NO. _____

IN THE SUPREME COURT OF THE UNITES STATES

JACQUEL O'NEAL

vs.

THE STATE OF TEXAS

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

1. Pursuant to Supreme Court Rule 13.5, Petitioner Jacquel O'Neal respectfully requests a 30-day extension of time, until August 21, 2025, within which to file a petition for writ of certiorari. The Texas Court of Criminal Appeals denied Petitioner's application for writ of habeas corpus on April 23, 2025, without written order, based on the findings of the trial court. The order denying relief is attached, along with the trial court's findings of fact and conclusions of law. This Court has jurisdiction under 28 U.S.C. § 1257.

2. Absent an extension, a petition for writ of certiorari would be due on July 22, 2025. *See* U.S.S.Ct.R 13.1. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case. The

requested extension is necessary because undersigned counsel has not yet received Petitioner's signed *in forma pauperis* oath. Counsel mailed the oath to Petitioner over two weeks ago, but due to delays in the mailing system at the Texas Department of Criminal Justice, counsel has not yet received Petitioner's return mail as of this date.

3. This case raises a critical question concerning the Sixth Amendment's guarantee of effective assistance of counsel. After accidentally injuring a baby's vagina with his long fingernails during a diaper change, Petitioner (just 18-years-old at the time of the offense) was convicted of Super Aggravated Sexual Assault of a Child even though there was never a suggestion that the conduct at issue was sexual in nature. Even the jury found that the injury was accidental, as it found Petitioner guilty of the lesser-included offense of negligent Injury to a Child when he was charged with the much higher felony of intentionally causing the injury. However, due to Trial Counsel's ineffective assistance with respect to failing to request a defensive jury instruction, the jury had no choice but to find Petitioner guilty of Super Aggravated Sexual Assault despite there being an exception in the Texas Penal Code for reasonable medical care of a child. *See* TEX. P. CODE §§ 22.021(d) & 22.011(d). Because Petitioner was found guilty of Super Aggravated Sexual Assault, the law prescribed a minimum term of 25 years confinement without the possibility of parole. *See* TEX. P. CODE §22.021(f)(1). The highest Texas court ruled

that Trial Counsel's failure to request a vital jury instruction was not deficient, and the petition for writ of certiorari will presents an important legal question that, if answered in the affirmative, would redress this injustice.

4. Although a draft of the Petition is nearly completed, Petitioner cannot file it until his motion to proceed *in forma pauperis* is ready, and this motion requires Petitioner's signed oath of indigency. Undersigned counsel is rendering free, *pro bono* services on the petition for writ of certioriari.

5. Wherefore, Petitioner respectfully requests that an order be entered extending the time to file a petition for writ of certiorari to Thursday, August 22, 2025.

Dated: July 10, 2025

Respectfully submitted,

/s/ Christopher M. Perri___
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COUNSEL FOR PETITIONER JACQUEL O'NEAL

ATTACHMENTS

Texas Court of Criminal Appeals' Order Denying Relief

and

Trial Court's Findings of Fact and Conclusions of Law

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

FILE COPY

4/23/2025

O'NEAL, JACQUEL **Tr. Ct. No. DC-23-21463A** **WR-95,364-01**

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court and on the Court's independent review of the record. JUDGE PARKER DID NOT PARTICIPATE

Deana Williamson, Clerk

CHRISTOPHER M. PERRI
ATTORNEY AT LAW
1304 NUECES STREET
AUSTIN, TX 78701
* DELIVERED VIA E-MAIL *

No. DC-23-21463A

EX PARTE	§	**IN THE DISTRICT COURT**
	§	
	§	**52ND JUDICIAL DISTRICT**
	§	
JACQUEL O'NEAL	§	**OF CORYELL COUNTY, TEXAS**

STATE'S PROPOSED SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the above-identified cause, JACQUEL O'NEAL, hereinafter Applicant, filed a Writ of Habeas Corpus concerning his conviction and sentence and is seeking relief from his final felony conviction pursuant to Art. 11.07, of the Texas Code of Criminal Procedure. In accordance with the procedures set out by Chapter 11, Texas Code of Criminal Procedure and the Texas Rules of Appellate Procedure, the Court makes the following findings of fact and conclusions of law for forwarding to the Court of Criminal Appeals. The Court has taken into consideration the original application and memorandum of law in support of the application, the State's original and supplemental answers, the affidavit of Applicant's attorney, the Hon. Lyle Gripp, the trial court record, the writ hearing record and all the documents filed in the Court's files in this case. Having duly considered the foregoing and the Court's personal recollection as the trial judge in this cause, the Court now makes the following as [its] Findings of Fact and Conclusions of Law:

I. Statement of the Case and Procedural History

The Applicant is currently incarcerated in the Institutional Division of the Texas Department of Criminal Justice by virtue of a Judgment of Conviction entered in Cause Number FISC-12-21463, in the 52nd District Court of Coryell County, Texas, wherein he was convicted of Aggravated Sexual Assault of a Child under six years of age.[1] This sexual assault case was joined with three other injury to a child cases involving the same victim.

Applicant was tried in the 52nd Judicial District Court of Coryell County, Texas beginning on May 18, 2015. Upon his plea of not guilty, the jury found Applicant guilty.[2] On the three injury to a child cases, Applicant was convicted of the lesser included offenses of causing injury by negligence.[3]

Applicant proceeded to the jury for punishment. On May 27, 2015, the jury assessed punishment at twenty-five (25) years' confinement in the Texas Department of Criminal Justice-Institutional Division.[4] On the three injury to a child cases, Applicant received community supervision.[5]

Applicant did appeal his conviction. On May 31, 2016, the Seventh Court of Appeals affirmed his conviction.[6] Applicant subsequently filed a petition for

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[1] (1 CR 6, 254-257). Tex. Pen. Code §22.021(1)(B)(i) and (2)(B) (West 2013).
[2] (Trial Record 27 RR 68).
[3] (Trial Record 27 RR 69).
[4] (1 CR 56-59), (28 RR 43).
[5] (Trial Record 28 RR 43 - 45).
[6] *See O'Neal v. State*, No. 07-15-00273-CR, 2016 Tex. App. LEXIS 5763, (Tex. App.—Amarillo May 31, 2016, pet. ref'd) (op., not designated for publication). Applicant also appealed his conviction in his three companion cases contending that the evidence was insufficient to

discretionary review which was refused by the Court of Criminal Appeals on November 2, 2016.

On October 19, 2023, Applicant filed his current post conviction writ application.[7] The State's original response to the application was filed on November 1, 2023.[8] On November 2, 2023, the trial court ordered Applicant's trial counsel, Hon. Lyle Gripp to respond to Applicant's ineffective allegations. On December 14, 2023, Mr. Gripp requested additional time to respond to the allegations.[9] On January 15, 2024, Mr. Gripp filed his affidavit.[10] On January 18, 2024, the State filed its supplemental response based on Mr. Gripp's affidavit. [11] On January 25, the State filed its proposed findings of fact and conclusions of law. The trial court's Findings of Fact and Conclusions of Law were signed on February 13, 2024. On February 22, 2024, Applicant filed his objections to the trial court's findings.[12]

On September 25, 2024, the Court of Criminal Appeals found that disputed factual issues remained regarding whether Applicant was in custody during police questioning, and habeas counsel presented an unresolved legal argument, based on

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support his three convictions for causing serious bodily injury or bodily injury to a child by criminal negligence. These convictions were also affirmed. *O'Neal v. State*, Nos. 07-15-00274-CR, 07-15-00275-CR, 07-15-00276-CR, 2016 Tex. App. LEXIS 8927, at *1 (Tex. App.—Amarillo Aug. 16, 2016, pet. ref'd) (op., not designated for publication).

[7] *See* Application.

[8] *See* State's original response.

[9] *See* Request for additional time to respond.

[10] *See* Affidavit of Lyle Gripp.

[11] *See* the State's Supplemental Response.

[12] *See* the Applicant's Objections to the Trial Court's Findings of Fact and Conclusions of Law.

Dowthitt v. State, 931 S.W.2d 244 (Tex. Crim. App. 1996), that the interview became custodial. The Court also found that a further factual dispute remained regarding whether Applicant's conduct could have qualified for the medical care defense. Habeas counsel argued that Applicant's statement to police about cleaning the child raised this defensive issue, while trial counsel claimed the defense was not supported by the evidence. The Court found that unresolved questions remained about trial counsel's strategic decision-making process in not pursuing the medical care defense alongside the accident defense. The Court remanded the application to the trial court for a hearing so that trial counsel may testify in order to resolve these disputed issues. [13]

On November 21, 2024, the trial court held an evidentiary hearing as requested by the Court of Criminal Appeals. Based on the testimony presented during the evidentiary hearing, the trial court supplements its original findings of fact and conclusions of law as follows:

II. Supplemental Findings of Fact

A. The Station House Interview

1. Applicant complains, in his first ground, that his trial counsel, Mr. Lyle Gripp (hereafter "Trial Counsel"), was ineffective for failing to file a motion to suppress and failing to object to the admission of Applicant's statements made at the

[13] *See Ex parte O'Neal*, No. WR-95,364-01, (Tex. Crim. App. Sept. 25, 2024) (not published).

Copperas Cove Police Station.[14] He argues his statements were the result of a custodial interrogation and Trial Counsel should have objected on that basis. [15]

2. Applicant testified during the writ hearing on November 21, 2024. He testified about the circumstances of his interview at the police station on August 5th, 2012. He said he was with the mother of the victim, Diamond Pender, when he got a call from Copperas Cove Police Officer Krystal Baker about a detective wanting to interview Ms. Pender. He understood the officer was going to pick up Ms. Pender to take her to the police station for an interview. He did not expect to go for an interview himself. When the officers arrived he was told he also had to go for an interview. He said he didn't want to go but was told Detective Terry still wanted to speak to him. He felt like he had no choice but to go with the officers. Applicant got dressed and was driven to the police station in a marked police car with Ms. Pender.[16]

3. Once Applicant arrived at the police station, he was told to wait while Ms. Pender was interviewed first. He had to sit out while another police officer, Officer Schaefer, stood next to him. He did not feel free to leave with Officer Schaefer next to him. He said the officer was close enough that he invaded his space. He sat with the officer for thirty minutes, until Ms. Pender's interrogation was over.

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[14] *See* State's exhibit nos. 11 and 11A (substitute).
[15] *See* Application pages 6 and7.
[16] (Writ Hearing RR 16).

He was then escorted into the interview room to talk to Detective Terry.[17]

4. During the interview, Applicant told the detective he was wiping feces out of a baby's vagina and accidentally cut the baby while he was doing the wiping. When Applicant told Det. Terry this, the detective made it seem like he was going to jail for sure that day. He did not feel like he was free to leave at any point in that interview. However, he wasn't actually arrested after the interview. He was surprised he wasn't arrested. He was arrested a couple of days later.[18]

5. Trial Counsel was appointed to represent Applicant as defense counsel. Applicant stated he had meetings with Trial Counsel while he was incarcerated. Applicant stated Trial Counsel never asked him about the circumstances of the police interview on August 5th, 2012. Applicant admitted he did not volunteer this information to Trial Counsel about how he didn't feel free to leave. This was because he had never have been in trouble before and didn't know anything about the law. [19]

6. Applicant testified although he met with Trial Counsel five times, he never saw any police reports nor did he see the video of his interview with Det. Terry. He said the first time he saw it was at trial.[20]

7. Applicant denied he told Officer Baker he would be willing to go to the

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[17] (Writ Hearing RR 17).
[18] (Writ Hearing RR 18).
[19] (Writ Hearing RR 19, 20, 34).
[20] (Writ Hearing RR 26, 27).

police station but needed a ride. He admitted when he first got questioned by Det. Terry he was told he was free to leave. The detective told him if anytime that he wanted to stop the interrogation, he could and leave. Applicant said he understood what he meant by that. He understood he could leave at any time.[21]

8. Applicant said when Det. Terry got aggressive with him he told the detective he wanted to leave. The detective got up, opened the door and told him if Applicant left he would get a warrant for his arrest. Applicant also said he told Detective Terry that he didn't want to leave because he wanted to talk about what happened some more. He admitted he was free to leave at that point but wanted to tell Detective Terry some more about what happened. [22]

9. Applicant said he felt like if he left, he would have gotten arrested. An arrest warrant was issued and he was arrested four days after the interview. Applicant felt like based on his statements to detective Terry, the detective had probable cause to arrest him. [23]

10. Trail Counsel testified he did not believe there was a suppression issue with regard to Applicant's station house interview. He disputed Applicant's testimony, stating he did discuss the circumstances of the interview with Applicant. He said Applicant did not tell him he was not ready to go to the police station and

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[21] (Writ Hearing RR 30, 31).
[22] (Writ Hearing RR 32, 33).
[23] (Writ Hearing RR 34, 35).

was unaware of it. Rather, Applicant told him he wanted to go because he wanted to try to tell his side of the story. [24]

11. Trial Counsel stated he was familiar with the case of *Dowthitt vs. State* but did not think it applied to Applicant's situation because Applicant thought that he could leave and he also thought Applicant could leave. He said Applicant never told him he felt like he was not free to leave. [25]

12. Trial Counsel stated if Det. Terry had told Applicant, during the interview, he failed miserably, after the Applicant described what happened in an injury to a child / sexual assault case that would not cause him to believe the detective was manifesting to the Applicant that they might have probable cause to arrest him for a criminal offense. He said this is because he has known detectives to lie to individuals during interviews in order to get them to admit something later. [26]

13. Trial Counsel reviewed the police reports with Applicant, including Det. Terry's report. They did discuss the fact that Detective Terry told him that he could leave. He believed Applicant was free to leave because Det. Terry in his report said that Applicant asked to leave and Detective Terry got up and opened the door. This indicated to him that Applicant was free to leave. The detective also said in his report that Applicant told him he didn't want to leave and wanted to talk to him

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[24] (Writ Hearing RR 42, 43, 57).
[25] (Writ Hearing RR 44 - 46).
[26] (Writ Hearing RR 48).

further. Trial Counsel said that would be a further indication that Applicant was free to leave and he stayed of his own free will. He said Applicant never told him he felt he was not free to leave during the interview with Det. Terry. [27]

14. Trial Counsel testified he did review the video of the interview with Applicant. He knew Applicant was not going to testify and he wanted the video of the interview to come into evidence. Trial Counsel said it was part of his trial strategy to have the video tape admitted into evidence because he was not only thinking about guilt or innocence but punishment. He said he did not object to Applicant's statements to Det. Terry and the video coming into evidence because he did not believe it ever turned into a custodial interrogation; and he wanted that video admitted into evidence as part of his trial strategy. He said that strategy did pay off.[28]

15. Trial Counsel has extensive experience as a criminal trial attorney. He was a felony prosecutor for 12 years. He has spent the last 20 years as a criminal defense attorney. He averages 4 – 5 felony trials a year. He understands when he should file a motion to suppress. Based on his experience and knowledge of the case, he did not think it was appropriate in this case. He also did not think it was appropriate to object to evidence from Applicant's interview. [29]

16. The Court has considered the writ hearing testimony of Applicant and

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[27] (Writ Hearing RR 56 - 58).
[28] (Writ Hearing RR 58, 59).
[29] (Writ Hearing RR 62, 63).

Trial Counsel. The Court has also considered the trial record and affidavit of Trial Counsel. The Court finds that Applicant voluntarily went to the police station to be interviewed by Det. Terry. The Court finds that Applicant was informed by Det. Terry that he was free to leave at the beginning of the interview. The Court further finds that Applicant never informed trial counsel he did not feel free to leave.

17. The Court finds that Applicant did ask to terminate the interview. Det. Terry asked Applicant if he wanted to stop speaking to him and Applicant stated he did. The detective got up and walked towards the door. He did indicate a warrant would be issued for Applicant. However, Applicant said he wanted to keep speaking with the detective. Det. Terry directly asked Applicant if he wanted to terminate the interview and Applicant stated he wanted to keep speaking to the detective. At this point, Applicant was free to leave but chose to stay and continue speaking with the detective.

18. Copperas Cove Police Officer Krystal Baker testified, during trial, she asked Applicant if he would be willing to come in and talk with her more about the incident that occurred the previous day involving the injury to the baby. She said Applicant agreed to come in but said he didn't have a ride. He was then picked up and brought to the police station.[30] This was confirmed by Detective Terry.[31]

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[30] (Trial record 24 RR 96).
[31] (Trial Record 25 RR 128).

19. Applicant admits he was told by Detective Terry at the beginning of his interview that he was free to leave and not under arrest. Further the detective told Applicant he was not going to jail that day.[32] This is supported by the record.[33] Applicant was released after the interview.

20. The Court finds Applicant was not in custody at the time he went to the police station and gave his statement. The Court finds Applicant's statements to Det. Terry were not the product of a custodial interrogation. Applicant has failed to show that a Motion to suppress those statements would have been granted. Nor has Applicant shown that an objection to the admission of those statements would have been sustained. The Court further finds the voluntary interview did not turn into a custodial interview after Applicant admitted to injuring the child. Although Det. Terry informed Applicant that a warrant for his arrest would be issued because he admitted to injuring the child, he did afford Applicant an opportunity to leave. Applicant chose to stay and continue talking to the detective.[34]

21. Applicant has failed to show that the interview became custodial. The Court finds Applicant's testimony not credible. Considering Applicant's demeanor during his testimony, his conflicting answers and admissions and that his testimony is contradicted by the record, the Court finds he did go to the police station

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[32] *See* Application page 7.
[33] (Trial Record 30 RR St. ex. 11).
[34] (Suppl. CR 24, 25).

voluntarily. The Court further finds he was told prior to the interview he was free to leave and afforded an opportunity to leave during the interview, but chose to stay of his own free will. Additionally, Applicant never informed trial counsel that he did not feel that he was free to leave during Det. Terry's interview.[35]

22. The Court finds Trial Counsel's testimony to be credible. The Court finds Trial Counsel's testimony that he had no reason to file a motion to suppress or object to the testimony is supported by the record. Neither a motion to suppress nor objection to testimony was warranted. Applicant's contention that he was subjected to a custodial interrogation is not credible and is not supported by the record. Applicant's contention that his interview turned custodial due to a manifestation of probable cause is also not supported by the record. The Court finds Trial Counsel's testimony that he did not believe Applicant was initially subjected to a custodial interrogation, nor did he think it turned into a custodial interrogation after Applicant's admissions because Applicant was free to leave credible and supported by the evidence.

23. The Court finds Trial Counsel to be an experienced felony trail attorney who met with Applicant several times and discussed the evidence and station house interrogation with him. The Court finds Applicant never told Trial Counsel he did not feel free to leave either before or during the interview. The Court finds Trial

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[35] (Writ Hearing RR 19, 20, 34, 57).

Counsel had two reasons for not filing a motion to suppress or object to the admission of Applicant's station house video. The first reason was that trial counsel did not believe that a motion or objection was appropriate. The second reason was that it was part of trial counsel's trial strategy to have the video introduced. The Court finds Trial Counsel exercised his professional judgment in electing not to file a motion to suppress or object to the admission of Applicant's interview. The Court finds Trial Counsel's trial strategy of having the video introduced was reasonable given the circumstances of this case.

24. This Court finds Trial Counsel's explanation of why he did not file a motion to suppress the station house video, or object to its admission to be reasonable. Based upon all of the foregoing, including the State's response, Trial Counsel's affidavit, the record, the writ hearing testimony and this Court's own recollection, the Court finds Applicant's Trial Counsel, as to Applicant's first ground, to be competent and professional in his representation of Applicant. This Court finds he was not ineffective. Applicant has failed to show ineffectiveness. This Court finds there are no facts to support Applicant's allegations. This Court further finds Applicant was not in custody at the time he made his statements at the police station nor did his interview ever turn custodial.

B. The Medical Defense Instruction

1. Applicant complains, in his second ground, that his trial counsel was

ineffective for failing to request a jury instruction regarding the medical care defense. He contends his statement, which he previously argued should not have been admitted, raised the issue of whether his conduct concerning cleaning the baby's vagina with a wet wipe wrapped around his finger, which had a long fingernail, qualified as reasonable medical care. He contends this provided an explanation of how his cleaning motion might have lacerated the baby's vagina.[36] He further contends this gave rise to the medical care defense and trial counsel should have requested an instruction.[37]

2. Applicant equivocated during his writ hearing testimony as to whether he placed his finger inside of the baby's vagina. He said he accidentally cut the baby's vaginal area with his long fingernail when he was cleaning feces from that area.[38] When asked if he stuck his finger inside, he said "no". He said he just wiped the surface but never made any entry into the vagina. He further admitted any entry that he might have made was an accident.[39] Applicant later stated he did go inside the baby's vagina to clean it. He said he accidentally injured her when he did that. However, he then contradicted himself when asked if he penetrated the baby's vagina on purpose or by accident. He said he did it by accident. [40]

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[36] *See* Application page 8.
[37] *See* Application page 8; 22.011(d) and 22.021(d)
[38] (Writ Hearing RR 12, 13).
[39] (Writ Hearing RR 21, 22).
[40] (Writ Hearing RR 36, 37, 39).

3. Applicant admitted to lying to Ms. Pender when he first told her he didn't know how the baby got injured. He said he lied because he did not want her to think he did it intentionally. Applicant further admitted to lying to Det. Terry when he was first asked if he knew how the baby was injured. He told the detective he did not know how the baby got injured. He said he lied at first because he did not want to get into trouble. [41]

4. Trail counsel explained why he did not ask for a jury instruction of the medical defense. He said that he had consulted with his own doctor who had been hired as a defense expert. The doctor told him that, after examining the child's medical records, there was no way this was an accident. So, in good conscience, he could not ask for the medical defense jury instruction when he knew what Applicant had told him could not be true. The doctor told him the baby's injuries were caused by blunt force trauma which mirrored what the State's doctors had said. He did not believe this conflicted with his trial strategy that the baby's injuries were caused by accident. He also considered this as a punishment issue. Trial counsel knew about the medical defense in sexual assault cases. He did not believe it was appropriate to raise that defense in this case.[42]

5. The trial testimony of the S.A.N.E. nurse indicated there was blunt

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[41] (Writ Hearing RR 29, 31, 32).
[42] (Writ Hearing RR 53 – 56, 63).

force penetration to the vagina.[43] She explained it would take a significant amount of force to cause the penetration and significant tearing, bleeding and bruising. The amount of damage suffered by this baby would not be consistent with Applicant's version of how the injury occurred.[44] The pediatric surgeon, Dr. Little, testified to this as well.[45] He also testified it would take an intentional act to cause this type of injury to the baby's vagina.[46] Dr. Stern, Pediatric Emergency Specialist, testified the vaginal injury could not have been caused by a simple cleaning as Applicant claimed.[47]

6. The Court finds that Trial Counsel was aware of the medical defense but chose not to request this instruction. Trial Counsel chose not to request this instruction because of information given to him by his own medical expert. Trial Counsel felt ethically bound not to request an instruction he knew to be false and unwarranted. The Court notes that habeas counsel, in his proposed findings, argues that Trial Counsel's explanation as to why he did not request the medical defense instruction was not credible because Trial Counsel used an accident defense at trial with respect to the victim's vaginal injury.[48]

In his closing argument, trial counsel argued that Applicant was not guilty of

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[43] (Trial Record 26 RR 60 - 62).
[44] (Trial Record 26 RR 73, 74, 80-82).
[45] (Trial Record 24 RR 63-67).
[46] (Trial Record 24 RR 80).
[47] (Trial Record 26 RR 110).
[48] *See* Applicant's Proposed Findings at page 9.

any of the charges against him. He later argued all the detective could get from Applicant during his interview was that it was an accident.[49] During the writ hearing, trial counsel stated the accident strategy not only went to the injury but to Applicant's culpable mental state as to the sexual assault.[50] The Court finds trial counsel's nuanced distinction between the medical defense instruction and accident strategy does not take away from trial counsel's credibility.

Although Trial Counsel believed a medical defense instruction was inappropriate he believed he could argue accidental injury to the jury both with regard to the baby's injuries and culpable mental state for the sexual assault and injury cases. Given that the jury returned verdicts finding the lesser included injury to a child offenses were committed with criminal negligence, the Court cannot say this was an unreasonable strategy. The court finds Trial Counsel's explanation for not requesting the medical defense instruction reasonable. He was not ineffective for failing to request the medical defense instruction.

7. Applicant's allegations are not supported by the record. Applicant's ineffectiveness claims are not supported by the record. During trial, Trial Counsel acted professionally, effectively made objections, cross-examined witnesses and challenged the State's case. The Court finds Trial Counsel's performance was

[49] (Trial record 27 RR 35, 38).
[50] (Writ Hearing RR 50, 51).

competent and professional. There was no deficient performance.

8. Based upon all of the foregoing, including the State's responses, Trial Counsel's affidavit, the trial record, testimony given during the writ hearing and this Court's own recollection, the Court finds Trial Counsel to be competent and professional in his representation of Applicant. This Court finds he was not ineffective. Applicant has failed to show ineffectiveness. This Court also knows Trial Counsel. This Court has always found his representation to be competent and professional. This Court finds there are no facts to support Applicant's allegations.

9. Applicant's allegations are not supported by the record. Applicant's ineffectiveness claims are not supported by the record.

III. CONCLUSIONS OF LAW

In a habeas corpus proceeding, the burden of proof is on the applicant. [51] An applicant "must prove by a preponderance of the evidence that the error contributed to his conviction or punishment."[52] In order to prevail, the applicant must present facts that, if true, would entitle him to the relief requested. [53] Relief may be denied if the applicant states only conclusions, and not specific facts. [54] In addition, an

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51 *Ex parte Rains* 555 S.W.2d 478 (Tex. Crim. App. 1977).
52 *Ex parte Williams*, 65 S.W.3d 656,658 (Tex. Crim. App. 2001).
53 *Ex parte Maldonado*, 688 S.W.2d 114 (Tex. Crim. App. 1985).
54 *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000).

applicant's sworn allegations alone are not sufficient to prove his claims. [55]

1. Applicant's makes two claims of ineffective assistance of his Trial Counsel Effective representation in a non-capital case is evaluated under the standard articulated in *Strickland v. Washington*.[56] An applicant must show both "deficient performance" and a "reasonable probability" that but for trial counsel's deficient performance the outcome would have been different.[57] The applicant must prove deficient performance by a preponderance of the evidence.[58] In order to evaluate the merits of Applicant's ineffective assistance of counsel claim, the record must demonstrate an explanation of or the motivation behind counsel's actions. That is, whether those actions were the result of strategic design or negligent conduct.[59]

To prevail on an ineffective assistance claim, an applicant must show (1) counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense.[60] To satisfy the first prong, an applicant must prove by a preponderance of the evidence that trial counsel's performance fell below an objective standard of reasonableness under the prevailing

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[55] *Ex parte Empey*, 757 S.W.2d 771, 775 (Tex. Crim. App. 1988).
[56] *Strickland v. Washington*, 466 U.S. 668 (U.S. 1984); *Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999).
[57] *Hernandez*, 988 S.W.2d 770 n.2 (citing *Strickland*, 466 U.S. at 687).
[58] *Ex parte Scott*, 190 S.W.3d 672, 672 (Tex. Crim. App. 2006).
[59] *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999).
[60] *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011).

professional norms.[61] To prove prejudice, an applicant must show there is a reasonable probability, or a probability sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different.[62]

2. Applicant contends trial counsel was ineffective for failing to file a motion to suppress and failing to object to testimony concerning Applicant's statements made at the Copperas Cove Police Station. An attorney's failure to file a motion to suppress evidence does not demonstrate a deficient performance by counsel per se.[63] An applicant must prove a motion to suppress would have been granted in order to satisfy *Strickland*.[64] With regard to the ineffectiveness allegation concerning Trial Counsel's failure to object to testimony concerning Applicant's statements at the police station, to successfully assert trial counsel's failure to object amounted to ineffective assistance, the Applicant must show that the trial judge would have committed error in overruling such an objection.[65] If Applicant cannot establish a reasonable likelihood that a pre-trial motion to suppress or proper

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[61] *Id.*

[62] *Id; Davis v. State*, 533 S.W.3d 498, 510 (Tex. App.—Corpus Christi 2017, pet. ref'd).

[63] *Cotton v. State*, 480 S.W.3d 754, 757 (Tex. App.—Waco 2015, pet. ref'd); *Castellano v. State*, 49 S.W.3d 566, 576-77 (Tex. App.—Corpus Christi 2001, pet. ref'd) (holding that the failure to file motion to suppress did not constitute ineffective assistance of counsel).

[64] *Cotton*, 480 S.W.3d at 757; see *Roberson v. State*, 852 S.W.2d 508, 510-12 (Tex. Crim. App. 1993) (explaining that unless there is a showing that a pre-trial motion had merit and that a ruling on the motion would have changed the outcome of the case, counsel will not be ineffective for failing to assert the motion); *Davis v. State*, 533 S.W.3d 498, 511 (Tex. App.—Corpus Christi 2017, pet. ref'd).

[65] *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004); *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996); *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011).

objection to admission of his statement would have been successful—and, as a result, would have altered the outcome of the proceeding—then counsel's failure to take those actions cannot support an ineffective assistance claim.[66]

3. Applicant claims he was in custody from the outset of his encounter with Det. Terry. A person is in custody when, under the circumstances, a reasonable person would believe that his freedom of movement is restrained to the degree associated with formal arrest.[67] Four general indicia help guide the assessment. They are whether 1) the suspect is physically deprived of his freedom of action in any significant way, 2) a law enforcement officer tells the suspect that he cannot leave, 3) a law enforcement officer creates a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and 4) there is probable cause to arrest and a law enforcement officer does not tell the suspect that he is free to leave.[68]

4. Applicant has failed to show he was in custody from the outset of his interview with Det. Terry. He volunteered to go to the police station. He was told by Det. Terry that he was free to leave at any time prior to questioning.

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[66] *See Yuhl v. State*, 784 S.W.2d 714, 717 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd); *Hernandez v. State*, No. 01-13-00245-CR, 2014 Tex. App. LEXIS 7910, at *20-21 (Tex. App.—Houston [1st Dist.] July 22, 2014, no pet.) (op., not designated for publication).
[67] *State v. Saenz*, 411 S.W.3d 488, 496 (Tex. Crim. App. 2013).
[68] *Id.* (quoting *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996)); *Scott v. State*, No. 07-20-00179-CR, 2020 Tex. App. LEXIS 8845, at *8-9 (Tex. App.—Amarillo Nov. 13, 2020, no pet.) (op., not designated for publication).

5. The fourth indicia of *Dowthitt* is implicated because Det. Terry informed Applicant that a warrant for his arrest would be issued. However, the fourth indicia alone is insufficient to establish custody; rather, manifesting the existence of probable cause still must be coupled with other circumstances which would lead a reasonable person to believe that he is being restrained to the degree associated with arrest.[69] Based on this Court's findings, those other circumstances are not present here. Rather, Applicant was free to leave when he was informed a warrant would be issued. The detective went to open the door so that he could leave and Applicant chose to stay. There were not other circumstances which would lead a reasonable person to believe that he is being restrained to the degree associated with arrest.[70]

6. Based on this Court's factual findings, Applicant has failed to show that a Motion to Suppress would have been granted. Applicant has further failed to show that had Trial Counsel objected to the admission of Applicant's statement, the Court would have erred in overruling it. Applicant has failed to show trial counsel was ineffective for failing to object to this evidence.[71] Further, Applicant cannot show a "reasonable probability" that but for trial counsel's failure to make an objection the outcome would have been different.[72]

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[69] *Id*; *Scott v. State*, No. 07-20-00179-CR, 2020 Tex. App. LEXIS 8845, at *9 (Tex. App.—Amarillo Nov. 13, 2020, no pet.) (op., not designated for publication).
[70] *Id*; *Scott v. State*, 2020 Tex. App. LEXIS 8845, at *9.
[71] *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004); *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996); *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011).
[72] *Hernandez,* 988 S.W.2d 770 n.2 (citing *Strickland*, 466 U.S. at 687); *See Jenkins v. State*, No.

7. Additionally, both Applicant and Trial Counsel agree that Applicant never informed Trial Counsel he did not feel he was free to leave during Det. Terry's interview.[73] When the accused has personal knowledge of relevant facts but fails to impart them to his attorney, the latter cannot be held ineffective for not pursuing them.[74] Since Applicant admits not telling Trial Counsel he did not feel he was free to leave during his questioning by Det. Terry, this is an additional reason why Trial Counsel should not be considered ineffective for failing to file a motion to suppress or object to the admission of the station house interview.

8. Trial Counsel had a second, strategic reason for not objecting to the statement coming into evidence. He believed Applicant would not testify and he wanted Applicant's statement before the jury. It was part of his trial strategy to show that Applicant accidentally caused the baby's injuries to it's sexual organ. In his opening statement, Trial Counsel referenced the interview stating Applicant was not guilty of anything and he's only had an accident.[75] This Court concludes Trial Counsel was not ineffective for failing to file a motion to suppress or object to the

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07-18-00186-CR, 2020 Tex. App. LEXIS 1092 (Tex. App.—Amarillo Feb. 6, 2020 no pet.) (op. not designated for publication).

[73] (Writ Hearing RR 19, 20, 34, 57).

[74] *See Hernandez v. State*, 885 S.\V.2d 597, 601-602 (Tex. App.--El Paso 1994, no pet) (recognizing that the defendant's failure to provide his attorney with relevant information defeats a later claim of ineffective assistance because the attorney failed to obtain the information); *see also Rodriguez v. State*, 74 S.W.3d 563, 569 (Tex. App.—Amarillo 2002, pet. ref'd) (finding a client has a duty to disclose information pertinent to his defense).

[75] (Trial Record 26 RR 130).

police station interview.

9. Applicant's second claim is that Trial Counsel was ineffective for failing to request a jury instruction regarding the medical care defense. To demonstrate deficient performance based on the failure to request a jury instruction, an applicant must show he was entitled to the instruction.[76] An attorney is not ineffective for failing to raise a defense which was not supported by the evidence.[77]

The medical-care defense provided for in Texas Penal Code Section 22.011(d) also applies to Section 22.021.[78] The medical-care defense is one of confession and avoidance. As such, a defendant claiming entitlement to an instruction on the medical-care defense must admit to each element of the offense, including both the act and the requisite mental state.[79] If the defensive evidence does no more than attempt to negate an element of the offense, a defendant is not entitled to a defensive instruction on any defense that is subject to the doctrine of confession and avoidance.[80] An instruction on a confession and avoidance is appropriate only "when the defendant's defensive evidence essentially admits to every element of the

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[76] *Washington*, 417 S.W.3d at 726 (citing *Fuentes v. State*, 991 S.W.2d 267, 272 (Tex. Crim. App. 1999)). *Davis v. State*, 533 S.W.3d at 513).

[77] *See e.g., Macri v. State*, No. 04-98-00378-CR, 1999 Tex. App. LEXIS 5523, at * 3 (Tex. App.—San Antonio July 28, 1999, no pet.) (op., not designated for publication) (Holding an attorney is not ineffective for failing to raise an insanity defense where the evidence does not support such a defense).

[78] *Villa v. State*, 417 S.W.3d 455, 462 (Tex. Crim. App. 2013); Tex. Penal Code Ann. Sections 22.011(d) and 22.021. (West 2015)

[79] *Cornet v. State*, 359 S.W.3d 217 (Tex. Crim. App. 2012).

[80] *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App.2007).

offense including the culpable mental state, but interposes the justification to excuse the otherwise criminal conduct.[81]

10. Applicant initially denied knowing how the victim received her vaginal injury. It wasn't until about an hour into the interview that Applicant admitted that as he was cleaning the feces off of the child, he took a wet wipe and wrapped it around the tip of his finger and entered the vagina of the child in order to try to get some of the poop out of the vagina. Applicant's equivocations did not admit to an admission of each element of the offense, including both the act and the requisite mental state. Applicant's initial response that he did not know how the injury occurred conflicted with his later statement. Applicant's testimony at the writ hearing, illustrated his equivocations about whether he entered the baby's vagina or not. He has failed to prove he was entitled to a medical defense jury instruction.

Applicant's station house interview was insufficient to raise the medical defense instruction because he did not admit to each element of the offense, including both the act and the requisite mental state.[82] As such, Applicant was not entitled to a medical defense instruction.[83] Therefore, he has failed to prove deficient performance.[84]

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[81] *Villa v. State*, 417 S.W.3d at 462; Browne v. State, 483 S.W.3d 183, 189 (Tex. App.—Austin 2015, no pet.).
[82] *Cornet v. State*, 359 S.W.3d 217 (Tex. Crim. App. 2012).
[83] *Villa v. State*, 417 S.W.3d at 462).
[84] *Davis v. State*, 533 S.W.3d at 513 ("To demonstrate deficient performance based on the failure to request a jury instruction, an appellant must show he was entitled to the instruction").

11. Alternatively, even if Applicant was entitled to the instruction, trial counsel gave a reasonable explanation of why he did not pursue it. He was ethically bound not to request an instruction he believed to be false. He cannot be considered ineffective for failing to request an instruction he believed to be false.

12. It was trial counsel's strategic decision to pursue an accidental injury defense. Based on this record, and given that Applicant was being tried for aggravated sexual assault and three counts of injury to a child, it was a reasonable trial strategy for trial counsel to choose to pursue the accident defense. A reasonable trial strategy, even if not successful, does not amount to ineffective assistance of counsel.[85] A legitimate and reasonable trial strategy is not ineffective assistance, even if, on hindsight, the strategy appears to have been unwise.[86]

Even if an applicant was entitled to a defensive instruction, the decision to forgo such an instruction may not be objectively unreasonable, where the decision is grounded in trial strategy.[87] Mere disagreement with strategic decisions will not satisfy the evidentiary burden required to prove that counsel has been ineffective.[88]

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[85] *Novak v. State*, 837 S.W.2d 681, 684 (Tex. App.--Houston [1st Dist.] 1992, pet. ref'd).
[86] *Heiman v. State*, 923 S.W.2d 622, 626-27 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd); *Coleman v. State*, Nos. 01-20-00768-CR, 01-20-00769-CR, 2022 Tex. App. LEXIS 2120, at *27 (Tex. App.—Houston [1st Dist.] Mar. 31, 2022, pet. ref'd) (op., not designated for publication)
[87] *Okonkwo v. State*, 398 S.W.3d 689, 697 (Tex. Crim. App. 2013) "[J]ust because a competent defense attorney recognizes that a particular defense might be available to a particular offense, he or she could also decide it would be inappropriate to propound such a defense in a given case." *Vasquez v. State*, 830 S.W.2d 948, 950 n.3 (Tex. Crim. App. 1992) (per curiam); *Hart v. State*, 667 S.W.3d 774, 782 (Tex. Crim. App. 2023).
[88] *See Miniel v. State*, 831 S.W.2d 310, 325 (Tex. Crim. App.), cert. denied, 506 U.S. 885, 113

13. Applicant has failed to show Trial Counsel's trial strategy was unreasonable under the circumstances of this case. Trial Counsel gives a reasonable explanation of his choice of trial strategies. Applicant has not met his burden to show that his Trial Counsel rendered ineffective assistance by failing to request the medical-care defense instruction. Applicant has not shown ineffectiveness.

14. This Court concludes Trial Counsel's representation of Applicant was professional and competent. Applicant has failed to show a deficient performance. Further, Applicant cannot show a "reasonable probability" that but for trial counsel's alleged deficient performance the outcome would have been different.[89]

Ms. Pender, the baby's mother, testified Applicant was the only person present when the baby started bleeding from the vagina. She testified when she saw the baby, the diaper just had blood on it. There was no feces present. She said Applicant told her he didn't know what happened.[90] She also testified she believed he was the one who injured the baby.[91] Considering the entire trial record, Applicant has failed to show prejudice. He cannot show that he would not have been convicted had his statement been suppressed. He cannot show that the verdict would have been

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S. Ct. 245, 121 L. Ed. 2d 178 (1992); *Standerford v. State*, 928 S.W.2d 688, 695 (Tex. App.—Fort Worth 1996, no writ).

[89] *Hernandez,* 988 S.W.2d 770 n.2 (citing *Strickland*, 466 U.S. at 687); *see Jenkins v. State*, No. 07-18-00186-CR, 2020 Tex. App. LEXIS 1092 (Tex. App.—Amarillo Feb. 6, 2020 no pet.) (op. not designated for publication).

[90] (Trial Record 25 RR 76 - 79).

[91] (Trial Record 25 RR 92).

different had he used the medical care defense instruction especially in light of the medical testimony.

15. There was sufficient evidence in the record to show Applicant's guilt. He has failed to prove any of his above listed claims. Applicant has failed to prove deficient performance of Trial Counsel. This Court concludes Applicant's trial attorney was not ineffective. This Court recommends these grounds for relief be denied.

16. The Court makes an additional conclusion with regard to Applicant's Laches argument. Trial counsel stated during the writ hearing he could not answer certain questions because he could not recall certain aspects of his representation of Applicant. [92] He said he no longer had his notes from his meetings with Applicant and his investigator was in really bad health. He also said he could have recalled more details of his representation of Applicant had he been asked about it five years earlier. [93] The Court concludes that Applicant's waiting approximately eight years to file his application was unwarranted and places the State in a "less favorable position".[94]

IV. RECOMMENDATION AS TO RELIEF

The Court recommends to the Court of Criminal Appeals that Applicant's

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[92] (Writ Hearing RR 44, 45, 47, 60 - 62).
[93] (Writ Hearing RR 56, 57).
[94] *Ex parte Perez*, 398 S.W.3d at 218-19.

requested relief be denied.

The Clerk is directed to prepare a record to include copies of the following documents from Cause Number FISC-12-21463:

1. Indictment;
2. Judgment of Conviction;
3. Docket Sheets; together with:
4. The Clerk's and Reporter's Records;
5. The Application for writ of habeas corpus filed in the instant cause, Memorandum of Law and supporting documents;
6. The State's Original and Supplemental Answers in the instant cause;
7. The affidavit of Mr. Lyle Gripp;
8. The Reporter's Record from the writ hearing;
9. The Proposed Findings and Conclusions of Law from Applicant and the State;
10. The Supplemental Findings of Facts and Conclusions of Law of the Court in the instant cause;

and transmit the same to the Court of Criminal Appeals in Austin, Texas.

The Clerk is further ordered to serve a signed copy of these Supplemental Findings of Fact and Conclusions of Law on counsel for Applicant, at the address listed in his application and memorandum of law.

Signed on 24th FEB January, 2025.

Hon. Trent D. Farrell
Judge Presiding

Certificate of Service

By my signature affixed below, I, Charles Karakashian Jr., certify that on January 28, 2025, a true and correct copy of the foregoing State's Proposed Findings of Fact and Conclusions of Law was delivered to Mr. Christopher M. Perri, attorney of record for Applicant, by electronic mail through the required e-filing service at chris@chrisperrilaw.com.

/s/ Charles Karakashian, Jr.

Charles Karakashian, Jr.
Special Prosecutor