United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 29, 2024
Lyle W. Cayce
Clerk

No. 24-10015

CLARENCE WYATT HOLLAND,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Northern District of Texas
USDC No. 3:22-CV-651

ORDER:

Clarence Wyatt Holland, Texas prisoner # 2233325, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 application challenging his conviction and sentence for continuous sexual abuse of a child younger than 14. Before this court, Holland contends only that the district court erred by denying his claim that his trial counsel rendered ineffective assistance by failing to object to certain statements made by the prosecutor during voir dire. He has, therefore, abandoned any challenge to the district court's denial of the other claims that he raised in his

§ 2254 application. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993); *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

To obtain a COA with respect to the dismissal of a § 2254 application, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). When constitutional claims have been rejected on the merits, the prisoner must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

Holland fails to make the necessary showing. Accordingly, his motion for a COA is DENIED.

KURT D. ENGELHARDT
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLARENCE WYATT HOLLAND TDCJ No. 2233325, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § §	No. 3:22-cv-651-K-BN

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The United States Magistrate Judge made findings, conclusions, and a recommendation in this case. Petitioner filed objections. The District Court reviewed the proposed findings, conclusions, and recommendation *de novo*. Finding no error, the Court ACCEPTS the Findings, Conclusions, and Recommendation of the United States Magistrate Judge and DENIES Petitioner's application for federal habeas relief. A judgment will enter separately. Petitioner's Objections are OVERRULED.

SO ORDERED

Signed January 3rd, 2024.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLARENCE WYATT HOLLAND TDCJ No. 2233325, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § §	No. 3:22-cv-651-K-BN

ORDER DENYING A CERTIFICATE OF APPEALABILITY

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court DENIES a certificate of appealability. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions, and Recommendation filed in this case in support of its finding that Petitioner has failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" or "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December 1, 2009, reads as follows:

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state

the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

But, if Petitioner elects to file a notice of appeal, he must either pay the $505 appellate filing fee or move for leave to appeal *in forma pauperis*.

SO ORDERED

Signed January 3rd, 2024.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLARENCE WYATT HOLLAND TDCJ No. 2233325, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:22-cv-651-K-BN

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Clarence Wyatt Holland – a Texas prisoner – was charged in Kaufman County with continuous sexual abuse of a child under 14. Dkt. No. 8-29 at 8-9. A jury found him guilty as charged and sentenced him to 50 years of imprisonment. *State of Texas v. Clarence Wyatt Holland*, 17-10195-422-F, (422nd Dist. Court, Kaufman Cty., Nov. 7, 2018); Dkt. No. 8-29 at 10-11.

The Fifth Court of Appeals of Texas affirmed the judgment. *Holland v. State*, No. 05-18-01419-CR, 2019 WL 6799755, at *5 (Tex. App. – Dallas Dec. 13, 2019, pet. ref'd). And the Texas Court of Criminal Appeals (CCA) denied Holland's petition for discretionary review. *Holland*, PD-0028-20 (Tex. Crim. App. 2020).

Holland applied for state habeas relief. The CCA denied the application without written order based on the findings of the habeas trial court after a hearing and on the court's own independent review of the record. *See Ex parte Holland*, WR-92-643-01, (Tex. Crim. App. Jan. 26, 2022); Dkt. No. 8-19.

Holland then filed this application for federal habeas relief pursuant to 28 U.S.C. § 2254. Dkt. Nos. 1-2. The Court referred this action to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) pursuant to a standing order of reference from United States District Judge Ed Kinkeade. The State responded to Holland's application. Dkt. No. 10. Holland filed a reply. Dkt. No. 11.

The undersigned now enters these findings of fact, conclusions of law, and recommendation that the Court should deny Holland's application for a writ of habeas corpus.

Legal Standards

"Federal habeas features an intricate procedural blend of statutory and caselaw authority." *Adekeye v. Davis*, 938 F.3d 678, 682 (5th Cir. 2019). In the district court, this process begins – and often ends – with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), under which "state prisoners face strict procedural requirements and a high standard of review." *Adekeye*, 938 F.3d at 682 (citation omitted).

Under the AEDPA, where a state court has already rejected a claim on the merits, a federal court may grant habeas relief on that claim only if the state court adjudication:

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

court proceeding.

28 U.S.C. § 2254(d); *see Adekeye*, 938 F.3d at 682 ("Once state remedies are exhausted, AEDPA limits federal relief to cases where the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States' or was 'based on an unreasonable determination of the facts in light of the evidence presented.'" (citation omitted)); *see also Allen v. Vannoy*, 659 F. App'x 792, 798-99 (5th Cir. 2016) (per curiam) (describing Section 2254(d) as "impos[ing] two significant restrictions on federal review of a habeas claim ... 'adjudicated on the merits in state court proceedings'").

And "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *see also Sanchez v. Davis*, 936 F.3d 300, 305 (5th Cir. 2019) ("[T]his is habeas, not a direct appeal, so our focus is narrowed. We ask not whether the state court denial of relief was incorrect, but whether it was unreasonable – whether its decision was 'so lacking in justification' as to remove 'any possibility for fairminded disagreement.'" (citation omitted)).

A state court decision is "contrary" to clearly established federal law if "it relies on legal rules that directly conflict with prior holdings of the Supreme Court or if it reaches a different conclusion than the Supreme Court on materially indistinguishable facts." *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004); *see also Lopez v. Smith*, 574 U.S. 1, 2 (2014) (per curiam) ("We have emphasized, time and

time again, that the [AEDPA] prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is 'clearly established.'" (citation omitted)).

"A state court unreasonably applies clearly established Supreme Court precedent when it improperly identifies the governing legal principle, unreasonably extends (or refuses to extend) a legal principle to a new context, or when it gets the principle right but 'applies it unreasonably to the facts of a particular prisoner's case.'" *Will v. Lumpkin*, 978 F.3d 933, 940 (5th Cir. 2020) (quoting *Williams v. Taylor*, 529 U.S. 362, 407-08 (2000); citation omitted)). "But the Supreme Court has only clearly established precedent if it has 'broken sufficient legal ground to establish an asked-for constitutional principle.'" *Id.* (quoting *Taylor*, 569 U.S. at 380-82; citations omitted).

"For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law.... 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*, 562 U.S. 86, 101 (2011) (citations and internal quotation marks omitted). "Under § 2254(d), a habeas court must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* at 102 (internal quotation marks omitted); *see also Evans v. Davis*, 875 F.3d 210, 216 (5th

Cir. 2017) (recognizing that Section 2254(d) tasks courts "with considering not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it could have relied upon" (citation omitted)).

The Supreme Court has further explained that "[e]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Richter*, 562 U.S. at 101 (internal quotation marks omitted). And "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102. The Supreme Court has explained that, "[i]f this standard is difficult to meet, that is because it was meant to be," where, "[a]s amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings," but "[i]t preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents," and "[i]t goes no further." *Id.* Thus, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103; *accord Burt v. Titlow*, 571 U.S. 12, 20 (2013) ("If this standard is difficult to meet – and it is – that is because it was meant to be. We will not lightly conclude that a State's criminal justice system has experienced the

extreme malfunction for which federal habeas relief is the remedy." (internal quotation marks, brackets, and citations omitted)).

As to Section 2254(d)(2)'s requirement that a petitioner show that the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," the Supreme Court has explained that "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance" and that federal habeas relief is precluded even where the state court's factual determination is debatable. *Wood v. Allen*, 558 U.S. 290, 301, 303 (2010). Under this standard, "it is not enough to show that a state court's decision was incorrect or erroneous. Rather, a petitioner must show that the decision was objectively unreasonable, a substantially higher threshold requiring the petitioner to show that a reasonable factfinder must conclude that the state court's determination of the facts was unreasonable." *Batchelor v. Cain*, 682 F.3d 400, 405 (5th Cir. 2012) (brackets and internal quotation marks omitted).

The Court must presume that a state court's factual determinations are correct and can find those factual findings unreasonable only where the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001).

This presumption applies not only to explicit findings of fact but also "to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001); *see also Ford*

v. Davis, 910 F.3d 232, 235 (5th Cir. 2018) (Section 2254(e)(1) "'deference extends not only to express findings of fact, but to the implicit findings of the state court.' As long as there is 'some indication of the legal basis for the state court's denial of relief,' the district court may infer the state court's factual findings even if they were not expressly made." (footnotes omitted)).

And, even if the state court errs in its factual findings, mere error is not enough – the state court's decision must be "*based* on [an] unreasonable factual determination." *Will v. Lumpkin*, 978 F.3d 933, 942 (5th Cir. 2020) (emphasis in original). In other words, habeas relief is unwarranted if the state court's conclusion would not have changed even if it got the disputed factual determination right. *See id.*

Further, "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Richter*, 562 U.S. at 98; *see also Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003) ("a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision" (quoting *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (per curiam))); *Evans*, 875 F.3d at 216 n.4 (even where "[t]he state habeas court's analysis [is] far from thorough," a federal court "may not review [that] decision de novo simply because [it finds the state court's] written opinion 'unsatisfactory'" (quoting *Neal*, 286 F.3d at 246)). This is "[b]ecause a federal habeas court only reviews the reasonableness of the state court's ultimate decision," "not the

written opinion explaining that decision." *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003) (quoting *Neal*, 286 F.3d at 246).

Section 2254 thus creates a "highly deferential standard for evaluating state court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). To overcome this standard, a petitioner must show that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

That is, a petitioner must, in sum, "show, based on the state-court record alone, that any argument or theory the state habeas court could have relied on to deny [him] relief would have either been contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court." *Evans*, 875 F.3d at 217.

Analysis

Noting that his trial counsel did not make "one objection during a three-day continuous sexual abuse of a child jury trial," Holland claims that his trial counsel was ineffective in various ways. Dkt. No. 1 at 6; Dkt. No. 2 at 19.

The Court reviews the merits of properly exhausted IAC claims, whether directed at trial or appellate counsel, under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984), under which a petitioner "'must show that counsel's performance'" – "'strongly presume[d to be] good enough'" – "'was [1] objectively unreasonable and [2] prejudiced him.'" *Coleman v. Vannoy*, 963 F.3d 429, 432 (5th Cir. 2020) (quoting *Howard v. Davis*, 959 F.3d 168, 171 (5th Cir. 2020)).

To count as objectively unreasonable, counsel's error must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *see also Buck v. Davis*, 137 S. Ct. 759, 775 (2017) (reaffirming that "[i]t is only when the lawyer's errors were 'so serious that counsel was not functioning as the "counsel" guaranteed ... by the Sixth Amendment' that *Strickland*'s first prong is satisfied" (citation omitted)). "And to establish prejudice, a defendant must show 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020) (per curiam) (quoting *Strickland*, 466 U.S. at 694).

"A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003); *see also Feldman v. Thaler*, 695 F.3d 372, 378 (5th Cir. 2012) ("[B]ecause of the risk that hindsight bias will cloud a court's review of counsel's trial strategy, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" (quoting *Strickland*, 466 U.S. at 689)).

And, "[j]ust as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities."

Richter, 562 U.S. at 110. "The Supreme Court has admonished courts reviewing a state court's denial of habeas relief under AEDPA that they are required not simply to give [the] attorney's the benefit of the doubt, ... but to affirmatively entertain the range of possible reasons [petitioner's] counsel may have had for proceeding as they did." *Clark v. Thaler*, 673 F.3d 410, 421 (5th Cir. 2012) (internal quotation marks omitted).

And, so, on habeas review under AEDPA, "if there is any 'reasonable argument that counsel satisfied *Strickland*'s deferential standard,' the state court's denial must be upheld." *Rhoades v. Davis*, 852 F.3d 422, 432 (5th Cir. 2017) (quoting *Richter*, 562 U.S. at 105); *see also Sanchez*, 936 F.3d at 305 ("As the State rightly puts it, we defer 'both to trial counsel's reasoned performance and then again to the state habeas court's assessment of that performance.'" (quoting *Rhoades*, 852 F.3d at 434)); *Dunn v. Reeves*, 141 S. Ct. 2405, 2410-11 (2021) (per curiam) (noting that a federal court can may grant habeas relief only if *every* "'fairminded juris[t]'" would agree that *every* reasonable lawyer would have made a different decision (citing *Richter*, 562 U.S. at 101) (emphasis in original)).

To demonstrate prejudice, a habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, "the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been

established if counsel acted differently." *Richter*, 562 U.S. at 111. "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different," which "does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case." *Id.* at 111-12 (quoting *Strickland*, 466 U.S. at 693, 696, 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

IAC claims are considered mixed questions of law and fact and are therefore analyzed under the "unreasonable application" standard of 28 U.S.C. § 2254(d)(1). *See Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010); *Adekeye*, 938 F.3d at 682.

Where the state court has adjudicated claims of ineffective assistance on the merits, this Court must review a habeas petitioner's claims under the "doubly deferential" standards of both *Strickland* and Section 2254(d). *Cullen v. Pinholster*, 563 U.S. 170, 190, 202 (2011); *compare Rhoades*, 852 F.3d at 434 ("Our federal habeas review of a state court's denial of an ineffective-assistance-of-counsel claim is 'doubly deferential' because we take a highly deferential look at counsel's performance through the deferential lens of § 2254(d)." (citation omitted)), *with Johnson v. Sec'y, DOC*, 643 F.3d 907, 910-11 (11th Cir. 2011) ("Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.").

In such cases, the "pivotal question" for this Court is not "whether defense

A. Failure to Object to Prosecutorial Misconduct During Voir Dire

Holland claims that his trial counsel was ineffective for not objecting to the prosecutor improperly vouching for the State's case during the voir dire. Dkt. No. 1 at 6; Dkt. No. 2 at 20-26. The prosecutor made these comments to the jury pool:

> My role, our role is not to just get convictions. I was telling you that all of us took an oath to seek justice. What does that mean? That means that when a case comes in, we don't have to accept it. That means that if it does not meet a certain burden of proof, if there's no probable cause in the case or if we don't think we can get there beyond a reasonable doubt at some point, then guess what? We can send it back to the agency, right? Okay. Now we also have a box full of motions to dismiss. At any stage after the case is filed, even after a grand jury has issued an indictment, we can, with the stroke of our signature, sign a motion to dismiss and dismiss a case, okay. Now, judge talked about it being the State's burden. It is our burden to prove each and every element of this charge beyond a reasonable doubt. Now, if we don't do it, and you find the defendant not guilty, whose fault is that?
>
> ....
>
> It's our fault. It's not your fault. And so I'm smiling right now, and if after you find the defendant not guilty, guess what, we're still going to be polite. We're still going to smile. Why? Because its not your fault, its our fault. So we want you to understand that, that we are not just here to get a conviction. We're here to seek justice, okay. So do we believe in the case? Obviously we believe in the case. We wouldn't be here, okay. Do we intend to prove each and every element beyond a reasonable doubt? Obviously or we wouldn't waste your time, and we would not waste our time, okay.

Dkt. No. 8-5 at 40-41.

Holland argues – and the direct appellate court agreed – that such statements are improper under Texas law because they amount to an opinion from the prosecutor as to the guilt of the defendant. *See Holland*, 2019 WL 6799755, at *4 (finding, in context of a prosecutorial misconduct claim, that prosecutor's commentary was improper but not sufficient to set aside the conviction) (citing *Clayton v. State*, 502

S.W.2d 755, 756 (Tex. Crim. App. 1973); *Escobar v. State*, No. 01-13-00496-CR, 2015 WL 1735244, at *1 (Tex. App. – Houston [1st Dist.] Apr. 14, 2015, pet ref'd) (mem. op., not designated for publication); *Williams v. State*, 417 S.W.3d 162, 171-72 (Tex. App. – Houston [1st Dist.] 2013, pet ref'd); *Beltran v. State*, 99 S.W.3d 807, 811 (Tex. App. – Houston [14th Dist.] 2003, pet. ref'd)).

According to that jurisprudence, statements like those offered in Holland's case are improper because they convey the idea that the prosecutor has a basis for such an opinion outside the evidence at trial, and because such statements encourage jurors to conclude that the defendant is necessarily guilty because he is being tried. *See Williams*, 417 S.W.3d at 172; *Mendoza v. State*, 552 S.W.2d 444, 447 (Tex. Crim. App. 1977).

Still, the CCA denied this claim, finding both that Holland's counsel was not ineffective, and that Holland failed to show prejudice even if he were. The state habeas court, in findings and conclusions adopted by the CCA, reasoned:

> 3. Applicant failed to cite to any case law showing that [trial counsel] did not adhere to an objective standard of reasonableness by failing to object to the prosecutor's statements during *voir dire*;
>
> 4. Applicant's brief cites only to case law demonstrating that the prosecutor's statements themselves were in error;
>
> 5. [Trial counsel's] decision to not object to the prosecutor's statements was strategic because he did not want to damage his credibility with the jury;
>
> 6. Applicant failed to show that [trial counsel's] strategic decision not to object to the prosecutor's statements was an error so serious as to deprive Applicant of a fair trial;

> 7. Applicant failed to show that he was harmed by [trial counsel's] decision not to object to the prosecutor's statements during voir dire[.]

Dkt. No. 8-30 at 192 (internal citations omitted).

Holland argues that the finding that his trial counsel's failure to object was strategic is unreasonable because Holland's trial counsel admitted during the state habeas hearing that he did not know that the prosecution's comments were improper, so the failure to object resulted from ignorance of the law – not strategy. *See id.* at 47-49.

An attorney's ignorance of the law relevant to a decision of whether to object may preclude the argument that his or her action was a matter of reasonable trial strategy. *See, e.g., Bullock v. Carver*, 297 F.3d 1036, 1049-50 (10th Cir. 2002) ("An attorney's demonstrated ignorance of law directly relevant to a decision will eliminate *Strickland's* presumption that the decision was objectively reasonable because it might have been made for strategic purposes, and it will often prevent the government from claiming that the attorney made an adequately informed strategic choice.") citing *Williams v. Taylor*, 529 U.S. 362, 395 (2000)); further citations and footnote omitted).

But the state habeas court also determined that there was no prejudice from trial counsel's failure to object. And Holland must also show that this finding was unreasonable. *See, e.g., Garcia v. Director, TDCJ-CID*, 73 F. Supp. 3d 693, 710 (E.D. Tex. 2014) ("Furthermore, when a state court provides alternative reasons for denying relief, a federal court may not grant relief 'unless *each* ground supporting the

state court decision is examined and found to be unreasonable under AEDPA.'") citing *Wetzel v. Lambert*, 565 U.S. 520, 525 (2012)) (emphasis in original).

Holland fails to do that.

On direct appeal in this case, the court considered whether the failure to object to the improper vouching would be a fundamental error – that is, egregious harm that deprives the defendant of a fair and impartial trial – in the context of a prosecutorial misconduct claim. *Holland*, 2019 WL 6799755, at *4 (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)). It concluded that it was not because "other actions by the prosecutor mitigated any harm the statement might have brought to the presumption of innocence." *Id.* Namely, "[t]he prosecutor promptly and thoroughly explained to the venire the presumption of innocence, the burden of proof, and [Holland's] Fifth Amendment right not to testify." *Id.* (citing *Escobar*, 2015 WL 1735244, at *4; *Beltran*, 99 S.W.3d at 811-12).

While the appellate court in Holland's case assessed prejudice in the context of fundamental error – a more demanding standard than *Strickland* prejudice – it relied on *Escobar*, which did address *Strickland* prejudice in a similar context. In *Escobar*, the prosecutor made similar comments to those that Holland complains of here. *See Escobar*, 2015 WL 1735244, at *1 ("So when we see someone that we believe to be not guilty, we can dismiss that case ... I also have had the opportunity to view our assistant district attorney, Mike Anderson, in a training session. He said, you know, 'I'm so thankful for this job and this position because I never have to try a case that I don't believe in.'"). The defense attorney failed to object, but the court found no

prejudice because the prosecutor "subsequently told the venire that the State had the burden to prove all elements of the offense, that the State's burden was beyond a reasonable doubt, and that Escobar was entitled to a fair trial and a presumption of innocence until proven guilty." *Id.* at *1.

The *Escobar* court relied in turn on *Mendoza*, in which the court held that improper opinions given to the jury pool were not fatal where the district attorney later clarified the presumption of innocence and the State's burden of proof. Such actions alleviated the chief dangers of prosecutorial vouching: that jurors might believe the prosecutor had an undisclosed basis for his opinion or that the defendant was necessarily guilty because he was being tried. *Mendoza*, 552 S.W.2d at 447.

Here, as in cases like *Escobar* and *Mendoza*, and as the direct appellate court noted in Holland's case, the prosecutor informed the jury pool that the State had the obligation to prove every element of the offense beyond a reasonable doubt (Dkt. No. 8-5 at 41), that Holland was presumed to be innocent (*Id.* at 41-42), and that Holland could elect not to testify, which could not be held against him (*Id.* at 42.).

While *Escobar* and *Mendoza* are not carbon copies of Holland's case – neither was in the context of sexual abuse where the only evidence was the complainant's testimony, which was the case here – they sufficiently establish the principle that curative actions following improper commentary to the jury pool might alleviate prejudice from the failure to object to that commentary. This is at least something that fairminded jurists could debate, so the CCA did not unreasonably apply *Strickland* in denying this claim.

B. Failure to Object to Stepmother's Testimony

Holland faults his trial counsel for not filing an evidentiary motion or objecting to testimony from the complainant's stepmother, an outcry witness. Dkt. No. 1 at 6; Dkt. No. 2 at 26-28.

Holland claims that the stepmother improperly opined that she believed that the complainant was sexually abused:

> Q. Ms. Oden, after [the complainant] outcried to you about the sexual abuse, what did she have to endure in this legal process?
>
> A. A lot. She's had to relive every detail of everything that happened, which has been a nightmare for her. She doesn't sleep. Any attempt that she has made to have a normal life aside from the fact that she had to have a kidney transplant has been stomped on by this. She's endured a lot more than kid should ever have to, and its not right.

Dkt. No. 8-6 at 34.

In recommending that this claim be rejected, the state habeas court reasoned:

> 9. A defendant must be able to show authority in support of his argument that the objections would have been meritorious. *Wert v. State*, 383 S.W.3d 747, 758 (Tex. App. – Houston [14th] 2012, no pet.);
>
> 10. Applicant relies on case law in which the witnesses in question were being directly asked or responding specifically about another witness's truth or believability [...] (citing *Ochs v. Martinez*, 789 S.W.2d 949, 956 (Tex. App. – San Antonio 1990, writ denied) (where witness was testifying about the truth/falsity of another witness's testimony); *Black v. State*, 634 S.W.2d 356, 357-58 (Tex. App. – Dallas 1982, no pet.) (where witness was testifying about believing whether the victim was telling the truth); *Fuller v. State*, 224 S.W.2d 823, 833-35 (Tex. App. – Texarkana 2007, no pet.) (where witness was being questioned about believing the victim).

11. The complained-of testimony form Krissi Oden was not bolstering, but instead a response to a question about Oden's observations of the complainant, not the victim's credibility;

12. Applicant failed to show that the complained-of testimony would have been successfully excluded;

13. Applicant failed to meet his burden of showing that his trial counsel was deficient;

14. Even assuming error, Applicant failed to meet his burden of showing that but for the stepmother's testimony, he would not have been found guilty[.]

Dkt. No. 8-30 at 192-193.

Holland is not entitled to federal habeas relief on this claim.

Under Texas law, "[o]rdinarily, the opinion of a witness as to the truth or falsity of other testimony may not be asked for." *Black*, 634 S.W.2d at 357 (citing *Ayala v. State*, 352 S.W.2d 955, 956 (Tex. Crim. App. 1962)). "One rationale for this rule is that truth or falsity bears directly on a witness' credibility, and the determination of credibility is vested in the exclusive province of the jury." *Id.* at 357-58 (citing *Johnson v. State*, 503 S.W.2d 788, 793 (Tex. Crim. App. 1974)). "A more compelling reason for prohibiting a witness from testifying as to the truthfulness of another witness is that such testimony constitutes impermissible bolstering." *Id.* "'Bolstering' occurs when one item of evidence is improperly used by a party to add credence or weight to some earlier unimpeached piece of evidence offered by the same party." *Id.* (citing *Pless v. State*, 576 S.W.2d 83, 84 (Tex. Crim. App. 1978)).

Here, the state habeas court's determination that the stepmother's testimony was not bolstering is a state law determination that may not be overturned on federal

habeas review. *See, e.g.*, *Anderson v. Dir. TDCJ-CID*, 2:18-CV-146-Z-BR, 2021 WL 2877461, at *12 (N.D. Tex. June 30, 2021), *rec. accepted* 2021 WL 2874117 (N.D. Tex. July 8, 2021) ("First, Respondent is correct that the 'correctness of the state habeas court's interpretation of state law' underlying an ineffective assistance of counsel claim may not be reviewed by the federal court ... The TCCA reviewed Petitioner's exact ineffective assistance of counsel claims and did not find that the challenged testimony was both inadmissible and prejudicial.") citing *Young v. Dretke*, 356 F.3d 616, 628 (5th Cir. 2004)).

Considering that determination, Holland cannot show that his counsel was ineffective for failing to object – as much as an objection relied on bolstering.

But, even if the state habeas court's determination did not rely on an interpretation of state law, Holland still fails to show that it was unreasonable. "To prevail on ineffective assistance of counsel based on a failure to raise an objection, the appellant must show that, had his counsel objected, the objection would have been sustained or that it would have been error for the trial court to overrule the objection." *Cornejo v. State*, 2018 WL 4923936, at *5 (Tex. App. – Houston [1st Dist.] Oct. 11, 2018) (unpublished) (citation omitted); *see also Klein v. United States*, Civ. Action No. H-13-963, 2014 WL 12855826, at *10 (S.D. Tex. Mar. 28, 2014) ("Therefore, even if his trial counsel or Gallagher had raised these variance issues, Klein has not shown those objections would have succeeded, and thus he has not shown a reasonable attorney would have objected at trial or appeal."); *Liberto v. TDCJ-CID*, Civ. Action No. 4:08cv89, 2011 WL 1085182, at *6 (E.D. Tex. Mar. 21, 2011) ("A failure to object does

not constitute deficient representation unless a sound basis exists for objection.") citing *Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997)).

Holland does not reference any authority showing that an objection would have succeeded. Unlike all the cases that Holland references – and the undersigned did not locate any on-point jurisprudence either – the stepmother did not offer a direct opinion on the complainant's veracity, nor was she asked to do so; she gave testimony that indirectly suggested that she believed the victim. *Compare, e.g.*, *Ochs*, 789 S.W.2d at 956 (finding that trial court erred in allowing lay witnesses to testify that the complainant was telling the truth about the alleged sexual abuse); *Matter of G.M.P.*, 909 S.W.2d 198, 205-06 (Tex. App. – Houston [14th Dist.] 1995, no writ) (expert testimony that the child sex assault complainant "is telling the truth" and that the expert "believe[d] [the complainant] was sexually assaulted by [the defendant]" was inadmissible); *Black*, 634 S.W.2d at 357-58 (questioning invaded province of the jury when witness was asked "[d]o you have an opinion as to whether or not (the complainant) is being truthful?", and she answered, "I believe she's telling the truth").

Given the absence of authority showing that an objection would be sustained, the undersigned cannot say that the CCA's rejection of this claim was so unreasonable that fairminded jurists could not debate it. So Holland is not entitled to federal habeas relief in relation to it.

C. Counsel Referred to Complainant as the Victim

Holland claims that his trial counsel was ineffective because he referred to the complainant as the victim once, asking a defense witness, "[y]ou didn't know ... the victim involved in this case?" Dkt. No. 8-7 at 16-17; Dkt. No. 1 at 6.

In recommending that this claim be rejected, the state habeas court reasoned:

> 107. Applicant claimed that by referring to the complainant as "victim" a single time during trial, trial counsel was ineffective;
>
> 108. The reporter's record of trial demonstrates that [trial counsel] referred to the complainant as "victim" once during the trial;
>
> 109. [Trial counsel] testified that if he referred to the complainant as "the victim" once, it would have been by accident and he would have misspoke;
>
> ...
>
> 22. In *Cueva v. State*, the Court of Appeals found that a defense counsel's use of the term "victim" was not deficient " in light of the fact that such terms are commonly used at trial in a neutral manner to describe the events in question and, in context, carry no implication that the person using such terms has an opinion one way or the other about the guilt of the defendant. 339 S.W.3d 839, 866 (Tex. App. – Corpus Christi 2011, pet ref'd). "[T]he term 'victim' is relatively mild and non-prejudicial, especially given that courts have held invocation of far stronger terms did not amount to reversible error;" *Id.* at 864 (citations omitted);
>
> 23. Applicant has failed to show that [trial counsel's] single accidental reference of complainant as "victim" fell below an objective standard of reasonableness;
>
> 24. Applicant failed to show that this single reference was the "but for" cause of the jury finding Applicant guilty[.]

Dkt. No. 8-30 at 188, 193-94 (internal citations omitted).

Holland fails to show that the state habeas court's analysis was unreasonable. Citing a Delaware case, he argues that the use of the term "victim" is not appropriate

when the commission of a crime is in dispute. *See Jackson v. State*, 600 A.2d 21, 24 (Del. 1991). But *Jackson* addressed the issue in the context of a court error claim when the prosecutor repeatedly used the term.

Holland points to no case in which the one-time, accidental use of the term "victim" amounted to ineffective assistance of counsel, and the undersigned has not located any. The closest case is *Cueva* where the court refused to find ineffectiveness under similar facts as explained by the state habeas court. *See Cueva*, 339 S.W.3d at 866.

And, so, fairminded jurists could debate whether Holland's counsel was ineffective for his one-time, accidental use of the term "victim," and the CCA's rejection of this claim was not an unreasonable application of *Strickland*.

D. Failure to Object to Testimony that the Complainant was Hit by a Car, Developed a Serious Kidney Disease, and had a Transplant

Holland faults his trial counsel for not objecting to testimony from the complainant and her relatives that, following an accident in which she was hit by a car, it was discovered she had a serious kidney disease, requiring a transplant. Dkt. No. 1 at 6; Dkt. No. 2 at 30. He claims that this testimony was irrelevant and the State presented it to garner sympathy with the jury. Dkt. No. 2 at 30.

In recommending that this claim be rejected, the state habeas court reasoned:

> 16. A defendant must be able to show authority in support of his argument that the objections would have been meritorious. *Wert v. State*, 383 S.W.3d 747, 757 (Tex. App. – Houston [14th] 2012, no pet);
>
> 17. Applicant failed to cite to any case law or other objective standard of reasonableness showing that [trial counsel] should have

> objected to the testimony about the car accident and complainant's kidney illness, or that if he had objected, the evidence would have been excluded;
>
> 18. Evidence of complainant's kidney disease would have been amissible [sic];
>
> 19. Applicant failed to prove that [trial counsel's] performance was deficient by failing to object to admissible evidence;
>
> 20. Assuming error, Applicant failed to prove that but for the alleged error, he would not have been found guilty of continuous sexual abuse of a child[.]

Dkt. No. 8-30 at 193.

Holland is not entitled to federal habeas relief on this claim.

To start, the state habeas court's conclusion that the kidney disease evidence was admissible under state law is binding on this Court. *See, e.g.*, *Garza v. Thaler*, 909 F. Supp. 2d 578, 652 (W.D. Tex. 2012) ("The Texas Court of Criminal Appeals' conclusion that Jeff Mitchel's testimony contradicting (or arguably impeaching) Ms. Henderson's trial testimony would have been inadmissible under applicable Texas rules of evidence is binding upon this Court in this federal habeas corpus proceeding.") citing *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court siting in habeas corpus."); *Paredes v. Quarterman*, 574 F.3d 281, 291 (5th Cir. 2009) (a state court's interpretation of state law binds a federal court sitting in habeas corpus); *Amador v. Quarterman*, 458 F.3d 397, 412 (5th Cir. 2006) (holding a federal habeas court must defer to a state court's interpretation of state law); *Fuhrman v. Dretke*, 442 F.3d 893,

901 (5th Cir. 2006) (holding the same); *Young*, 356 F.3d at 628 ("In our role as a federal habeas court, we cannot review the correctness of the state habeas court's interpretation of state law."); *Johnson v. Cain*, 215 F.3d 489, 494 (5th Cir. 2000) (holding a federal habeas court may not review a state court's interpretation of its own law); *Gibbs v. Johnson*, 154 F.3d 253, 259 (5th Cir. 1998) (holding the same), *cert. denied*, 526 U.S. 1089, 119 S. Ct. 1501, 143 L.Ed.2d 654 (1999)).

Holland cannot show ineffectiveness, because counsel need not make meritless objections. *See Koch v. Puckett*, 907 F.2d 523, 527 (5th Cir. 1990).

And Holland also fails to show that CCA's finding that he could not establish prejudice even assuming ineffectiveness is unreasonable.

Holland argues that the kidney disease evidence garnered sympathy with the jury, which was important given that the only evidence to support the State's case was the complainant's testimony. He claims that the evidence was a focal point of the State's closing argument. He points to the State's argument that the jury "should honor [the complainant's] courage by convicting [Holland.]" Dkt. No. 2 at 37.

The undersigned cannot agree.

First, the State's honor-her-courage argument was more directed at the outcry of sexual abuse than the car accident and kidney disease. *See* Dkt. No. 8-7 at 79-80.

Second, the evidence did not go to the complainant's credibility, nor did it go to an element of the offense.

At bottom, it is speculative that this evidence had any impact, much less impact sufficient to undermine confidence in the outcome of the proceeding. *See*

Strickland, 466 U.S. at 694; *see also Nee v. Lumpkin*, Civ. Action No. H-21-4192, 2022 WL 2118370, at *8 (S.D. Tex. June 13, 2022) ("An ineffective assistance of counsel claim based on speculation or conclusional rhetoric will not warrant habeas relief.") (citation omitted). At the least, fairminded jurists could debate the impact this evidence might have had. Thus, even assuming ineffectiveness, Holland fails to show that the CCA's determination of no prejudice was unreasonable.

The CCA did not unreasonably apply *Strickland* in rejecting this claim.

E. Failure to Impeach Complainant with Prior Inconsistent Statement

At trial, the complainant testified that she did not outcry about the abuse when it was occurring because she was scared, she did not want to damage her brother's friendship with Holland's nephew, and because she did not think that anyone would believe her. Dkt. No. 8-5 at 152, 193. But, in a report that the complainant's stepmother filled out for the Texas Department of Family and Protective Services, which was produced to Holland's trial counsel before trial, the stepmother wrote that the complainant told her that she never told anyone about the abuse because "she was scared of the perpetrator, as he told her that he would harm her family if she ever said anything." Dkt. No. 8-32 at 30.

In recommending that this claim be denied, the state habeas court reasoned:

> 26. Appellate courts have found no error where a trial attorney's decision not to raise inconsistent testimony or impeach a witness may constitute sound trial strategy because the attempt to impeach may be more harmful than beneficial. *Briones v. State*, No. 01-14-00121-CR, 2016 WL 2944274, at *11 (Tex. App. – Houston [1st] May 19, 2016, no pet.) (not designated for publication);

27. Applicant's reliance on *Ex parte Saenz* is incorrect. 491 S.W.3d 819, 829 (Tex. Crim. App. 2016). The *Saenz* case differs because in that case, defense counsel failed to impeach a State's witness with a direct contradiction of a previous statement, where in the hospital, the witness said he would not be able to identify his assailant, but identified the defendant during trial. *Id.* at 829. Further, the prior inconsistent statement in *Saenz* was the one piece of evidence that could have substantially neutralized the identification of the defendant. *Id.*

28. The complained-of statements at issue are not direct contradictions of one another;

29. The complained-of testimony, if negated, would not have undermined an essential element of the State's case;

30. Applicant has failed to present case law or other standards to show that [trial counsel's] failure to impeach the complainant fell below an objective standard of reasonableness;

31. Applicant failed to show that but for his failure to impeach the complainant, he would not have been found guilty[.]

Dkt. No. 8-30 at 194.

This analysis was reasonable. In the context of an IAC claim, the habeas petitioner must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

Holland fails to do that.

As the state habeas court pointed out, the attempt to impeach can be more harmful than beneficial. Indeed, "[t]he Fifth Circuit has recognized that a trial counsel's tactical decision not to impeach a child-victim of sexual abuse is not unreasonable because doing so may do more harm than good." *Frattarola v. Lumpkin*,

Civ. Action No. H-21-2895, 2023 WL 5191948, at *7 (S.D. Tex. Aug. 11, 2023) (citing *Reed v. Vannoy*, 703 F. App'x 264, 270 (5th Cir. July 28, 2017) (per curiam); *see also Barker v. Lumpkin*, No. CV H-21-3001, 2023 WL 3261779, at *11 (S.D. Tex. May 4, 2023)).

This is especially true here where, as the state habeas court noted, the complainant's out of court statement was not necessarily inconsistent with her trial testimony and it would not have negated an essential element of the case. Also, the out-of-court statement would have introduced the possibility that Holland threatened the complainant to stay silent – a possibility that was not otherwise raised.

At bottom, Holland's trial counsel could have reasonably concluded that it was better strategy not to impeach the complainant with the supposedly inconsistent statement.

Holland also fails to overcome the finding that he did not show any prejudice even assuming ineffectiveness. Because the statement at issue was not necessarily inconsistent with the complainant's trial testimony, because it did not negate an essential element of the State's case, and because it would have introduced the possibility that Holland threatened the complainant, the undersigned cannot conclude that it was unreasonable to find that Holland failed to establish that he was prejudiced by his trial counsel's decision not to impeach the complainant with it.

The CCA did not unreasonably apply *Strickland* in denying this claim.

F. Failure to Investigate and Introduce Evidence of the Closet

Holland claims that his trial counsel was ineffective for not physically examining the closet where most of the claimed sexual abuse occurred and for not introducing photographs and measurements of the closet taken years after the events in question. Dkt. No. 2 at 33.

Holland testified on direct that the closet was too small, given the materials in it, to accommodate the alleged acts of abuse. Dkt. No. 8-7 at 39. Holland also took photos and measurements of the closet at the time of trial, but his trial counsel elected not to introduce those. Dkt. No. 8-32 at 31, Dkt. No. 8-30 at 45. Nor did his trial counsel ever physically examine the closet. Dkt. No. 8-30 at 45.

During deliberations, the jury sent out notes asking for Holland's testimony about the measurements of his closet and about the consequences of the inability to reach a unanimous verdict. Dkt. No. 8-1 at 58-61.

In rejecting this claim, the state habeas court reasoned:

> 33. Texas courts will sustain a defendant's challenge to trial counsel's failure to investigate [if] "(1) the consequence of the failure to investigate is that the only viable defense available to the accused is not advanced, and (2) there is reasonable probability that, but for, counsel's failure to advance the defense, the result of the proceeding would have been different. *Cantu v. State*, 993 S.W.2d 712, 718 (Tex. App. – San Antonio 1999, pet. ref'd);
>
> 34. Applicant has failed to demonstrate that [trial counsel's] failure to visit Applicant's closet in person and/or his refusal to offer Applicant's pictures and measurements of his own closet eight years after the alleged offense prevented him from offering his only viable defense;

> 35. Applicant failed to show that [trial counsel's] refusal to use photographs and measurements of a scene taken eight years after an offense fell below an objective standard of reasonableness;
>
> 36. Assuming error, Applicant cannot show that but for those photographs or measurements, the jury would not have found Applicant guilty[.]

Dkt. No. 8-30 at 194-95.

The state habeas court's analysis of this claim was not unreasonable.

As to trial counsel's failure to examine the closet, Holland never explains what such an investigation would have revealed that was not already known. *See Moawad v. Anderson*, 143 F.3d 942, 948 (5th Cir. 1998) (a petitioner who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial) citation omitted)).

As to the failure to introduce photographs of the closet taken eight years after the events in question, Holland fails to show how this was ineffective. Pictures taken years later – especially without any corresponding evidence that the photos were an accurate depiction of the closet during the pertinent timeframe – had little, if any, relevance. Indeed, Holland fails to establish that the photographs would have even been admissible, much less that his counsel was ineffective for not introducing them.

And, as to the measurements of the closet – ten feet five inches long and six feet wide – while Holland is correct that these would not have changed since the events in question, the measurements alone do not establish that it would have been

difficult for sexual abuse to occur in the closet. Their utility is limited; it is unclear how they add anything to Holland's testimony about the limited space in the closet.

In sum, the CCA reasonably determined that Holland failed to establish ineffectiveness in relation to this claim.

And, for largely the same reasons, it also correctly, or at least reasonably, determined that Holland failed to show prejudice. Holland fails to show how the photographs and measurements, to the extent admissible, would have led to the reasonable probability of a different outcome.

Recommendation

The Court should deny Holland's application for federal habeas relief.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or

adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: November 16, 2023.

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

Filed: 10/8/2021 9:31 PM
Rhonda Hughey,
District Clerk
Kaufman County, Texas
Dianna Myrick

TR. CT. WRIT NO. 17-10195A-422-F

EX PARTE	§	**IN THE 86TH DISTRICT COURT**
	§	
CLARENCE WYATT HOLLAND	§	**KAUFMAN COUNTY, TEXAS**

FINDINGS OF FACT & CONCLUSIONS OF LAW

On this day came to be heard Applicant's Application for Writ of Habeas Corpus, the attached Brief, and the testimony from this Court's hearings. The Court further finds that:

FINDINGS OF FACT

Procedural History

1. Applicant was indicted for continuous sexual abuse of a child under fourteen;
2. A jury found Applicant guilty and sentenced him to fifty years in the Texas Department of Criminal Justice;
3. On appeal, Applicant attacked the sufficiency of the evidence, the prosecutor's statement during trial, and the constitutionality of the punishment scheme;
4. The Dallas Court of Appeals affirmed Applicant's conviction and sentence;
5. Applicant filed this Writ;
6. Upon discovering that the newly elected Judge of the 422nd District Court served as a prosecutor at trial, this cause was transferred to the 86th District Court;
7. This Court held two zoom hearings on Applicant's Writ;

Trial: The State's Case

8. Carrie[1], the victim in this case was born June 13, 2000, and was eighteen at the time of her testimony; R.R. 4:141;

9. From around the first through fifth grades, Carrie lived with her parents in Forney, Texas, which is located in Kaufman County; R.R. 4:149;

10. At trial, testimony revealed that Carrie had a kidney transplant the summer after she graduated from high school, due to scarring at birth, a subsequent injury, and deterioration; R.R. 4:145; R.R. 5:26;

11. One of Carrie's younger brothers is best friends with Applicant's nephew; R.R. 4:152–53;

12. Carries and her siblings frequently stayed at Applicant's house after school to be babysat; R.R. 4:156, 157;

13. The boys would typically go upstairs to play video games, and Carrie's younger sister frequently spent time with Alex's grandmother; R.R. 4:163;

14. During trial, Carrie drew diagrams of both floors Applicant's house, and Applicant's bedroom; R.R. 4:157–62, 165–66; State's Exhibit 6; State's Exhibit 7; State's Exhibit 8;

15. Applicant's bedroom was on the first floor, and had a large walk-in closet with a lock on the inside, which would prevent someone from exiting the closet; R.R. 4:166;

16. Carrie started spending time alone with Applicant in his room when she was in the first grade; R.R. 4:167;

17. Carrie spent most of her time at the house in Applicant's room because "he gave [her] the most attention;" R.R. 4:164;

18. Carrie testified that she took naps with Applicant in his bed between ages seven and ten, although the abuse did not occur there; R.R. 4:190–91;

19. Applicant bought Carrie many gifts and kept them in his bedroom, but did not purchase anything for her siblings; R.R. 4:168;

[1] This is a pseudonym used during the trial and for appellate purposes.

20. Carrie testified that Applicant made her feel special, treated her differently from the other kids, and rarely said no to her; R.R. 4:174;

21. Carrie could not say exactly how the abuse started, but she testified that it began when she was in the first grade and occurred in his bedroom, behind his locked door; R.R. 4:175, 177;

22. The abuse took place in Applicant's walk-in closet, with carpet flooring; R.R. 4:176;

23. Applicant and Carrie would play hide and seek; Carrie would usually run inside the closet, and Applicant would follow, locking the door behind him and turning off the light; R.R. 4:176–78;

24. Applicant would remove her pants and underwear; R.R. 4:177;

25. Applicant touched Carrie on her breasts over her clothing, and hold Carrie's butt skin-to-skin; R.R. 4:178–79;

26. Carrie would lay on her back on the closet floor with her legs spread when Applicant would touch her vagina; R.R. 4:179;

27. Applicant covered Carrie's face with a blanket so she could not see; R.R. 4:179;

28. Carrie could not see Applicant, but could tell his body was close to her and his breathing became heavy. R.R. 4:181;

29. Carrie felt Applicant touching around and inside her vagina with his hands; R.R. 4:179;

30. Applicant's fingers would go inside the lips of Carrie's vagina, and she said it would sting and hurt; R.R. 4:180;

31. Applicant also used his tongue on and inside Carrie's vagina. R.R. 4:181–82;

32. Carrie could tell it was Applicant's tongue because it was wet and she could feel his breath next to her vagina; R.R. 4:182;

33. Carries testified that during the abuse, she "would be too scared to say something. Sometimes [she] would just not think anything at all;" R.R. 4:182;

34. Carrie testified that Applicant abused her, touching and penetrating her vagina with his hands and tongue, more than twice over a period of years; R.R. 4:184;

35. Carrie testified that Applicant abused her "around a hundred" times beginning when she was in the first grade and ending at the end of fifth grade; R.R. 4:183, 185;

36. Carrie testified that Applicant also touched her vagina outside her swimsuit at local pools in Kaufman County; R.R. 4:186;

37. The abuse at the pools occurred more than five times; R.R. 4:189;

38. Carrie testified that she did not expose the abuse at the time because she was scared and "didn't want to mess up the friendship between [her] brother and his best friend, and [she] didn't think anyone would believe [her];" R.R. 4:193;

39. Carrie gave a general disclosure of the abuse to her stepmother, Krissi Oden, when Carrie was sixteen years old; R.R. 4:198;

40. Carrie then went to a child advocacy center where she was interviewed, giving all the specifics of Applicant's abuse; R.R. 4:199–200;

41. The forensic interviewer with the Children's Advocacy Center who interviewed Carrie, testified that Carrie told her that Applicant had touched Carrie's breast over her clothing and that "he penetrated her vagina with his tongue and with his fingers;" R.R. 5:45;

42. The forensic interviewer also testified that Carrie told her that Applicant had touched her over 100 times at his house, as well as at the local pool; R.R. 5:45–48;

43. The SANE nurse, who examined Carrie, reported she found no trauma on Carrie, and due to the timeframe of the abuse and the rapidity of healing due to the area's quick healing, she did not expect to find any; R.R. 5:71, 74;

44. The SANE nurse also testified that Carrie told her that Applicant put his fingers inside her vagina, that it hurt, and that Applicant touched her at the local pool as well; R.R. 5:69;

45. Carrie's mother, father, brother, and sister testified generally about the family circumstances during the period of abuse; R.R. 5:80–145.

Trial: Applicant's Case

46. Applicant's nephew testified that he did not think there was anything weird about Applicant's interactions with the kids; R.R. 5:182;

47. Applicant's brother testified that he did not recall Applicant's door being locked and never observed anything inappropriate or odd; R.R. 6:17–23;

48. Two females who Applicant babysat as children testified that Applicant had a good reputation for caring for children; R.R. 6:7–16;

49. Applicant testified on his own behalf; R.R. 6:31;

50. Applicant testified that he never touched Carrie inappropriately; R.R.6:39;

51. Applicant was surprised about Carrie's allegation and had no idea why she would accuse him of abuse; R.R. 6:38;

52. Applicant testified there was not enough room in his closet for the abuse to have occurred as Carrie described; R.R. 6:39;

Applicant's Claims

53. Applicant claims that he received ineffective assistance of trial counsel regarding the following:

    a. Trial counsel failed to object during voir dire when the prosecutor told the voir dire panel, "that the district attorney take[s] 'an oath to seek justice,'" he "can reject a case because there is no probable cause or the allegations cannot be proven beyond a reasonable doubt," he "can dismiss a case at any time," and "that prosecutors 'want you to understand that ... we are not just here to get a conviction. We're here to seek justice, okay? Do we believe in the case? Obviously we believe in the case;" Writ at 6; Brief at 10–15;

    b. Trial counsel failed to file a motion in limine or object to:

        i. "prohibit opinion testimony that the complainant had been sexually abused" from the complainant's stepmother, Krissi Oden, that:

            A. "the complainant has had to relive 'the details of the abuse;'"

B. "that it has been 'a nightmare'" for the complainant;"

C. "that [the complainant] does not sleep;" and,

D. "...it's not right;" Writ 6; Brief at 15–16;

ii. Testimony that "long after the alleged offense, the complainant was hit by a car, developed a serious kidney disease, and had a transplant;" Writ at 6; Brief at 17–18;

c. Trial counsel referred to complainant as "victim" while questioning a defense witness; Writ at 6; Brief at 16–17;

d. Trial counsel failed to impeach the complainant's testimony that "she did not report the alleged sexual abuse sooner because she did not want to mess up the friendship between her brother and [Applicant's] nephew and [complainant] did not think anyone would believe her" by failing to elicit testimony that the complainant told her stepmother that complainant "did not report the abuse sooner because she was scared of [Applicant], as he threatened to harm her family if she told anyone; Writ at 6–7; Brief at 18–19; Exhibit 3, page 9;

e. Trial counsel "failed to offer measurements and photos of [Applicant's] walk-in closet in his bedroom to show the improbability of the complainant's description of the sexual abuse;" Writ at 7; Brief at 19–20;

f. Trial counsel "failed to request instructions on aggravated sexual assault and indecency with a child, lesser included offenses raised by the evidence." Writ at 7; Brief at 21–22;

Applicant's Trial Counsel: Generally

54. Applicant was represented at trial by the Honorable Heath Hyde ("Hyde");

55. Hyde testified at two separate zoom hearing in this cause on July 14, 2021, and August 9, 2021;

56. At the time of Applicant's trial, Hyde was an experienced criminal defense lawyer licensed to practice in both State and Federal Courts in Texas, with more than 24 years' experience; Writ Reporter's Record (hereinafter "W.R.R.") 1:5, 7;

57. After serving as a prosecutor with the Dallas District Attorney's Office for ten years, Hyde launched a private practice in 2007, around 92-95 of which has been criminal cases; W.R.R. 1:6;

58. At the time he represented Applicant, Hyde's average caseload was between 250 and 300 cases; W.R.R. 1:6.

59. Hyde has handled over 11,000 cases since he began practicing; W.R.R. 1:9;

60. Hyde has gone to jury trial almost 400 times, 15 to 25 of them were child sex cases; W.R.R. 1:9;

61. Prior to testifying at the zoom hearings in this cause, Hyde visited with both Applicant's attorney and an attorney for the State; W.R.R. 1:10;

62. Hyde is known to this Court to be competent and credible;

63. Hyde's testimony is credible;

64. Assistant District Attorney Robyn Beckham, who served as the lead prosecutor for the State at Applicant's trial, testified briefly at the second Zoom hearing; W.R.R. 2:31–35;

65. Beckham was licensed to practice as an attorney in November of 2011; W.R.R. 2:31;

66. For two years, Beckham exclusively handled all of the child abuse cases for Kaufman County District Attorney's Office, and has tried approximately 12 cases; R.R. 2:32;

67. Beckham is known to this Court to be competent and credible;

68. Beckham's testimony is credible;

Hyde's Trial Strategy

69. Hyde's trial strategy to defend Applicant was that the complainant "wanted attention and that this was another effort to get attention as far as the outcry and that it didn't happen[;]" W.R.R. 1:30;

70. Hyde explained that his trial strategy was to show Applicant's innocence by:

    g. Sponsoring witnesses who were exposed to Applicant as children and had not been molested; W.R.R. 1:17;

h. Demonstrating that the complainant was not truthful and was seeking attention; W.R.R. 1:17;

i. Showing that Applicant would not have had the opportunity to abuse the complainant; W.R.R. 1:17;

71. Hyde has objected during previous trials, but does not "object to everything that legally could be objected to. I think that takes away from your credibility sometimes as a lawyer. It just kind of depends on the facts of what it is trying to be presented, what they're trying to do, if they're trying to get into evidence that wouldn't be admissible. It just depends on the situation;" W.R.R. 1:18–19;

Ground One: Prosecutor's Statements during Voir Dire

72. Applicant claims trial counsel erred by failing to object to the prosecutor's statements during voir dire; Writ at 6; Brief at 10–15;

j. Specifically,

> My role, our role is not to just get convictions. I was telling you that all of us took an oath to seek justice. What does that mean? That means when a case comes in, we don't have to accept it. That means that if it does not meet a certain burden of proof, if there's no probable cause in the case or if we don't think we can get there beyond a reasonable doubt at some point, then guess what? We can send it back to the agency, right? Okay. Now we also have a box full of motions to dismiss. At any stage after the case is filed, even after a grand jury has issued an indictment, we can, with the stroke of our signature, sign a motion to dismiss and dismiss a case, okay.
>
> Now, judge talked about it's the State's burden. It is our burden to prove each and every element of this charge beyond a reasonable doubt. Now, if we don't do it, and you find the defendant not guilty, whose fault is that?
>
> Venireperson: Yours.
>
> It's our fault. It's not your fault. And so I'm smiling right now, and if after you find the defendant not guilty, guess what, we're still going to be polite. We're still going to smile. Why? Because

> it's not your fault, it's our fault. So we want you to understand that, that we are not just here to get a conviction. We're here to seek justice, okay. So do we believe in the case? Obviously we believe in the case. We wouldn't be here, okay. Do we intend to prove each and every element beyond a reasonable doubt? Obviously or we wouldn't waste your time, and we would not waste our time okay. So those are the roles.
>
> R.R. 4:40–41.

73. On direct appeal, Applicant complained of the same language (as Ground One), alleging prosecutorial misconduct; *Holland v. State*, No. 05–18–01419–CR, 2019 WL 6799755, at **3–5 (Tex. App.—Dallas Dec. 13, 2019, pet. ref'd) (not designated for publication);

74. The Dallas Court of Appeals determined that the prosecutor's comment was improper because,

> A prosecutor may not inject personal opinion in statements to the jury. Such a statement improperly conveys the idea that the prosecutor has a basis for such an opinion outside the evidence presented at trial. *Williams v. State*, 417 S.W.3d 162, 172 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). Further, such a statement encourages jurors to conclude that a defendant is necessarily guilty because he is being tried. *See Mendoza v. State*, 552 S.W.2d 444, 447 (Tex. Crim. App. 1977)[;]
>
> *Holland*, 2019 WL 6799755, at *4;

75. Because trial attorney did not object to these standards, the Dallas Court of Appeals determined whether the error was fundamental, i.e., whether the error was so egregious that it prevented a fair and impartial trial; *Holland*, 2019 WL 6799755, at *4;

76. The Court of Appeals ruled that the prosecutor's improper statements did not constitute fundamental error because immediately after the complained-of statements, "the prosecutor mitigated any harm the statement might have brought to the presumption of innocence[;]" *Holland*, 2019 WL 6799755, at *4 (citing *Escobar v. State*, No. 01–13–00496–CR, 2015 WL 1735244, at *4 (Tex. App.—Houston [1st Dist.] Apr. 14, 2015, pet. ref'd) (not designated for publication); *Beltran v. State*, 99 S.W.3d 807, 811–12 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd));

77. At the zoom hearings, Hyde testified that in his experience, prosecutors try to convey to the jury that they believe in their case; W.R.R. 1:15;

78. Hyde testified that he did not believe it was improper for a prosecutor to believe in his or her case; W.R.R. 1:16;

79. Hyde had heard prosecutors say something similar to the prosecutor in this case during previous trials; W.R.R. 1:23;

80. When asked about why he failed to object to the prosecutor's statements, Hyde testified that a jury understands that prosecutors believe a defendant is guilty when going to trial, and with a jury, one loses credibility when objecting to common sense notions; W.R.R. 1:22–23;

81. Hyde testified that he did not object to the prosecutor's statements because he "did not want to lose credibility with a jury over that issue[;]" W.R.R. 2:26;

82. Hyde explained that he was unaware of a case where an appellate court found harmful error where a defense attorney failed to object to prosecutorial statements that vouched for a case; W.R.R. 1:24;

Ground Two: Stepmother's Testimony

83. Applicant claimed that trial counsel should have objected to Krissi Oden's, complainant's stepmother, specifically:

> Q: Ms. Oden, after Carrie outcried to you about the sexual abuse, what did she have to endure in this legal process?
>
> A: A lot. She's had to relive every detail of everything that happened, which has been a nightmare for her. She doesn't sleep. Any attempt that she had to have a normal life aside from the fact that she had to have a kidney transplant has been stomped on by this. She's endured a lot more than any kid should ever have to, and it's not right.

R.R. 5:34;

84. Applicant portrays Oden's testimony as describing the complainant's believability or credibility; Writ at 6; Brief at 15–16; W.R.R. 1:28, 29;

85. However, Hyde explained that he believed the testimony was admissible (W.R.R. 1:30, 31) because:

    a. The stepmother "was able to describe as the outcry witness what she was told by her daughter – stepdaughter[;]" W.R.R. 1:28–29; and,

    b. The stepmother testified as "to what she observed as her stepmother[;]" W.R.R. 1:28–29; 31, 32;

86. Hyde testified he would have objected if the stepmother, "made opinions of her trying to be an expert on whether or not it happened, but I would not object to her describing that her daughter was having trouble sleeping and disturbed[;]" W.R.R. 1:32;

Ground Three: Car Accident & Kidney Disease

87. Applicant claimed that trial counsel was ineffective for failing to file a motion in limine and subsequently object to testimony that the victim was hit by a car and developed serious kidney disease; Writ at 6; Brief at 16–17;

88. The complainant/victim became Facebook friends with Applicant; W.R.R. 1:11;

89. Hyde explained that motions in limine are filed "to discuss an issue before the judge before being presented... to the jury;" W.R.R. 1:16;

90. According to Hyde, the subject-matter of his motion in limine depends on the situation; W.R.R. 1:16

91. Hyde did not believe it was necessary to file a motion in limine in this case, and did not do so; W.R.R. 1:17–18;

92. At the hearings, Hyde vaguely remembered that the complainant had been involved in an accident and that she had kidney disease; W.R.R. 1:36;

93. Hyde testified that he remembered the Applicant "indicating that there had been contact about [the accident and kidney disease] between them, which we would later show she wasn't scared of Mr. Holland because they communicated back and forth during that period;" W.R.R. 1:36, 38;

94. Hyde testified that at the time of trial, he believed that the possibility that the jury would feel sorry for the complainant because of her kidney transplant did not overcome the significance of the fact that the complainant

and Applicant were in contact, showing that complainant was not afraid of Applicant; W.R.R. 1:39, 41, 42, 43; W.R.R. 2:10;

95. Hyde was aware before the trial that the complainant had received a kidney transplant; W.R.R. 1:41;

96. Applicant portrayed the State's closing argument at guilt innocence as follows:

> [T]he complainant had to endure more in 18 years than most people endure in a lifetime, that she was hit by a car, had State 5 kidney disease, and had a transplant, and that the jury should honor her courage by convicting Holland.
>
> W.R.R. 1:37; *see also* W.R.R. 1:43–44;

97. The State's argument is as follows:

> She's had to endure so much throughout her life, so much more by 18 years than I think most anyone goes through in a lifetime. And I'm not just talking about the sexual abuse. You heard she was hit by a car, she's got stage 5 kidney disease, a kidney transplant. I mean this young lady has been through the ringer. And on top of all of that, she had to talk to stranger about sexual abuse. She had to go through a physical examination. She had to come in here and take an oath and tell you the most terrible things that have ever happened to her. And she did it.
>
> And ladies and gentlemen, I'm going to ask that you honor her courage with your verdict. I 'm going to ask you to hold this man accountable for what he did to her. I'm going to ask all 12 of you to go back there and deliberate and return a guilty verdict and get Carrie that justice that she deserves. Thank you.
>
> R.R. 6:79–80;

98. At the second Zoom hearing, Applicant admitted his Exhibit 7, which were screenshots of Facebook posts by the complainant;

99. Exhibit 7 contains complainant's Facebook statuses, comments, responses to statuses, and messages;

100. None of the communications seen in Exhibit 7 discussed the complainant's car accident or kidney issues; W.R.R. 2:11–14;

101. The communications seen in Exhibit 7 were retrieved this year;

102. The communications in Exhibit 7 are not comprehensive of all the communications between Applicant and the complainant over Facebook; W.R.R. 2:28;

103. Applicant's attorney listed examples of how Hyde elicited testimony from complainant to show that complainant was not afraid of Applicant; W.R.R. 2:7–8;

104. Hyde did not cross-examine complainant about her kidney transplant; W.R.R. 2:9;

105. Hyde testified that his strategy that complainant made up the story about the abuse to get attention was in-part due to the attention she received due to the car accident and her kidney illness; W.R.R. 2:15;

106. Beckham testified that if Hyde had objected to testimony about the victim's kidney disease, she would have offered the victim's testimony that the "process of going through a traumatic experience with the kidney disease leading up to a likely transplant that had caused [the complainant], first of all, to grow closer in a trust bonder with her stepmother, who she eventually outcried to, and also that she had a feeling of, well, if I can get through what I'm trying to survive this kidney disease, then I'm ready to talk about this other trauma that happened to me a long time ago[;]" W.R.R. 2:34;

Ground Four: "Victim"

107. Applicant claimed that by referring to the complainant as "victim" a single time during trial, trial counsel was ineffective; Writ at 6; Brief at 16–17;

108. The reporter's record of trial demonstrates that Hyde referred to the complainant as "victim" once during the trial as follows:

> Q: You don't know the victim involved in this case?
>
> R.R. 6:16–17;

109. Hyde testified that if he referred to the complainant as "the victim" once, it would have been by accident and he would have "misspoke"; W.R.R. 1:33, 34, 36;

Ground Five: Impeach Complainant

110. At trial, Carrie testified that she did not outcry about the abuse when it was occurring because, "[She] was scared. [She] didn't want to mee up the friendship between [her] brother and his best friend, and [she] didn't think anyone would believe [her;]" R.R.4:193

111. In a report complainant's stepmother filled out for the Texas Department of Family and Protective Services the stepmother wrote that complainant, "stated that she never told anyone because she was scared of the perpetrator, as he told her that he would harm her family if she ever said anything[;] Exhibit 3, page 9, accompanying Applicant's Brief;

112. Hyde agreed with Applicant's attorney at the hearing that impeaching a witness with a prior inconsistent statement is an important tool to undermine a witness's credibility to show that a witness is not truthful; W.R.R. 1:48;

Ground Six: Closet

113. Hyde never went to Applicant's home to see the closet where the offense occurred; W.R.R. 1:14; W.R.R. 2:17–18;

114. Hyde testified that he had the time to visit the closet, but chose not to do so; W.R.R. 2:19;

115. Prior to trial, Applicant presented Hyde with pictures that Applicant had taken of his closet; W.R.R. 1:14;

116. Hyde testified that he did not see the importance of pictures and measurements of the closet taken eight years after the offense alleged, given the amount of time that passed between when complainant was in the closet and the date the photographs and measurements were taken; W.R.R. 2:18, 19;

117. Hyde also expressed that he "had other concerns about the closet during the trial;" W.R.R. 2:20;

118. Hyde testified that he had the pictures and measurements of the closet taken by Applicant at the time of the trial, and chose not to use them; W.R.R. 2:22;

119. During deliberations, the jury sent out a note on November 7, 2018 asking for Applicant's testimony regarding the measurements of his closet; W.R.R. 2:16–17;

120. The jury also sent out a note asking about the consequences of the inability to reach a unanimous verdict; W.R.R. 2:17;

Ground Seven: Lesser-Included Offense

121. Hyde testified that generally lesser-included offenses can be raised in cases regarding continuous sexual abuse of a child, such as aggravated sexual assault and indecency with a child; W.R.R. 2:22;

122. Hyde agreed that lesser-included offenses have lower punishment ranges than continuous sexual abuse of a child; W.R.R. 2:22;

123. Hyde did not request any lesser-included offenses in Applicant's jury charge; W.R.R. 2:23;

124. During his testimony, Hyde explained that his defensive theory, that Applicant did not abuse complainant and her outcry was due to attention-seeking, was not conducive with seeking a lesser-included offense instruction, which would mean that something inappropriate had occurred between Applicant and complainant; W.R.R. 2:23;

125. During plea negotiations, the State offered Applicant the opportunity to plead guilty to a lesser offense, and Applicant "did not want to accept that offer because it didn't happen" and Applicant "understood the circumstances of the trial and what would happen if found guilty;" W.R.R. 2:23;

126. Hyde explained that Applicant was adamant that the abuse did not occur, so he tailored his defensive theory accordingly; W.R.R. 2:23;

127. Prior to trial, Hyde explained to Applicant the possible lesser-included offenses and their potential ranges of punishment; W.R.R. 2:30;

CONCLUSIONS OF LAW

1. In making a claim of ineffective assistance, Applicant must show by a preponderance of the evidence that (1) counsel's performance was so deficient that he was not functioning as acceptable counsel under the Sixth Amendment and (2) there is a reasonable probability that, but for counsel's

error or omission, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–96 (1984); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Under the first prong of the test, Applicant must show by a preponderance of the evidence that his counsel's representation fell below the standard of prevailing professional norms. *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005).

The review of counsel's actions is highly deferential and presumes that counsel's actions fell within the wide range of professional competence. *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). There is a strong presumption of effective assistance and sound trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Decisions should not be judged in the distorting view of hindsight. *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992). That another attorney would have acted differently does not establish ineffective assistance. *Scheanette v. State*, 144 S.W.3d 503, 509 (Tex. Crim. App. 2004).

2. In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. The likelihood of a different result must be substantial, not just conceivable. *Harrington v. Richter*, 131 S.Ct. 770, 791–92 (2011) (citations omitted).

Ground One: Voir Dire

3. Applicant failed to cite to any case law showing that Hyde did not adhere to an objective standard of reasonableness by failing to object to the prosecutor's statements during voir dire; Brief at 10–15;

4. Applicant's brief cites only to case law demonstrating that the prosecutor's statements themselves were in error; Brief at 10–15;

5. Hyde's decision to not object to the prosecutor's statements was strategic because he did not want to damage his credibility with the jury;

6. Applicant failed to show that Hyde's strategic decision not to object to the prosecutor's statements was an error so serious as to deprive Applicant of a fair trial;

7. Applicant failed to show that he was harmed by Hyde's decision not to object to the prosecutor's statements during voir dire;

8. Ground One should be denied;

Ground Two: Stepmother's Testimony

9. A defendant must be able to show authority in support of his argument that the objections would have been meritorious. *Wert v. State*, 383 S.W.3d 747, 758 (Tex. App.—Houston [14th] 2012, no pet.);

10. Applicant relies on case law in which the witnesses in question were being directly asked or responding specifically about another witness's truth or believability; Brief at 15–16 (citing *Ochs v. Martinez*, 789 S.W.2d 949, 956 (Tex. App.—San Antonio 1990, writ denied) (where witness was testifying about the truth/falisity of another witness's testimony); *Black v. State*, 634 S.W.2d 356, 357–58 (Tex. App.—Dallas 1982, no pet.) (where witness was testifying about believing whether the victim was telling the truth); *Fuller v. State*, 224 S.W.2d 823, 833–35 (Tex. App.—Texarkana 2007, no pet.) (where witness was being questioned about believing the victim);

11. The complained-of testimony from Krissi Oden was not bolstering, but instead a response to a question about Oden's observations of the complainant, not about the victim's credibility;

12. Applicant failed to show that the complained-of testimony would have been successfully excluded;

13. Applicant failed to meet his burden of showing that his trial counsel was deficient;

14. Even assuming error, Applicant failed to meet his burden of showing that but for the stepmother's testimony, he would not have been found guilty;

15. Ground Two should be denied.

Ground Three: Car & Kidney

16. A defendant must be able to show authority in support of his argument that the objections would have been meritorious. *Wert v. State*, 383 S.W.3d 747, 758 (Tex. App.—Houston [14th] 2012, no pet.);

17. Applicant failed to cite to any case law or other objective standard of reasonableness showing that Hyde should have objected to the testimony about the car accident and complainant's kidney illness, or that if he had objected, the evidence would have been excluded;

18. Evidence of complainant's kidney disease would have been amissible;

19. Applicant failed to prove that Hyde's performance was deficient by failing to object to admissible evidence;

20. Assuming error, Applicant failed to prove that but for the alleged error, he would not have been found guilty of continuous sexual abuse of a child;

21. Ground Three should be denied;

Ground Four: "Victim"

22. In *Cueva v. State*, the Court of Appeals found that a defense counsel's use of the term "victim" was not deficient "in light of the fact that such terms are commonly used at trial in a neutral manner to describe the events in question and, in context, carry no implication that the person using such terms has a opinion one way or the other about the guilt of the defendant. 339 S.W.3d 839, 866 (Tex. App.—Corpus Christi 2011, pet. ref'd). "[T]he term "victim" is relatively mild a non-prejudicial, especially given that courts have held invocation of far stronger terms did not amount to reversible error;" *Id.* at 864 (citations omitted);

23. Applicant has failed to show that Hyde's single accidental reference of complainant as "victim" fell below an objective standard of reasonableness;

24. Applicant failed to show that this single reference was the "but for" cause of the jury finding Applicant guilty;

25. Ground Four should be denied;

Ground Five: Impeach Victim

26. Appellate courts have found no error where a trial attorneys decision not to raise inconsistent testimony or impeach a witness may constitute sound trial strategy because the attempt to impeach may be ore harmful than beneficial. *Briones v. State*, No. 01–14–00121–CR, 2016 WL 2944274, at *11 (Tex. App.—Houston [1st Dist.] May 19, 2016, no pet.) (not designated for publication);

27. Applicant's reliance on *Ex parte Saenz* is incorrect. *Ex parte Saenz*, 491 S.W.3d 819, 829 (Tex. Crim. App. 2016). The *Saenz* case differs because in that case, defense counsel failed to impeach the State's witness with a direct contradiction of a previous statement, where in the hospital, the witness said he would not be able to identify his assailaint, but identified the defendant during trial. *Id.* at 829. Further, the prior inconsistent statement in *Saenz* was the one piece of evidence that could have substantially neutralized the identification of the defendant. *Id.*

28. The complained-of statements at issue are not direct contradictions of one another;

29. The complained-of testimony, if negated, would not have undermined an essential element of the State's case;

30. Applicant has failed to present case law or other standards to show that Hyde's failure to impeach the complainant fell below an objective standard of reasonableness;

31. Applicant failed to show that but for his failure to impeach the complainant, he would not have been found guilty;

32. Ground Five should be denied;

Ground Six: Closet

33. Texas Courts will sustain a defendant's challenge to trial counsel's failure to investigate "(1) the consequence of the failure to investigate is that the only viable defense available to the accused is not advanced, and (2) there

is a reasonable probability that, but for, counsel's failure to advance the defense, the result of the proceeding would have been different. *Cantu v. State*, 993 S.W.2d 712, 718 (Tex. App.—San Antonio 1999, pet. ref'd).

34. Applicant failed to demonstrate that Hyde's failure to visit Applicant's closet in person and/or his refusal to offer Applicant's pictures and measurements of his own closet eight years after the alleged offense prevented him from offering his only viable defense;

35. Applicant failed to show that Hyde's refusal to use photographs and measurements of a scene taken eight years after an offense fell below an objective standard of reasonableness;

36. Assuming error, Applicant cannot show that but for those photographs or measurements, the jury would not have found Applicant guilty;

37. Ground Six should be denied.

Ground Seven: Lesser-Included

38. Failure to request a jury instruction on a lesser included offense can render ineffective assistance of counsel if the trial judge would have erred in refusing the instruction had counsel requested it; *Gayton v. State*, No. 13–19–00293–CR, 2020 WL 6878732, at *4 (Tex. App.—Corpus Christi Nov. 24, 2020, no pet.) (not designated for publication) (citing *Jones v. State*, 170 S.W.3d 772, 775 (Tex. App.—Waco 2005, pet. ref'd));

39. In *Rousseau v. State*, the Court of Criminal Appeals set out the *Royster* test for determining lesser included offenses: (1) the lesser included offense must be included within the proof necessary to establish the offense charged, and (2) must be some evidence in the record that would permit a jury to rationally find that if the defendant is guilty, he is only guilty of the lesser offense. *Rousseau v. State*, 855 S.W.3d S.W.2d 666, 673 (Tex. Crim. App. 1993);

40. The Eastland Court of Appels upheld a trial court's denial to instruct the jury on lesser-included offenses in a continuous sexual assault of a child case, finding the second prong of the *Royster* test unmet where the defendant denied any illegal behavior against the child; *Brown v. State*, 381 S.W.3d 565, 570, 583 (Tex. App.—Eastland 2012, no pet.);

41. Like the defendant in *Brown*, Applicant categorically denied touching the complainant inappropriately;

42. Applicant failed to meet the second prong of the *Royster* test; there was no evidence that Applicant was only guilty of a lesser included offense;

43. Applicant failed to show that if Hyde had requested a lesser included offense, the trial court would have erred by denying that request;

44. Ground Seven should be denied.

Accordingly, this Court **recommends** that Applicant's Writ be **DENIED.**

IT IS ORDERED that the Clerk of this Court file these findings and transmit them along with the Writ Transcript to the Clerk of the Court of Criminal Appeals as required by law.

IT IS FURTHER ORDERED that the Clerk of this Court shall email these findings to Attorney for Applicant at:

Randy Schaffer, P.C.
Attorney for Applicant
1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
noguilt@schafferfirm.com

SIGNED this 8 day of October, 2021

PRESIDING JUDGE