and the former law is continued in effect for that purpose.[17]

[16]*See* Act of May 17, 2013, 83d Leg., R.S., ch. 387, § 1, 2013 Tex. Gen. Laws 1167 (current version at TEX. CODE CRIM. PROC. ANN. art. 38.37, §§ 1(b), 2, 2-a (West Supp. 2014)).

[17]*See* Act of May 17, 2013, 83d Leg., R.S., ch. 387, §§ 2–3, 2013 Tex. Gen. Laws 1167 (emphasis added).

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Initially, we note that the State argued at trial, and the trial court agreed, that under *Howland*, a proceeding, for purposes of Article 38.37, means any of the individual steps that may be taken during the course of a criminal prosecution. *See Howland*, 990 S.W.2d at 277. Since Fahrni's trial—one of the many steps of a criminal prosecution—commenced after September 1, 2013, the trial court held that the 2013 amendment to Article 38.37 was applicable. While we agree that the reasoning in *Howland* is instructive in the construction of the 2013 amendment, we do not think that it is controlling. *But see Dominguez v. State*, No. 04-13-00789-CR, 2015 WL 1939378, *3 (Tex. App.—San Antonio March 25, 2015, pet. filed) (finding 2013 amendment applicable to trial that commenced after September 1, 2013, based on *Howland*, but without additional analysis).

In *Howland*, the Texas Court of Criminal Appeals determined the applicability of Section 1 of Article 38.37 to the trial of a defendant who was indicted before the effective date of the statute, but who was tried after the effective date. *Howland*, 990 S.W.2d at 275. Section 1 provided that it "'applies to *a proceeding in a prosecution* of a defendant,'" and the enactment provision stated that it was applicable "'to *any criminal proceeding* that commences on or after the effective date.'" *Id.* at 276 (citing TEX. CODE CRIM. PROC. ANN. art. 38.37). The court focused its analysis on the meaning of "proceeding" and noted that *Black's Law Dictionary* recognizes two competing meanings: proceeding could "'describe the *entire course of an action at law*'" or "'*every step required to be taken* in any cause by either party.'" *Id.* at 276 (quoting BLACK'S LAW DICTIONARY 1024 (Centennial & 6th ed. 1990)). Since the entire course of an action at law "means the same

thing as or would encompass 'a prosecution,'" the court held that "the phrase 'a proceeding in a prosecution,' [in Section 1] refers on its face to one of the individual or smaller 'steps or measures' that may be taken *within* the larger criminal prosecution." *Id.* at 277. The court went on to hold that "[c]onstrued in light of this reading of section one, the enactment paragraph's reference to 'any criminal proceeding' logically refers to 'any' of the many steps that might occur within the process of a prosecution." *Id.* However, the court went on to specifically note,

> We recognize that the phrase "criminal proceeding" might, taken alone, be interpreted as an entire course of a prosecution. However, this phrase takes on a different meaning when construed in light of the language utilized in the article itself and in light of the use of the term "any" preceding it.

Id. at 277 n.6. Thus, the *Howland* court based its construction of "any criminal proceeding" in the enactment provision of Section 1 on the specific language used in Section 1 ("a proceeding in a prosecution"), its construction of the use of "proceeding" in Section 1, and the use of the modifier "any" preceding "criminal proceeding." *Id.* at 276–77.

However, the Legislature chose to limit the applicability of Section 2 to "the *trial* of a defendant," TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2 (emphasis added), and chose not to use the modifier "any" before the phrase "criminal proceeding" in the enactment provision.[18] Thus, we are tasked with construing the meaning of "criminal proceeding," taken alone, as used in the enactment paragraph.

Under the Texas Code of Criminal Procedure, words, phrases, or terms not "specially defined" "are to be taken and understood in their usual acceptation in common language." TEX.

[18]Act of May 17, 2013, 83d Leg., R.S., ch. 387, § 2, 2013 Tex. Gen. Laws 1167.

CODE CRIM. PROC. ANN. art. 3.01 (West 2015). "Criminal proceeding" is not specially defined in the Texas Code of Criminal Procedure. Therefore, we begin our analysis "by looking at the plain and literal language of the provision." *Howland*, 990 S.W.2d at 276. In the edition of *Black's Law Dictionary* in publication at the time the 2013 amendment was enacted, "criminal proceeding" is defined as "[a] proceeding instituted to determine a person's guilt or innocence or to set a convicted person's punishment; a criminal hearing or trial." BLACK'S LAW DICTIONARY 1324 (9th ed. 2009). This definition indicates that "criminal proceeding" to an individual hearing, a trial, or to either the guilt/innocence phase or punishment phase of the trial, rather than to the entire course of a criminal prosecution.

In addition, there is a distinction between a "criminal proceeding" and a "criminal action." The Texas Code of Criminal Procedure provides that "[a] criminal action is prosecuted in the name of the State of Texas against the accused, and is conducted by some person acting under the authority of the State, in accordance with its laws." TEX. CODE CRIM. PROC. ANN. art. 3.02 (West 2015). Thus, the Legislature uses "criminal action" in the sense of encompassing the entire course of an action at law against the accused, i.e., the entire course of a criminal prosecution. *See Howland*, 990 S.W.2d at 277 n.5 (recognizing one definition of "prosecution," as used in Section 1 of Article 38.37, is "criminal action," meaning "'the entire course of an action at law'"). This leads us to the conclusion that by using "criminal proceeding," rather than "criminal action," in the enactment provision, the Legislature must have intended "criminal proceeding" to mean something other than the entire course of action against the accused. Coupled with the common meaning of "criminal proceeding," found in *Black's*, and considering that Section 2 limits the use

of the evidence to the trial of the defendant, we find that the Legislature intended "criminal proceeding" in this instance to mean the trial, or one of the phases of the trial. Therefore, since the trial of this case commenced after September 1, 2013, evidence of an extraneous offense against a non-complaining child victim was admissible under Section 2 of Article 38.37. Consequently, we find that the trial court did not abuse its discretion in admitting the extraneous-offense testimony under Article 38.37, Section 2 and overrule Fahrni's first point of error.

III. Out-of-Court Statements of the Child Victim

Kathy Lach, a registered nurse and SANE, testified at trial regarding her examination of Sarah. She explained that a SANE conducts medical examinations of both adults and children. These medical examinations consist of taking a history, performing a head-to-toe physical assessment of the patient, and performing a genital examination. Lach testified that the purpose of the verbal history is for medical treatment and diagnosis, telling her where to look in her examination and what medical treatments might be needed. She also testified that she had performed a medical examination of Sarah, including obtaining a verbal history, performing a head-to-toe physical examination, and conducting a detailed genital examination. When memorializing a verbal history, Lach testified that she writes down whatever the patient tells her, word for word. She affirmed that her purpose in taking a child's verbal history is to evaluate the child's medical needs, and she further acknowledged that the children she examines have an interest in receiving proper medical treatment.

When the State offered Lach's SANE report into evidence, Fahrni objected that it contained hearsay; more specifically, he argued that it contained statements by Sarah that were not given for

purposes that would qualify them for admission under the medical exception to the hearsay rule. After his objection was overruled, the report was admitted into evidence and Lach read the history that Sarah provided.[19]

In his third point of error, Fahrni asserts that the trial court erred in allowing Lach to read the statement given her by Sarah, as set forth in the SANE report, under the medical diagnosis or treatment exception to the hearsay rule. *See* TEX. R. EVID. 803(4), 60 TEX. B.J. 1129, 1149 (1997). He argues that there is nothing in the record establishing that Sarah knew her statement was for purposes of medical diagnosis or that Sarah understood the importance of giving truthful information. Pointing to testimony provided by Lach, Fahrni also argues that the sole reason for the SANE examination was to allow Lach to obtain the oral statement for use in court. The State points out that when a victim is speaking with medical personnel, such as a SANE, this Court can infer from the record that the victim knew the importance of telling the truth in order to obtain medical treatment or diagnosis. The State further argues that there is sufficient evidence in the record to support an inference that Sarah understood the need to be truthful with the SANE, and we agree.

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[19]As read by Lach, the SANE report reflected Sarah's history as follows:

> "I was on my stomach on the floor and [Fahrni] was on the couch in the living room and we were watching TV. Then I felt him touch me. He touched me with his fingers on my private part." Patient labels anatomical picture of female vulva as what she calls her private part. "He touched me with his fingers beneath my panties. I moved and he said, I thought you were sleeping, then I got up and went in my room. When we are horse-playing he grabs me and -- and my brother and tries to pull our pants down but we hold on to our belt loops." Patient states, "He put his fingers inside my private that one time in the living room." Patient states.

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A. Standard of Review

We review a trial court's admission of evidence under an exception to the hearsay rule using an abuse-of-discretion standard. *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008); *Franklin v. State*, 459 S.W.3d 670, 675 (Tex. App.—Texarkana 2015, pet. filed). We will not reverse the trial court's ruling unless it "was so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor*, 268 S.W.3d at 579 (citing *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003)); *Franklin*, 459 S.W.3d at 675.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TEX. R. EVID. 801(d), 60 TEX. B.J. 1129, 1149 (1997). "Once the opponent of hearsay evidence makes the proper objection, it becomes the burden of the proponent of the evidence to establish that an exception applies that would make the evidence admissible in spite of its hearsay character." *Taylor*, 268 S.W.3d at 578–79; *Franklin*, 459 S.W.3d at 676. In this case, Fahrni properly objected to the admission of Sarah's hearsay statement contained in the SANE report; therefore, it was incumbent on the State to establish an exception under which the evidence was admissible. At trial, the State asserted that the statement was admissible as a statement made for medical diagnosis or treatment, and the trial court admitted it on that basis. Rule 803(4) provides,

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> **(4) Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception

> or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

TEX. R. EVID. 803(4), 60 TEX. B.J. 1129, 1149 (1997).

A proponent of a statement made for the purpose of medical diagnosis or treatment has the burden to show that the "declarant was aware that the statements were made for that purpose and that 'proper diagnosis or treatment depends upon the veracity of such statements.'" *Taylor*, 268 S.W.3d at 589 (quoting *Jones v. State*, 92 S.W.3d 619, 623 (Tex. App.—Austin 2002, no pet.)); *Prieto v. State*, 337 S.W.3d 918, 921 (Tex. App.—Amarillo 2011, pet. ref'd). In addition, the proponent must show that the particular statement is "pertinent to diagnosis or treatment."[20] *See* TEX. R. EVID. 803(4), 60 TEX. B.J. 1129, 1149 (1997); *see also Taylor*, 268 S.W.3d at 591; *Prieto*, 337 S.W.3d at 921.

We look to the entire record to determine whether a child understands the importance of being truthful when being questioned by medical personnel. *Franklin*, 459 S.W.3d at 676–77; *see Beheler v. State*, 3 S.W.3d 182, 188–89 (Tex. App.—Fort Worth 1999, pet. ref'd). An express statement that the child understood the need to be truthful is not required. *Beheler*, 3 S.W.3d at 188. Rather, as the Texas Court of Criminal Appeals has stated, "[I]t seems only natural to presume that adults, and even children of a sufficient age or apparent maturity, will have an implicit awareness that the [medical personnel]'s questions are designed to elicit accurate information and that veracity will serve their best interest."[21] *Taylor*, 268 S.W.3d at 589. In addition, it is

[20]In this appeal, Fahrni does not contend that the particular statements contained in the SANE report were not pertinent to diagnosis or treatment.

[21]*See Taylor*, 268 S.W.3d at 589 n.95 (citing cases recognizing children as young as eight years old to be of sufficient age to appreciate need to be truthful in statements made to medical personnel).

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reasonable to assume that a child of sufficient age understands that statements made to a recognized medical professional, such as a physician or nurse, are "made for the purpose of medical diagnosis and treatment." *Gohring v. State*, 967 S.W.2d 459, 463 (Tex. App.—Beaumont 1998, no pet.). As this Court recently held, "[C]ourts can infer from the record that the victim knew it was important to tell a SANE the truth in order to obtain medical treatment or diagnosis." *Franklin*, 459 S.W.3d at 677 (citing *Prieto*, 337 S.W.3d at 921).

B. Analysis

In this case, Lach testified that she introduced herself to Sarah, took a history of what had happened to her, and performed a head-to-toe physical examination and a detailed genital examination. She testified that the purpose of taking the history was to evaluate the medical needs of the child, and she confirmed that Sarah had an interest in receiving proper medical treatment. There is nothing in the record that would lead us to conclude that Sarah was unaware that the purpose of Lach's questions was to provide medical treatment or diagnosis or that she was unaware of the necessity to be truthful. *See Taylor*, 268 S.W.3d at 589. We find the record sufficient to support a finding that Sarah understood both the necessity to be truthful and that her statements were elicited for the purpose of medical treatment or diagnosis.

Further, we disagree with Fahrni's assertion that the history was taken solely for use in court. Fahrni points to the following testimony of Lach, along with her testimony that the examination was performed at the request of law enforcement, in support of his contention:

> Q [By the State] And why is it so important, ma'am, that you write down word for word what the child tells you?

A Because if it were to be going to court, I don't know if it would or how long it would be from then, and there may be no way I would remember, so that way I can remember exactly what the child told me and it wouldn't be, you know, any speculation on my part.

We do not think this statement is necessarily evidence that Lach took Sarah's history solely for its use in court. Lach testified that courts have recognized her as an expert in her capacity as a SANE, indicating that she has testified in similar cases. Therefore, the complained-of statement could reasonably be interpreted as reflecting her concern that any future testimony she may give concerning her examination be as accurate as possible. This does not negate the fact that the purpose behind taking the patient's history, including her complaints and an explanation of the cause of those complaints, was medical treatment and diagnosis. Further, Fahrni ignores the exchange that immediately followed the complained-of statement:

Q And when you ask these questions of the child to get the verbal history, it [sic] that to evaluate the medical needs of the child at that time?

A Correct.

Q Now, when you're, when you take a verbal history from a child, do these children have an interest in receiving proper medical treatment?

A Yes.

Lach then made it clear that she does not ask a patient what kind of assault she may have suffered; rather, she asks the patient why she is there. On this record, we conclude that it is at least within the zone of reasonable disagreement that the history was taken for the purpose of medical treatment or diagnosis. Therefore, we hold that the trial court did not abuse its discretion in admitting Lach's testimony, as well as the statements attributed to Sarah contained in the SANE report, under Rule 803(4). We overrule Fahrni's third point of error.

IV. Cross-Examination of the State's Expert Witness

The State offered Kandice Kimmel, who conducted forensic interviews of Sarah and Sam, as an expert witness. Kimmel testified that she found no signs of coaching in their interviews.[22] On cross-examination, Fahrni sought to use a statement made by Sarah in her forensic interview. The State initially raised a hearsay objection, and when that objection was overruled, the State objected under Rule 403.[23] During a hearing outside the presence of the jury, Fahrni informed the trial court that he wished to cross-examine Kimmel regarding a portion of the forensic interview Fahrni viewed as evidence of coaching. He identified the portion of the interview as follows:

> [Counsel for Fahrni]: Ms. Kimmell says, Okay, all right. Well, did you know you were coming here to talk to me today? And [Sarah]'s response is, Yeah, my, um, there was a paper on his sink that he molested his ex-wife or his ex-girlfriend's daughters but nobody -- but my mom didn't believe it because her ex-wife didn't pursue it.

Fahrni then argued that this was a sign of coaching because it was a non-responsive answer and because "pursue" was not a word that an eleven-year-old would normally use. The State responded by pointing out that Kimmel had not testified that the statement contained adult language. The State then argued that allowing Fahrni to cross-examine this expert witness about the victim's statement was substantially more prejudicial than allowing him to cross-examine the victim herself. Finally, the State claimed that this would be confusing to the jury. The trial court pointed

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[22]Kimmel testified that "[s]ome signs would be inconsistencies during the child's statement, the child's not having answers for the questions, not having any sensory details, or using very adult language." On cross-examination, she testified that "the signs we look for for a child that is not coached would be if they're -- their statement remained consistent, if they used kid language, if they had adult sexual knowledge, if they correct me during the interview."

[23]Under Rule 403, relevant evidence may be excluded, *inter alia*, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." TEX. R. EVID. 403, 60 TEX. B.J. 1129, 1134 (1997).

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out that rather than giving an opinion on coaching, Kimmel had simply stated that she saw no signs of coaching. The court additionally noted that Fahrni was free to cross-examine Sarah about the statement[24] and was also at liberty to argue to the jury that this was evidence of coaching. The trial court then found that questioning Kimmel about the statement would create a confusion of the issues and sustained the State's objection.

In his fourth point of error, Fahrni contends that the trial court erred in limiting his cross-examination of Kimmel in violation of Rule 705 of the Texas Rules of Evidence[25] and his right to confront the witnesses against him.[26] He argues that the trial court's ruling prevented him from cross-examining the State's expert witness concerning the facts and data she relied upon in forming her opinion. The State responds that the alleged error is predicated on an exclusion of evidence and that Fahrni failed to preserve this error for appellate review, citing *Love v. State*, 861 S.W.2d 899, 903 (Tex. Crim. App. 1993). We agree.

Fahrni characterizes the trial court's ruling as an impediment to his right under Rule 705 to examine Kimmel concerning the facts and data she relied upon in forming any opinion she may have expressed. The trial court, however, informed Fahrni that in its view, Kimmel had not

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[24]As noted above, Fahrni cross-examined Sarah regarding the complained-of statement.

[25]Rule 705 states that when an expert testifies in terms of opinion, she "may . . . be required to disclose on cross-examination, the underlying facts or data" on which the opinion is based. TEX. R. EVID. 705(a), 60 TEX. B.J. 1129, 1147 (1997).

[26]Although Fahrni's point of error states that the trial court's ruling "violat[ed] . . . Appellant's right to confront witnesses against him," he makes no argument and cites no legal authority in support of this point. The parties to an appeal are required to "cite specific legal authority and to provide legal argument based on that authority." *Rhoades v. State* 934 S.W.2d 113, 118 (Tex. Crim. App. 1996) (citing *Vuong v. State*, 830 S.W.2d 929, 940 (Tex. Crim. App. 1992)). Where adequate briefing is not provided, the contention may be overruled. *Id.*; *Heiselbetz v. State,* 906 S.W.2d 500, 512 (Tex. Crim. App. 1995). We overrule this point.

expressed an expert opinion about coaching, but merely had stated that she saw no signs of coaching. If the trial court is correct, then any error on its part could be characterized as limiting Fahrni's right to impeach Kimmel under Rule 611(b).[27] In either case, the predicate of the alleged error is the exclusion of evidence by the trial court, and it was necessary for Fahrni to make an adequate offer of proof in order to preserve any error. *See* TEX. R. EVID. 103(a)(2), 60 TEX. B.J. 1129, 1130 (1997); *Mays v. State*, 285 S.W.3d 884, 889–90 (Tex. Crim. App. 2009); *Love*, 861 S.W.2d at 903; *Duke v. State*, 365 S.W.3d 722, 725–26 (Tex. App.—Texarkana 2012, pet. ref'd).

Under Rule 103(a)(2),

> Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and
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> . . . .
>
> (2) . . . . the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

TEX. R. EVID. 103(a)(2), 60 TEX. B.J. 1129, 1130 (1997). The complaining party may make his offer of proof through questions and answers, or by counsel making a concise statement of the evidence. *Mays*, 285 S.W.3d at 889. "If an offer of proof is made in the form of a concise statement, the concise statement must include a reasonably specific summary of the proposed testimony." *Duke*, 365 S.W.3d at 726 (citing *Love*, 861 S.W.2d at 901; *Harty v. State*, 229 S.W.3d 849, 854 (Tex. App.—Texarkana 2007, pet. ref'd)). The purpose of the offer of proof is "'to enable an appellate court to determine whether the exclusion was erroneous and harmful'" and,

[27]Rule 611(b) allows cross-examination of a witness "on any matter relevant to any issue in the case, including credibility." TEX. R. EVID. 611(b), 60 TEX. B.J. 1129, 1145 (1997).

secondarily, "'to permit the trial judge to reconsider his ruling in light of the actual evidence.'" *Mays*, 285 S.W.3d at 890 (quoting Steven Goode et. al., 1 *Texas Practice Series—Guide to the Texas Rules of Evidence: Civil and Criminal* § 103.3 (2d ed. 1993)).

In this case, Fahrni failed to either present a formal bill of exceptions to the trial court or make an informal offer of proof through questions and answers or in the form of a concise statement by counsel. Fahrni informed the trial court of the specific statement made by Sarah in her interview and argued that the statement was non-responsive to Kimmel's question and that Sarah used adult language. However, we do not know how the statement related to Kimmel's alleged opinion on coaching, if at all, or what Kimmel's testimony would have been regarding the statement. We cannot speculate on what Kimmel's testimony might have been, then find error based on that speculation. *See Duke*, 365 S.W.3d at 726. Since no error has been preserved regarding the cross-examination of Kimmel, we overrule Fahrni's fourth point of error.

V. Jury Argument

In closing argument, the State argued to the jury that the evidence showed Fahrni's sexual attraction for children and that Sarah's trial testimony regarding the sexual assault was consistent with the statements she had made to Kimmel. The State then reminded the jury members of expert testimony they had heard regarding grooming and how Sarah's, Sam's, and Kathy's testimony supported the State's theory that Fahrni had targeted their families and groomed them for his sexual assaults. The State next argued that the circumstances leading up to the assault on Sarah were strikingly similar to those that preceded the assault on Kathy. Then, the State shifted its focus to Fahrni's defensive theories and stated,

> Now, ladies and gentlemen, in order for you to find Kevin Fahrni not guilty, you would have to believe the defense's theory, and the defense's theory is that in 2005 after [Kathy]'s mother had been broken up with Kevin Fahrni for a number of years, after they had left the state and moved back home to Pennsylvania and they had no contact with him, that her mother was so terribly upset and distraught over the breakup that had occurred years before --

At that point, Fahrni objected that the State was attempting to change its burden of proof. The trial court disagreed and overruled the objection.

In his fifth point of error, Fahrni asserts that the State's argument improperly lessened its burden of proof and that the trial court erred in overruling his objection. The State argues that it was permissibly summarizing the evidence, making reasonable deductions from the evidence, and answering a defensive theory. In addition, the State argues that if there was any error, it was harmless. We conclude that the trial court did not err and overrule this point of error.

A trial court's ruling on an objection to a jury argument is reviewed using an abuse-of-discretion standard. *Lemon v. State*, 298 S.W.3d 705, 707 (Tex. App.—San Antonio 2009, pet. ref'd); *see also Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004). Further, we review challenged remarks from jury arguments in the context in which they appear. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988); *Tucker v. State*, 456 S.W.3d 194, 217 (Tex. App.—San Antonio 2014, pet. ref'd). Proper jury argument falls within four areas: evidence summation, reasonable deductions drawn from the evidence, answers to the arguments of opposing counsel, or pleas for law enforcement. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008); *Jackson v. State*, 17 S.W.3d 664, 673 (Tex. Crim. App. 2000). Counsel generally has wide latitude in drawing inferences from the evidence so long as the inferences are reasonable, fair, and made in good faith. *Gaddis*, 753 S.W.2d at 398.

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In his opening argument, Fahrni urged the jury to pay attention to the timing of the allegations against him relating to Sarah and to note how they were made to look like the prior allegations relating to Kathy. He argued that the allegations were false and that they were motivated by revenge from a scorned mother. Fahrni's argument regarding the allegations resulting from a scorned mother reasonably could be interpreted as referring to both the prior (Kathy's) allegations and the present (Sarah's) allegations. Thus, it is at least within the zone of reasonable disagreement that the State was answering Fahrni's argument. *See Tucker*, 456 S.W.3d at 217–18. Further, our review of the entirety of the State's argument shows that the State was arguing the implausibility of Fahrni's defensive theories based on the evidence and reasonable deductions from that evidence. As noted above, these remarks appeared immediately after the State had argued to the jury that the evidence showed Fahrni's motive, opportunity, and plan to commit the sexual assault and Sarah's veracity in claiming that he had assaulted her. The State went on to argue that other evidence established that the families did not know each other, that Sandra and Sarah did not know the details of Kathy's allegations, and that Sandra was already moving out and, hence, had no revenge motive. We also note that the State went on to emphasize that it had the burden to prove the allegations in the indictment beyond a reasonable doubt. We hold that the trial court did not abuse its discretion in overruling Fahrni's objection and overrule Fahrni's fifth point of error.

VI. The Indictment

In his second point of error, Fahrni asserts that the trial court erred by including in the jury charge the statement that Fahrni was accused of committing the offense on or about the 1st day of

July, 2008, when the date alleged in the original indictment was on or about November 1, 2008. Although Fahrni acknowledges that the State moved to amend the alleged date of the offense at a pretrial hearing over two years before trial and that the trial court granted that request, he nevertheless complains that the State filed neither a motion to amend, nor an amended indictment. Fahrni then contends that as a result, the evidence was insufficient to support his conviction. Fahrni's argument is based solely on the lack of a proper amendment to the indictment, and he does not contend that there was insufficient evidence to convict him if the indictment had been properly amended. The State argues that since Fahrni stated he had no objections to the amendment at the pretrial hearing, since the trial court approved the amendment, and since the trial court noted the date of amendment on a copy of the original indictment, the indictment was properly amended. We agree.

After Fahrni filed his brief, the court reporter filed a supplemental reporter's record containing the transcript of a pretrial hearing held on April 23, 2012, and the district clerk filed a supplemental clerk's record containing the amended indictment. The amended indictment appears to be a copy of the original indictment with a line drawn through the word "November" and the word "July" handwritten above it. In the margin to the right of these changes are the handwritten initials of the trial judge and the date "4/23/2012." Although we cannot discern a separate clerk's file mark for this document, the district clerk has certified it as part of the record in this case. Fahrni has not challenged this filing and, therefore, has not overcome the presumption of the regularity of the clerk's record. *See Chancy v. State*, 614 S.W.2d 446, 447 (Tex. Crim. App. [Panel Op.] 1981). An interlineated copy of the original indictment showing the amendments approved

by the trial court is an effective amendment. *Riney v.* State, 28 S.W.3d 561, 565–66 (Tex. Crim. App. 2000). Therefore, we find that the amendment to the indictment reflecting an offense date of on or about July 1, 2008, was effective. We overrule Fahrni's second point of error.

We affirm the judgment of the trial court.

Jack Carter
Justice

Date Submitted: July 9, 2015
Date Decided: August 31, 2015

Publish

APPENDIX Q

TEXAS CODE OF CRIMINAL PROCEDURE ART. 38.07

TESTIMONY IN CORROBORATION OF VICTIM
OF SEXUAL OFFENSE.
(2013)

(a) A conviction under Chapter 21, Section 20A.02(a)(3)(4)(7), or 8, Section 22.011, or Section 22.021 Penal Code, 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.

(b) The requirement that the victim inform another person of an alleged offense does not apply if at the time of the alleged offense the victim was a person:

(1) 17 years of age or younger;

(2) 65 years of age or older; or

(3) 18 years of age or older who by reason of age or physical or mental disease, defect, or injury was substantially unable to satisfy the person's need for food, shelter, medical care, or protection from harm.

TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 38.37 (Enacted Sept. 1, 1995)

Section 48(b) of Acts 1995, 74th Leg. Ch. 318 provides:

"Article 38.37 Code of Criminal Procedure as added by this Section, applies to any criminal proceeding that commences on or after the effective date [Sept. 1, 1995] of this Act regardless of whether the offense that is the subject of the proceeding was committed before, on, or after the effective date of this Act."

TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 38.37 (Amended Sept. 1, 2011)

Acts 2011, 82nd Leg., ch. 1 (S.B. 24), §2.08, eff. Sept. 1, 2011.

"The change in law made by this Act applies only to an offense committed on or after the effective date [Sept. 1, 2011] of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this Section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date."

TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 38.37

O'Connor's Law Book 2013-2014 Enactment Paragraph

(Trial Court Used:)
"The amended text in Article 38.37 is effective for the admissibility of evidence in a criminal proceeding that commences on or after Sept. 1, 2013. The admissibility of evidence in a criminal proceeding that commences before Sept. 1, 2013, is governed by the former law in effect at that time."

(Appellate Court Used:)
"The change in law made by this Act applies to the admissibility of evidence in a criminal proceeding that commences on or after the effective date of this Act [September 1, 2013]. The admissibility of evidence in a criminal proceeding that commences before the effective date of this Act is covered by the law in effect when the proceeding commenced, and the former law is continued in effect for that purpose."

TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 38.37 (1995)

EVIDENCE OF EXTRANEOUS OFFENSES OR ACTS

Sec. 1. This article applies to a proceeding in the prosecution of a defendant for an offense under the following provisions of the Penal Code, if committed against a child under 17 years of age:

(1) Chapter 21 (Sexual Offenses);
(2) Chapter 22 (Assaulted Offenses);
(3) Section 25.02 (Prohibited Sexual Conduct);
(4) Section 43.25 (Sexual Performance by a Child); or
(5) An attempt or conspiracy to commit an offense listed in this section.

Sec. 2. Notwithstanding Rules 404 and 405, Texas Rules of Criminal Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:

(1) The state of mind of the defendant and the child; and
(2) The previous and subsequent relationship between the defendant and the child.

Sec. 3. On timely request by the defendant, the state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 2 in the same manner as the state is required to give notice under Rule 404(b), Texas Rules of Criminal Evidence.

Sec. 4. This article does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law.

Added by Acts 1995, 74th Leg., ch. 318, § 48(a), eff. sept. 1, 1995

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TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 38.37 (2013)

EVIDENCE OF EXTRANEOUS OFFENSES OR ACTS

Sec. 1. (a) Subsection (b) applies to a proceeding in the prosecution of a defendant for an offense, or an attempt or conspiracy to commit an offense, under the following provisions of the Penal Code:

(1) if committed against a child under 17 years of age:

(A) Chapter 21 (Sexual Offenses);

(B) Chapter 22 (Assaultive Offenses); or

(C) Section 25.02 (Prohibited Sexual Conduct); or

(2) if committed against a person younger than 18 years of age:

(A) Section 43.25 (Sexual Performance by a Child);

(B) Section 20A.02(a)(7) or (8); or

(C) Section 43.05(a)(2) (Compelling Prostitution)

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:

(1) The state of mind of the defendant and the child; and

(2) The previous and subsequent relationship between the defendant and the child.

Sec. 2. (a) Subsection (b) applies only to the trial of a defendant for:

(1) an offense under any of the following provisions of the Penal Code:

(A) Section 20A.02, if punishable as a felony of the first degree under Section 20A.02(b)(1) (Sex Trafficking of a Child);

(B) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);

(C) Section 21.11 (Indecency With a Child);

(D) Section 22.011(a)(2) (Sexual Assault of a Child);

(E) Section 22.021(a)(1)(B) and (2)(Aggravated Sexual Assault of a Child);

(F) Section 33.021 (Online Solicitation of a Minor);

(G) Section 43.25 (Sexual Performance by a Child); or

(H) Section 43.26 (Possession or Promotion of Child Pornography), Penal Code; or

(2) an attempt or conspiracy to commit an offense described by Subdivision (1).

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(a) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

Sec. 2-a. Before evidence described by Section 2 may be introduced, the trial judge must:

(1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and

(2) conduct a hearing out of the presence of the jury for that purpose.

Sec. 3. The state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 1 or 2 no later than the 30th day before the date of the defendant's trial.

Sec. 4. This article does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law.

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TEXAS RULES OF EVIDENCE
RULE 404(b)

TRE 404(b) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

APPENDIX R

— COUNTY CRIMINAL DISTRICT ATTORNEY

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Michael Shepherd
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Samantha Oglesby
Lauren Sutton

Administrative Assistant
Lindsey Lender
Victims Assistance Coordinator
Jonna Tye
Hot Checks
Leslie Daniel

May 12, 2014

Kevin Fahrni
128 Eastline
Wake Village, TX. 75501

REF: State of Texas vs: Kevin Fahrni
Cause No. 10F0484-005
Offense: Indecency w/ Child
(WV08-1780)

Please be advised that the above entitled and numbered cause will be called for the purpose of **Jury Selection / Trial** on **June 3, 2014,** at **9:00 A.M.** at the **Bowie County Courthouse – New Boston, TX.** You will therefore make your appearance for said purposes required by law.

Sincerely,

Jerry D. Rochelle
Criminal District Attorney

JR/kc
Joe Tyler

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WEDNESDAY

JUNE 4, 2014

PAGE 6A

High near 92
Low near 72

Variations for memorable marinades.

MAY LEAVES HOMETOWN SIMMS TO COACH AT DEK

75¢

Texarkana Gazette

4 SECTIONS, 28 PAGES | VOLUME 138, NO. 155

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IN COURT
■ FIFTH DISTRICT

Indecency trial to start today

By Lynn LaRowe
Texarkana Gazette

Trial is expected to begin this morning for a Wake Village, Texas, man accused of sexual misconduct with an 11-year-old girl.

Kevin Fahrni, 44, faces two to 20 years in a Texas prison if convicted of indecency with a child. Fahrni, a former friend of the girl's mother, allegedly touched the child inappropriately in October 2008, according to an offense report. Family members of the girl's allegedly reported the suspected abuse to police after she made an outcry in October 2008.

Tuesday, Assistant District Attorneys Samantha Oglesby and Kelley Crisp and defense lawyers Joe Tyler and Shorty Barrett selected a jury of seven men and five women to decide the case.

Fifth District Judge Ralph Burgess is expected to hear and rule on arguments concerning pretrial motions before the jury is seated in the courtroom at 9 a.m.

BUSINESS | ELECTRIC COMPANIES

LOOKING TO CURB

Electric companies consider future after E

By Jim Williamson
Texarkana Gazette

Electric companies weren't shocked about the Environmental Protection Agency's announcement to curb emissions from coal-fired power plants, but the move has created a cautious review regarding electric bills and future jobs.

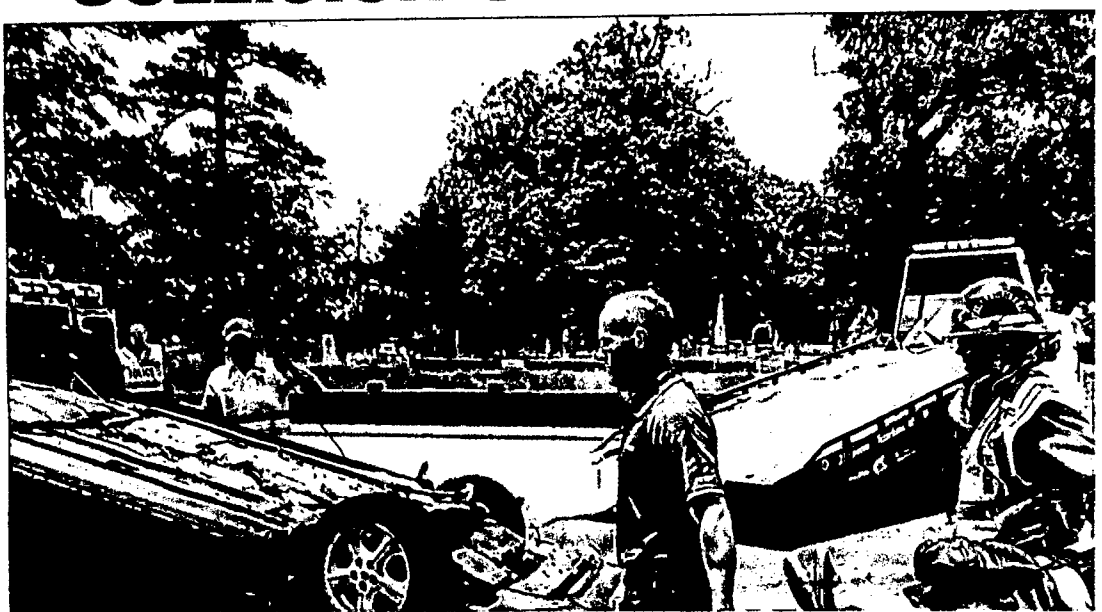
The EPA introduced a plan Monday to reduce carbon dioxide emissions from power plants and suggests a cut of nearly 45 percent by 2030 for Arkansas, a coal-rich state where, in 2012, nearly 44 percent of its energy came from fossil fuel, according to EPA figures.

Natural gas placed second at 26 percent, and nuclear power accounted for nearly 24 percent.

John W. Turk Jr. Power Plant "meets or exceeds all EPA standards," said Scott McCloud, AEP-Southwestern Electric Power Co. corporate communications spokesman, in a statement issued Tuesday after the EPA announcement.

The Turk plant is a 600-megawatt facility that began opera-

COLLISION ON TEXAS BOULE



APPENDIX S

KK: Tell me why you're here today.

1:38:26 (3) AG: My mom's ex-boyfriend touched me in a place I didn't want to be touched.

KK: Your mom's ex-boyfriend touched you in a place you didn't want to be touched? Okay. Um, what's your mom's ex-boyfriend's name?

AG: Kevin.

KK: Kevin? Is that what you call him?

AG: (shakes head "yes")

KK: Kevin? What's his last name?

AG: (Inaudible).

KK: (Inaudible)? Okay. You said he touched you, Kevin touched you in a place you didn't want to be touched?

AG: (shakes head "yes")

KK: What place was that?

(3-4) AG: On my private part.

KK: On your private part? Okay. Um, Arlette I've got some drawings of kids. Um, it just kind of helps me when I talk to kids about stuff like this, um, when I talk about body parts. There's a boy and a girl. They have fronts and backs. I'm going to get out the girl drawing. When you say private part, can you circle, um, the place that you call the private part so I know exactly what you're talking about? Okay. I'm just going to put private part right there because that's what you called it. Okay? So you say Kevin touched your private part. What did you touch it with?

(4-5)

14:39:32 (3) AG: These fingers.

KK: Those two fingers? Okay. Um, and how did he touch it.

(5-6) AG: He went under my underwear. He touched me with his fingers underneath my panties.

KK: He went under your underwear? Okay. So was it on the skin of your private part?

AG: (shakes head "yes")

KK: Okay. With those two fingers you showed me?

APPENDIX T

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[illegible] Police

11/04/2008

Report to Prosecuting Attorney

A. REFERRAL INFORMATION

Family Name	Case Number	Referral Number	Referral Date
PURTELL		1003457	09/25/2005

Referral Synopsis

11 Y/O Ashley said that 35 Y/O Kevin Fahrni (bio mother's boyfriend) stuck his finger inside her vagina.

[redacted]

B. CHILDREN

Name	Date of Birth	Gender	Alleged Victim	Tribe	In Household
ASHLEY KLOSKY	07/21/1993	Female	*		*
ERIC AUGUSTINE	06/12/1991	Male			*

C. PARENT/PERSON RESPONSIBLE FOR CHILD (PRFC)

Name	Date of Birth	Gender	Alleged Perpetrator	Tribe	In Household	Relationship To Child
VALIRIE PURTELL	12/31/1970	Female			*	Mother (Biological) of 2 Mother (Biological) of 1
KEVIN FAHRNI	10/25/1969	Male	*			No Relation of 1

D. ADDITIONAL INFORMATION

Indian Heritage Addressed

n/a

Child is a Ward of Another Court?

n/a

Other Custody Proceedings Pending?

n/a

Emergency Existed?

n/a

Preventive Services Were Offered?

n/a

Appendix #T-1

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List Other Documents/Records Attached

F. SUMMARY / RECOMMENDATION

Summary/Recommendation

There is not a preponderance of evidence to find this investigation true against Kevin Fahrni. This investigation should be closed as unsubstantiated against Kevin Fahrni for sexual abuse - sexual penetration.

G. INVESTIGATIVE FINDING

Overall Findings

Unsubstantiated

H. INVESTIGATIVE CLOSURE

Approved By: LAURIE L ALEXANDER

Approve Date: 06/23/2005 15:01:55

Family Service Worker | Date | Supervisor | Date

County