

No. 25-

IN THE
Supreme Court of the United States

DONNIE RAY PEARSON,

Petitioner,

v.

ERIC GUERRERO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Donnie Pearson was charged with a sex offense against a child. After *voir dire* but before the lawyers made challenges and strikes, a juror disclosed in a note that she was molested as a child but thought she could be fair. No one questioned her. Defense counsel did not challenge or strike her, and she served on the jury. On habeas, Mr. Pearson alleged that counsel was ineffective in failing to remove her. The Fifth Circuit held that counsel was not ineffective because the juror was not impliedly biased even though she was a victim of the same type of crime.

At least ten federal circuits have recognized the doctrine of implied juror bias as a viable constitutional principle after Justice O'Connor's concurrence in *Smith v. Phillips*, 455 U.S. 209, 222 (1982). However, the circuits deeply disagree on *how* to determine whether a juror who has been the victim of the same type of crime presents the kind of "extreme circumstances" to presume implied bias. Although no court holds that crime-victim status alone, *per se*, creates implied bias, no clear test guides lower courts on how to determine if a juror is impliedly biased. The question presented is:

Whether a juror who has been the victim of the same type of crime as the charged offense is impliedly biased where she does not unequivocally state that she can be fair and impartial.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Petitioner is Donnie Ray Pearson, an individual resident of Texas and an inmate in the custody of Texas.

Respondent is Eric Guerrero, the Director of the Texas Department of Criminal Justice, Correctional Institutions Division, in his official capacity. He has custody of Mr. Pearson.

No corporate parties are involved in this case.

**RULE 14.1(b)(iii) STATEMENT
OF RELATED CASES**

This case arises from the following proceedings in the state courts of Texas, the United States District Court for the Southern District of Texas, and the United States Court of Appeals for the Fifth Circuit:

- *Texas v. Pearson*, No. 1286988, 185th District Court, Harris County, Texas. Judgment entered January 14, 2011.
- *Pearson v. Texas*, No. 14-11-00041-CR, Court of Appeals for the Fourteenth Judicial District of Texas. Opinion issued and Judgment entered August 7, 2012.
- *Pearson v. Texas*, No. PD-1285-12, Texas Court of Criminal Appeals. Order entered January 9, 2013.
- *Ex parte Pearson*, No. 1286988-A, 185th District Court, Harris County, Texas. Findings and Order entered December 3, 2020.
- *Ex parte Pearson*, No. WR-90,524-01, Texas Court of Criminal Appeals. Judgment entered October 6, 2021.
- *Pearson v. Lumpkin*, No. 4:21-cv-03269, United States District Court for the Southern District of Texas. Memorandum Opinion, Order, and Judgment entered February 21, 2024.

- *Pearson v. Lumpkin*, No. 24-20112, United States Court of Appeals for the Fifth Circuit. Order entered October 29, 2024.
- *Pearson v. Guerrero*, No. 24-20112, United States Court of Appeals for the Fifth Circuit. Opinion issued and Judgment entered January 28, 2026.

No other proceedings related directly to this case.

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PETITION FOR A WRIT OF CERTIORARI

Donnie Ray Pearson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The Fifth Circuit's unreported opinion affirming the denial of federal habeas corpus relief (App. 1-10) is available at 2026 WL 228764. The federal district court's opinion and order denying habeas relief (App. 11-60) is unreported. The Texas Court of Criminal Appeals' denial of habeas corpus relief is unreported. The state habeas district court's findings and order recommending that habeas relief be denied is unreported. The Texas Court of Criminal Appeals' refusal to review the court of appeals' decision to affirm the judgment of conviction on direct appeal is unreported. The Texas Fourteenth Court of Appeals' unreported opinion affirming the judgment of conviction on direct appeal is available at 2012 WL 3765000. The state district court's judgment of conviction is unreported.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2254 because Mr. Pearson's claim arises under the United States Constitution. The Fifth Circuit had jurisdiction under 28 U.S.C. §§ 1291 & 2253(c)(1) because Mr. Pearson timely appealed the district court's final judgment and the Fifth Circuit granted a certificate of appealability (COA). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . and to have the Assistance of Counsel for his defence.”

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, “No State shall . . . deprive any person of . . . liberty . . . without due process of law. . . .”

INTRODUCTION

This case presents an important constitutional question subject to an increasingly entrenched disagreement among almost every circuit: Whether a juror who has been the victim of the same type of crime as the charged offense is impliedly biased where she does not unequivocally state that she can be fair and impartial.

The split developed in the wake of Justice O’Connor’s concurring opinion in *Smith v. Phillips*, 455 U.S. 209 (1982). She reinforced that the doctrine of implied juror bias is a constitutional principle rooted in the Sixth Amendment right to an impartial jury. She gave three non-exhaustive examples of scenarios where a juror’s bias could be presumed. Since then, the circuits that have considered the question have struggled with how to determine what constitutes implied bias. This Court has never announced guidelines for that process.

When the alleged bias flows from a juror's status as the victim of the same type of crime, the decisions are all over the map. The Third, Seventh, Ninth, Tenth, and D.C. circuits have found implied juror bias where the crimes bear close similarity. By contrast, the First, Sixth, and Eighth circuits have rejected implied bias even where the crimes are similar. The Fifth Circuit has been internally inconsistent. Whether a person is entitled to relief depends entirely on which circuit decides his case. This stubborn split will not resolve unless this Court intervenes.

And the Fifth Circuit's decision below is wrong. The impliedly biased juror had been a victim of the same type of crime, did not state unequivocally that she could be fair, and did not reveal her prior victimization during *voir dire*, waiting instead to pass a note to the bailiff after the examination had ended but before the parties made challenges and strikes. The court did not even follow its own precedent acknowledging that *implied bias exists even when a juror in good faith claims that she is not biased*—and specifically includes jurors who were “the victim of a similar crime.” *Solis v. Cockrell*, 342 F.3d 392, 398-99 & n.42 (5th Cir. 2003). Mr. Pearson's case is the ideal vehicle to resolve the circuit split.

STATEMENT OF THE CASE

A. Procedural History

Mr. Pearson pled not guilty to super-aggravated sexual assault of a child in cause number 1286988 in the 185th District Court of Harris County, Texas. A jury convicted and assessed punishment at life imprisonment without parole on January 14, 2011.

The Texas Fourteenth Court of Appeals affirmed the conviction in an unpublished opinion issued on August 7, 2012. The Texas Court of Criminal Appeals (TCCA) refused discretionary review on January 9, 2013. *Pearson v. State*, 2012 WL 3765000, No. 14-11-00041-CR (Tex. App.—Houston [14th Dist.] 2012, pet. ref’d).

Mr. Pearson filed a state habeas corpus application on April 7, 2014. The trial court recommended that relief be denied on December 3, 2020. The TCCA denied relief without written order on October 6, 2021. *Ex parte Pearson*, No. WR-90,524-01 (Tex. Crim. App. October 6, 2021).

Mr. Pearson filed a federal habeas corpus petition in cause number 4:21-cv-03269 on October 7, 2021. The United States District Court for the Southern District of Texas denied relief and a COA on February 21, 2024 (App. 11-60).

Mr. Pearson appealed to the Fifth Circuit. A judge of that court granted a COA in part and denied it in part on October 29, 2024. That court affirmed the denial of habeas relief on January 28, 2026 (App. 1-10).

B. Relevant Facts

The indictment alleged that, on July 7, 2009, Mr. Pearson sexually assaulted a child younger than six years who was not his spouse (ROA.240).

After *voir dire*, the lawyers approached the bench to make their challenges for cause (ROA.537). As they discussed with the court which venire members they

could agree to excuse, the court interrupted (ROA.540) (emphasis added):

Okay. I have just received a note from the clerk. It says—it's Juror No. 27. It says: *I think I can be fair but I was molested as a child*. I didn't want to speak up in front of everyone. I just want y'all to know that. Says they can be fair, so I don't know how you want to handle that. And I will make this a part of the record.

The record does not reflect that any of the lawyers reacted to the court's comment regarding the note.¹ Counsel did not ask to question her, challenge her for cause, or use a peremptory strike on her (ROA.351, 537-47).

After the court announced the names of the jurors, including Juror 27, an unidentified female juror said, "Why did they pick me? . . . Objection. Can I object myself?" (ROA.548). The record does not reflect the identity of the juror, but the totality of the circumstances points toward it being Juror 27. There were only seven female jurors, and none of the other six provided information during *voir dire* that should have caused them to expect the parties to challenge or strike them. Counsel did not object to her serving on the jury (ROA.348, 547-48).

The jury convicted Mr. Pearson of the charged offense and assessed punishment at life in prison (ROA.364, 369).

1. Despite the court's promise to do so, it did not make the note part of the record.

C. The State Habeas Proceeding

Mr. Pearson alleged on state habeas that counsel was ineffective in failing to challenge Juror 27 for cause or use a peremptory strike on her.

Counsel did not remember the court mentioning the note and believed that he did not hear that occur (ROA.5672). He reviewed his notes from *voir dire* and did not see any reference to a venire member being molested. Importantly, *had he heard the court announce that Juror 27 had been molested as a child, he would have challenged her for cause or, if the challenge were denied, exercised a peremptory strike on her* (ROA.5672). He did not assert any strategic reason for leaving Juror 27 on the jury.² The state court found counsel credible and that he would have challenged or struck her had he heard the trial court state that she had been molested (ROA.5751-52).

The state habeas trial court adopted *verbatim* the State's proposed findings of fact and conclusions of law recommending that relief be denied. It found that Mr. Pearson failed to prove that Juror 27 was biased against him or was challengeable for cause and that counsel did not perform deficiently in failing to challenge or strike her (ROA.5752). The TCCA denied habeas corpus relief based on the trial court's findings and its independent review of the habeas record.

2. During *voir dire*, Juror 27 spoke only once in response to a question from a lawyer, when she told the prosecutor that she believes that the primary reason to send someone to prison is for punishment (ROA.497). That answer alone would not have established a strategic reason for counsel to leave her on the jury, especially in light of her disclosure that she was molested as a child.

D. The Federal Habeas Proceeding

The federal district court deferred to the state court decision and denied relief (App. 29-35). It failed to analyze whether counsel performed deficiently in failing to remove Juror 27 or whether Mr. Pearson was prejudiced by that omission. Instead, it concluded that the record did not establish that Juror 27 was *actually* biased, and it refused to consider if she was *impliedly* biased. It asserted that the Fifth Circuit had not settled the issue of whether the presence of an *impliedly* biased juror on a jury causes prejudice to a defendant.

The Fifth Circuit issued a COA on the issue and affirmed. It held that “this case does not present the kind of extreme situation in which courts have imputed juror bias” (App. 10). It reasoned that Juror 27 was neither connected to any participant in the trial nor involved in the alleged offense (App. 8). This analysis embraced the narrowest reading of Justice O’Connor’s concurrence in *Smith*, in which she gave three examples of implied juror bias: (1) where the juror is an actual employee of the prosecuting agency; (2) is a close relative of a participant in the trial or the criminal transaction; or (3) was a witness or involved in the criminal transaction. 455 U.S. at 222 (O’Connor, J., concurring). The Court has never said if that list is exhaustive.

REASON FOR GRANTING CERTIORARI

The Court should grant certiorari to resolve the deep disagreement among the federal circuits on *how* to determine whether a juror who has been the victim of the same type of crime presents the kind of “extreme circumstances” to presume implied bias.

I. This Court has clearly established the right to an impartial jury and the doctrines of actual and implied juror bias.

The Sixth Amendment guarantees a criminal defendant the right to trial by an impartial jury. U.S. CONST. amend. VI; *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). This right includes adequate *voir dire* to identify unqualified jurors and intelligently exercise peremptory challenges. *Mu’Min v. Virginia*, 500 U.S. 415, 431 (1991). The bias or prejudice of a single juror is enough to violate the constitutional guarantee to an impartial jury. *See Parker v. Gladden*, 385 U.S. 363, 366 (1966) (defendant “entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors”); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988) (had biased juror sat on jury that sentenced defendant to death, and defendant properly preserved challenge to remove biased juror, sentence would have to be vacated).

A juror is biased if his “views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Adams v. Texas*, 448 U.S. 38, 45 (1980). But this Court has resisted the temptation to guide lower courts on what constitutes “impartiality.” *Irvin*, 366 U.S. at 724-25 (“impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.”).

This Court has long distinguished between two categories of juror bias—actual bias and implied bias.

See United States v. Wood, 299 U.S. 123, 133 (1936) (“The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law.”). A juror is actually biased when she demonstrates partiality as a matter of fact, usually during *voir dire* examination. A juror is impliedly biased when a court can presume conclusively that she is biased as a matter of law, regardless of any assurances that she can or might be impartial. *See, e.g., Leonard v. United States*, 378 U.S. 544, 544-45 (1964) (reversing conviction based on implied juror bias where prospective jurors who heard trial court announce defendant’s guilty verdict in first trial should have been automatically disqualified from sitting on second trial on similar charges); *Peters v. Kiff*, 407 U.S. 493, 502 (1971) (plurality) (“[E]ven if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias.”).

This Court’s foundational decision on the issue of implied bias is Justice O’Connor’s concurring opinion in *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O’Connor, J., concurring). A juror secretly applied for a job with the district attorney’s office during the trial. *Id.* at 212. The majority held that the remedy for a juror bias claim usually is a post-trial hearing so the defendant can prove actual bias. *Id.* at 215. Due process “does not require a new trial every time a juror has been placed in a potentially compromising situation.” *Id.* at 217. The majority did not address the doctrine of implied bias.

Justice O’Connor wrote separately to express her view that implied juror bias applies “in appropriate circumstances.” *Id.* at 221. She began by acknowledging

that some jurors try to conceal their biases and others are not aware of them. *Id.* at 222. She was concerned that a post-trial hearing would be inadequate to uncover a juror's bias "in certain instances" and observed that "there are some extreme situations that would justify a finding of implied bias." *Id.* She gave three examples for demonstrative purposes: (1) the juror is an actual employee of the prosecuting agency; (2) the juror is a close relative of one of the participants in the trial or the criminal transaction; or (3) the juror was a witness or somehow involved in the criminal transaction. *Id.* She concluded that, "it is important for the Court to *retain* the doctrine of implied bias to preserve Sixth Amendment rights." *Id.* at 224 (emphasis added to demonstrate Justice O'Connor's belief that the Court previously recognized doctrine of implied juror bias).

Justice O'Connor's concurrence in *Smith* provided a foundation for virtually all subsequent federal circuit and state court analysis of implied juror bias. At least ten federal circuits have recognized the implied juror bias doctrine as a viable constitutional principle rooted in pre-*Smith* common law and *Smith* itself.

II. Circuit courts are divided on how to determine whether a juror who has been the victim of the same type of crime presents the kind of "extreme circumstances" to presume implied bias.

The issue of implied juror bias often arises when a juror has been a crime victim. When the prior crime is dissimilar to the crime on trial, the risk of juror bias is low. For example, a juror who has been the victim of a nonviolent property crime presents a low risk of bias in a

trial for a murder or sex crime. But when the prior crime is the same type or similar to the crime on trial, the risk of bias becomes real. Courts that have grappled with this issue since Justice O'Connor's concurrence acknowledge the doctrine of implied juror bias; but no clear, uniform test or guiding principles have emerged to define the contours of what constitutes implied juror bias when a juror has been the victim of the same type of crime as the charged offense.

A. The split over how to determine implied juror bias when a juror has been the victim of the same type of crime will not resolve without this Court's intervention.

No federal circuit holds that a juror's status as a prior victim of a crime similar to the one being tried creates implied bias as a matter of law. And Mr. Pearson does not request such a bright-line, categorical rule. The circuits that have addressed the issue require an "extreme situation" analysis—an objective inquiry into whether a juror likely could not remain impartial under the circumstances. But they are divided without consensus on what constitutes an "extreme situation" or, more importantly, *how* lower courts should go about making that determination. And a tension exists regarding how similar the crimes must be and whether other factors must exist to presume bias.

The Third, Seventh, Ninth, Tenth, and D.C. circuits have found implied juror bias where the crimes bear close similarity. *See United States ex rel. De Vita v. McCorkle*, 248 F.2d 1, 8 (3d Cir. 1957) (*en banc*) (juror who was previously robbed, and failed to disclose that during

voir dire of capital trial involving a murder committed in course of robbery, was impliedly biased); *Hunley v. Godinez*, 975 F.2d 316, 320 (7th Cir. 1992) (jurors who were burglarized during burglary trial were impliedly biased); *United States v. Gonzalez*, 214 F.3d 1109, 1113-14 (9th Cir. 2000) (juror who was previously married to cocaine user and dealer, but recently divorced due to ex-spouse's drug problems and never affirmatively agreed to be impartial, was impliedly biased in drug trial); *Dyer v. Calderon*, 151 F.3d 970, 979-82 (9th Cir. 1998) (juror whose brother was murdered in similar manner as victim in murder case, and repeatedly lied about it to preserve her status as juror, was impliedly biased); *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991) (juror who was experiencing ongoing domestic violence and lied about her experience was impliedly biased in murder trial involving domestic abuse). And in a case where the defendant was charged with murdering his wife, the D.C. Circuit found implied bias where a juror was not a crime victim but may have had an affair with a woman who was killed by her husband. *Jackson v. United States*, 395 F.2d 615, 617-18 (D.C. Cir. 1968). *But see Fields v. Brown*, 503 F.3d 755, 774-75 (9th Cir. 2007) (rejecting implied bias where juror's wife had been victim of sexual assault similar to charged crimes). The disparate outcomes in *Jackson* and *Fields* highlight the lower court split.

By contrast, the First, Sixth, and Eighth circuits reject implied bias even where the crimes are similar. *See Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir. 1992) (rejecting implied bias where juror in child sexual abuse prosecution had been sexually assaulted 40 years earlier but failed to disclose it during *voir dire* because she did not remember it); *Johnson v. Luoma*, 425 F.3d 318, 326-27 (6th

Cir. 2005) (rejecting implied bias where juror in domestic violence prosecution truthfully disclosed that she had been victim of domestic violence and unequivocally asserted she could be fair);³ *United States v. Davis*, 126 F.4th 610, 617-19 (8th Cir. 2025) (rejecting implied bias where juror in robbery trial had been victim of armed robbery 50 years earlier but was not employed by prosecuting agency, not closely related to any parties in trial or robbery, and did not witness or was otherwise involved in robbery).

The Fifth Circuit, which decided Mr. Pearson’s case, has been particularly schizophrenic on implied juror bias stemming from prior-crime status. It has observed that *implied bias exists even when a juror in good faith claims that she is not biased*—and specifically includes jurors who were “the victim of a similar crime.” *Solis v. Cockrell*, 342 F.3d 392, 398-99 & n.42 (5th Cir. 2003). It has acknowledged that the fact that a juror asserts that she *thinks* she can be fair despite her bias does not mean that she is unbiased. *United States v. Scott*, 854 F.2d 697, 698-99 (5th Cir. 1988) (district court erred in denying motion for new trial based on service of impliedly biased juror who decided for himself that he could be fair). Yet, more recently, it rejected a claim of implied bias where a juror in a child sexual abuse prosecution *allegedly* failed to disclose personal history of sexual abuse. *United States v. Buckner*, 945 F.3d 906, 912-14 (5th Cir. 2019). But that decision apparently resulted from the defendant’s failure to prove that the prior abuse occurred, as the juror

3. The Sixth Circuit also squarely questioned whether the implied juror bias doctrine remains viable after *Smith v. Phillips*, where the majority opinion failed to address it and only Justice O’Connor’s concurrence discussed it. 425 F.3d at 326.

made no admission. Regardless, the court held that the evidence of prior sexual abuse would have been insufficient to establish that the juror had an “inherent emotional involvement” rising to implied bias.

The Fifth Circuit summarily rejected Mr. Pearson’s claim because he “has not identified a case in which either this court or the Supreme Court has implied bias based on a juror’s experience as a victim of a similar crime” (App. 8). That rationale highlights the conflict that this Court must resolve, because Mr. Pearson would have received relief had his case been in the Third, Seventh, Ninth, Tenth, or D.C. circuits.

This Court has not revisited the implied bias doctrine since *Smith v. Phillips* in 1982. Over the ensuing 44 years, lower courts have grappled with determining what constitutes implied bias in the absence of a clear North Star test, especially in the context of jurors with prior crime victim status. Until this Court resolves the disagreement, circuit panels will continue to lick their thumbs, stick them in the air, and guess which way the wind is blowing. The Court should grant certiorari to resolve the lower court disagreement and announce a uniform standard for determining whether a juror who has been the victim of the same type of crime as the charged offense is impliedly biased where she does not unequivocally state that she can be fair and impartial.

B. Counsel’s Ineffective Assistance

Mr. Pearson’s implied juror bias claim arose in his claim that counsel was ineffective in failing to challenge or strike Juror 27. Counsel admitted, and the state

courts found, that he would have challenged or struck the juror had he heard the trial court read the note that the juror was molested as a child. Thus, he conceded that he performed deficiently in this omission, which satisfied the first prong of the test for ineffective assistance. *See Strickland v. Washington*, 466 U.S. 668 (1984).

The federal habeas litigation has focused on the second prong of that test—whether counsel’s deficient performance caused prejudice to Mr. Pearson. If Juror 27 was not biased, then he did not suffer prejudice because, even had counsel removed her from the jury, he would have replaced one unbiased juror with another. But if Juror 27 was impliedly biased, then Mr. Pearson suffered prejudice from counsel’s failure to challenge or strike her from the jury.

It is telling that Juror 27 did not disclose her prior crime victim status during *voir dire* and waited to pass a note to the bailiff after the examination ended. She also equivocated on whether she could be fair, writing only that she *thought* she could be, not that she *knew* she could be. Although her willingness to disclose her prior crime victim status distinguishes her from the cases where jurors have failed to disclose or lied about their prior victimization, that she failed to mention it during *voir dire* and waited to pass a note demonstrates that she was uneasy sitting on a jury in a child sexual assault case. In sum, her prior crime victim status presented the kind of extreme situation that would justify a finding of implied bias for three reasons: (1) she was a victim of the same type of crime as the charged offense; (2) she did not state unequivocally that she could be fair, and only speculated that she *thought* she could be fair; and (3) she hesitated on the disclosure by waiting

until after *voir dire* ended to pass a note to the bailiff. Therefore, Mr. Pearson suffered prejudice in having a biased juror decide his fate, and counsel was ineffective in failing to challenge or strike her.

This Court should grant certiorari because the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT, FILED JANUARY 28, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-20112

DONNIE RAY PEARSON,

Petitioner-Appellant,

v.

ERIC GUERRERO, DIRECTOR, TEXAS
DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Filed January 28, 2026

OPINION

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-3269

Before ELROD, *Chief Judge*, and CLEMENT and HAYNES,
Circuit Judges.

PER CURIAM:*

Donnie Ray Pearson was convicted of super-aggravated sexual assault of a child. At trial, immediately

* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

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after *voir dire*, one of the jurors sent a note to the judge saying that she had been molested as a child, but she thought she could be fair. In this federal habeas appeal, Pearson argues that he was denied the effective assistance of counsel because his attorney did not challenge or strike the juror. But because this case does not present the kind of situation in which courts have implied bias to jurors, we affirm the district court's denial of Pearson's habeas petition.

I

In November 2010, Pearson was indicted in Texas state court for super-aggravated sexual assault of a child. Pearson pleaded not guilty, and the case proceeded to trial. After *voir dire*, the lawyers approached the bench to discuss their for-cause challenges. During this discussion, the judge said the following:

Okay. I have just received a note from the clerk. It says—it's Juror No. 27. It says: I think I can be fair but I was molested as a child. I didn't want to speak up in front of everyone. I just want y'all to know that. Says they can be fair, so I don't know how you want to handle that. And I will make this a part of the record.

Neither party said anything about the note. Pearson's trial counsel, Neal Davis III, did not challenge Juror 27 for cause or use a peremptory strike. Juror 27 ultimately served on the petit jury, which found Pearson guilty and assessed a punishment of life imprisonment without

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parole. Texas's Fourteenth Court of Appeals affirmed Pearson's conviction in an unpublished opinion, and the Texas Court of Criminal Appeals ("CCA") refused discretionary review.

Pearson then applied for a writ of habeas corpus in Texas state court, asserting that he was denied effective assistance of counsel at trial because Davis failed to challenge or strike Juror 27. The state district court recommended that the CCA deny Pearson's habeas application. The court found that Pearson failed to show both that Juror 27 was biased or challengeable for cause and that Davis was deficient for failing to challenge or strike Juror 27 from the jury. Thus, the court concluded that Pearson failed to show that he was denied effective assistance of counsel. The CCA denied Pearson's application without written order based on the findings of the trial court and the CCA's independent review of the record.

Pearson next filed a federal habeas petition under 28 U.S.C. § 2254, again arguing that Davis performed deficiently because he failed to challenge or strike Juror 27. The district court dismissed Pearson's petition with prejudice. The court deferred to the state habeas court's factual finding that Juror 27 was not actually biased. As to whether Pearson had shown that Juror 27 was impliedly biased, the court opined that it is an open question in this circuit whether the doctrine of implied juror bias is clearly established law. Nevertheless, the court determined that this case does not present the kind of extreme situation in which courts can imply juror bias. Because Pearson had

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not shown that Juror 27 was biased, the court determined that Davis’s failure to challenge Juror 27 did not support a claim for ineffective assistance of counsel.

Pearson timely appealed, and we granted a certificate of appealability as to his claim that Davis provided ineffective assistance by failing to challenge a potentially biased juror.

II

Review of a district court’s denial of a § 2254 petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *Buckner v. Davis*, 945 F.3d 906, 909 (5th Cir. 2019). We “review[] issues of law de novo and findings of fact for clear error, applying the same deference to the state court’s decision as did the district court.” *Id.* (citing *Ortiz v. Quatterman*, 504 F.3d 492, 496 (5th Cir. 2007)).

Pearson’s ineffective-assistance claim was adjudicated on the merits in state court. Accordingly, under the provision of AEDPA relevant to this appeal, we may grant habeas relief only if 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.” 28 U.S.C. § 2254(d)(1).

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III

As a threshold matter, the State contends that Pearson did not exhaust all available state-court remedies as required by AEDPA, 28 U.S.C. § 2254(b)(1)(A), because the claim he presented to the state courts is different than the claim he advances in federal court. According to the State, Pearson argued in state court that Juror 27 was *actually* biased and did not raise the issue of *implied* bias until he filed his reply brief in the federal district court.

We reject this argument because Pearson fairly presented his ineffective-assistance claim to the state courts. *See Picard v. Connor*, 404 U.S. 270, 275 (1971). Pearson stated his claim the same way in his state and federal habeas petitions: “Counsel failed to challenge for cause or exercise a peremptory strike on a venire member who was molested as a child and served on the jury.” Although Pearson’s state habeas application did not mention the phrase “implied bias,” he argued that Juror 27’s “prior experience gave her a bias or prejudice against [Pearson] because her views likely prevented or substantially impaired the performance of her duties” as a juror, even though “her note read, ‘I think I can be fair.’” This same argument was the basis for Pearson’s implied-bias theory in his federal petition. The substance of Pearson’s federal habeas claim was presented to the state court, *see id.* at 278, so we proceed to the merits of Pearson’s ineffective-assistance claim.

Pearson’s claim is governed by the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687

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(1984): He “must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” Pearson’s *Strickland* claim is based on the failure of his trial counsel to strike or challenge an allegedly biased juror. Thus, his claim hinges on whether Juror 27 was biased; counsel’s failure to challenge or strike an unbiased juror cannot support a claim for ineffective assistance of counsel. *See Virgil v. Dretke*, 446 F.3d 598, 608–09 (5th Cir. 2006).

“A juror is biased if his ‘views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’” *Hatten v. Quarterman*, 570 F.3d 595, 600 (5th Cir. 2009) (quoting *Soria v. Johnson*, 207 F.3d 232, 242 (5th Cir. 2000)). Juror bias can be either actual or implied. “Actual bias exists when the juror failed to answer a material question honestly on voir dire, and a correct response would have provided a valid basis for a challenge for cause.” *Id.* Pearson does not argue that Juror 27 was actually biased.

Implied bias, on the other hand, applies in certain limited circumstances “in which no reasonable person could not be affected in his actions as a juror and in which the Constitution refuses to accept any assurances to the contrary.” *Brooks v. Dretke*, 444 F.3d 328, 331 (5th Cir. 2006). Our court has looked to Justice O’Connor’s concurring opinion in *Smith v. Phillips*, 455 U.S. 209 (1982), when determining the kinds of “extreme situations that would justify a finding of implied bias.” *Id.* at 222 (O’Connor, J., concurring); *e.g.*, *Solis v. Cockrell*, 342 F.3d

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392, 396 (5th Cir. 2003) (“Following Justice O’Connor’s concurrence in *Smith* our circuit has recognized the implied bias doctrine, albeit with carefully watched limits.”). “While each case must turn on its own facts,” Justice O’Connor offered three examples of situations in which courts might presume a juror is biased: “a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.” *Smith*, 455 U.S. at 222 (O’Connor, J., concurring). In addition, our court has implied bias where a juror failed to disclose that his brother was a detective in the sheriff’s office that investigated the case, *United States v. Scott*, 854 F.2d 697, 698–700 (5th Cir. 1988), and where the district attorney’s office prosecuting a case was simultaneously prosecuting a member of the jury for bringing a handgun into the courthouse, *Brooks v. Dretke*, 418 F.3d 430, 431–32, 434–35 (5th Cir. 2005). In such extreme scenarios, “a juror has a close connection to the circumstances at hand, [so] bias may be presumed as a matter of law.” *Buckner*, 945 F.3d at 910.

Even assuming *arguendo* that the doctrine of implied juror bias is clearly established federal law in this circuit for the purposes of 28 U.S.C. § 2254(d)(1), this case “is outside the ‘extreme genre of cases’ that would warrant” applying the doctrine. *Buckner*, 945 F.3d at 915. Accordingly, we join recent panels of this court in declining to “revisit[] whether this Court recognizes the implied-bias doctrine as clearly established law.” *Id.*; see also *Uranga v. Davis*, 893 F.3d 282, 288 (5th Cir. 2018);

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Craaybeek v. Lumpkin, 855 F. App'x 942, 947 (5th Cir. 2021).

Juror 27 had no connection to any participant in the trial, and she was in no way involved in the offense giving rise to Pearson's prosecution. *See Smith*, 455 U.S. at 222 (O'Connor, J., concurring). Nor is this situation comparable to the circumstances we considered in *Scott* or *Brooks*. To be sure, we have previously remarked that most cases "embracing the implied bias doctrine . . . have done so because the juror had a close relationship with one of the important actors in the case or was otherwise emotionally involved in the case, usually because the juror was the victim of a similar crime." *Solis*, 342 F.3d at 398–99. But Pearson has not identified a case in which either this court or the Supreme Court has implied bias based on a juror's experience as a victim of a similar crime.

In fact, we declined to do just that in *Buckner*. Buckner was convicted of aggravated sexual assault of a child in Texas state court. 945 F.3d at 908. After the trial, Buckner's counsel moved for a new trial and submitted an affidavit asserting that one of the jurors had been sexually abused by his father and "was the victim, in a separate incident, of kidnapping and attempted sexual assault." *Id.* at 908–09. The affidavit did not provide any details about the alleged incidents or disclose how Buckner's attorney learned of them. *Id.* at 909. Even assuming that the unsupported affidavit was actual evidence of the juror's abuse, we held that the "scant facts" presented did "not reveal circumstances so inevitably attended by emotional involvement that protestations of fairness

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cannot sufficiently cure the resulting bias.” *Id.* at 914. “In the absence of additional supporting details of [the juror’s] alleged abuse,” we concluded that there were no salient factors “that would create inherent emotional involvement.” *Id.* at 915.

Buckner resolves this case. As in *Buckner*, there are no factors suggesting that Juror 27’s experience as a victim of abuse created such a close emotional involvement in the case that she could not be impartial. There are no details in the record about the abuse that Juror 27 experienced and its potential similarity to Pearson’s conduct beyond Juror 27’s statement that she “was molested as a child.” Moreover, Juror 27 voluntarily disclosed that she had been molested; she did not lie or omit relevant information to secure a spot on the jury. *Cf. Scott*, 854 F.2d at 699 (“The record of the *voir dire* strongly suggests that [the juror] wanted to serve on the jury and feared that he would not be allowed to do so if he disclosed his brother’s employment.”). Like in *Buckner*, there are no facts suggesting that Juror 27’s experience of abuse “would inherently create in a juror a substantial emotional involvement, adversely affecting impartiality,” such that the courts must imply that she was biased. *Solis*, 342 F.3d at 399 (quoting *United States v. Powell*, 226 F.3d 1181, 1188–89 (10th Cir. 2000)). Accordingly, even if the doctrine of implied juror bias is clearly established, the state court’s determination that Juror 27 was not biased was not contrary to or an unreasonable application of clearly established federal law.

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IV

Because this case does not present the kind of extreme situation in which courts have imputed juror bias, Davis's failure to challenge or strike Juror 27 cannot support Pearson's ineffective-assistance claim. Thus, we AFFIRM the district court's denial of Pearson's 28 U.S.C. § 2254 petition.

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**APPENDIX B — MEMORANDUM AND ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION, FILED FEBRUARY 21, 2024**

CIVIL ACTION NO. H-21-03269

DONNIE RAY PEARSON,
TDCJ No. 01693395,

Petitioner,

vs.

BOBBY LUMPKIN-DIRECTOR TDCJ-CID,

Respondent.

Filed February 21, 2024

MEMORANDUM AND ORDER

State inmate Donnie Ray Pearson (TDCJ No. 01693395), represented by counsel, filed this petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his conviction and sentence, in Harris County cause number 1286988. Doc. No. 1. Pearson additionally filed a brief in support of his petition. Doc. No. 9. Respondent filed an Answer and relevant state court records, and Pearson filed a response. Doc. Nos. 15-18. After carefully considering the petition, answer, response, record, and applicable law, the Court DISMISSES the petition with prejudice and DENIES a certificate of appealability.

*Appendix B***I. BACKGROUND**

On January 14, 2011, a jury convicted Pearson of super-aggravated sexual assault of a child in cause number 1286988 in the 185th District Court of Harris County, Texas. Doc. No. 1 at 2. Pearson was sentenced to life without parole. Doc. No. 16-2 at 140, Clerk's Record (CR) at 00131 (Judgment of Conviction by Jury).

On August 7, 2012, the Texas Fourteenth Court of Appeals affirmed Pearson's conviction. *Pearson v. State*, 2012 WL 3765000, No. 14-11-00041-CR (Tex. App. — Houston [14th Dist.] 2012, pet. ref'd) (unpublished op.). That court set forth the following facts presented at trial:

Ashley, the mother of the complainant [] met [Pearson] when she was in the sixth grade, and they dated in the tenth grade.[] Ashley became pregnant, and she and [Pearson] broke up before their daughter, Donna, was born. Ashley had three more daughters—Tonya, Rebecca, and [the complainant]—each by a different father.² Ashley married Lawrence, Rebecca's father, in June 2004, and was still married to him at the time of trial. [Pearson] had married Misty and they had three sons.[] [Pearson] and Ashley started to see each other at the same time Ashley was seeing another man, Cody. Ashley testified that [the complainant] was “conceived close in time or actually at the time [Ashley was] actually with [Cody].” [The complainant] was born in July 2007. Ashley told

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[Pearson] that Cody was [the complainant's] father. Ashley testified that she "had many conversations with [[Pearson]] about this," but that [Pearson] did not like the fact that Ashley had a child by someone else while he was trying to reconcile with her.

[Pearson], who had separated from his wife, got back together with Ashley and moved in with Ashley and her four daughters in December 2008. After [Pearson] moved in, the "conflict about Cody" did not "go away totally." According to Ashley, there were many occasions on which [Pearson] wanted to discuss whether he was [the complainant's] father, but Ashley responded each time that Cody was probably [the complainant's] father. A paternity test ultimately established that Cody is [the complainant's] father.

Before [Pearson] moved in with Ashley and the girls, Ashley had never noticed anything odd about [the complainant's] behavior or that she engaged in any "self-harming" behavior. In February or March 2009, Ashley noticed [the complainant's] behavior changing. [The complainant], then nineteen months old, started pulling her hair out, leaving bald spots. [The complainant], who slept in a crib, woke up on three different occasions with a busted lip and a scrape on her head on another occasion. With regard to her injuries, [Pearson] suggested

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that [the complainant] “was doing it to herself.” Ashley also testified that, in February or March of 2009, [the complainant] became scared of [Pearson] and would cry and not want [Pearson] to come near her. Ashley and [Pearson] shaved [the complainant’s] head after Easter 2009, so that she would not have “anything to pull.”

On April 29, 2009, Ashley talked to Heather Hartstock, a nurse at a medical clinic. Hartstock had first met [the complainant] in September 2007, when [the complainant] was two months old. Ashley told Hartstock that [the complainant] had been pulling out her hair and that she had shaved [the complainant’s] head because she did not know what else to do. Ashley also reported that [the complainant] was biting herself, banging her head, having a lot of outbursts, and was crying. Hartstock wanted Ashley to bring [the complainant] to the clinic so that the doctor could refer her to a specialist in behavioral pediatrics. On May 6, 2009, Ashley brought [the complainant] to the clinic for a fever. Ashley and Hartstock discussed the behavioral issues. On June 9, 2009, Ashley called Hartstock and told her that [the complainant] had woken up with a busted lip and a bruise under her eye and was afraid to go to sleep. Hartstock talked to Ashley about putting [the complainant] in bed with her or her sisters so that someone could watch her while she was sleeping. Hartstock also told Ashley

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to take [the complainant] to Texas Children's Hospital (TCH) that day to be evaluated.

On June 9, 2009, Ashley took [the complainant] to TCH to find out why she was injuring herself. However, the doctor at TCH "saw her for maybe five minutes, said she was just a bad kid and . . . had behavioral problems." On June 10, 2009, Hartstock reported the situation to CPS because she did not know what was going on. Hartstock asked Ashley if she had any concerns about the babysitter or her boyfriend injuring [the complainant]. Ashley responded that she had no concerns.

Ashley testified that when [the complainant] slept with her, she did not wake up with any injuries, but [Pearson] "hated" having [the complainant] sleep in their bed. [The complainant] did not wake up with any injuries when she slept with Donna and Tonya. Hartstock also suggested putting a video camera in [the complainant's] room, but [Pearson] was against the idea and said they could not afford it.

In late May or early June, [Pearson]'s three sons came to live with [Pearson], Ashley, and the girls. When the boys moved in, [the complainant] started sleeping in a toddler bed, and Fred, [Pearson]'s 16-month-old son, slept in the crib in [the complainant's] room.

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When Ashley put [the complainant] to bed on the night of July 6, 2009, [the complainant] did not have any injuries to her face, head, or body. Ashley left the house for work no later than 7:00 a.m. the next morning.[] Ashley did not see [the complainant] before she left for work because [the complainant] would not want Ashley to leave. Before she left, Ashley heard [Pearson] put Fred in their bed with him. When Ashley left for work, [Pearson], [the complainant], Henry, Fred, Bob, and Tonya were in the house. Donna, who had stayed the night with her friend Elizabeth, was not home when Ashley left, and Rebecca was not there because she was staying with her father. Because of the expense of hiring babysitters, [Pearson] quit his job to stay home with the children.

Elizabeth's parents dropped Donna and Elizabeth off after Ashley had left. [Pearson] went back to bed after letting Donna and Elizabeth in the house. Donna and Elizabeth went to sleep in Donna's room. Around 11:30 a.m. or 12:00 noon, everyone in the house was awake except [the complainant]. It was unusual for [the complainant] not to be awake by that time. After getting [the complainant] up, Tonya noticed a bump on [the complainant's] head and showed it to [Pearson]. When Tonya changed [the complainant's] diaper, she noticed there was blood on it, told [Pearson], and gave him the diaper. [Pearson] told Donna and Tonya to bathe

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[the complainant], but [the complainant], who normally liked baths, cried when they put her in the water. Tanya put a fresh diaper on [the complainant] and watched her the rest of day.

At noon, Ashley received a text message from [Pearson] stating that [the complainant] had a knot on her head. Ashley called [Pearson] immediately. [Pearson] said that Fred had hit [the complainant] in the head with a toy. Ashley asked [Pearson] why he was not watching the children. [Pearson] sent Ashley a text “a little while later saying that it was a little worse, just talking about that bruise.” Ashley called [Pearson], but he did not say anything about the blood in the diaper. When Ashley called [Pearson] on her way home from work, he told her that there was blood in [the complainant’s] diaper. When Ashley got home a little after 5:30 p.m., she saw that [the complainant’s] head was “lopsided.” There was a “[b]ig bruise” on it. [Pearson] did not speak to Ashley, and Ashley dressed [the complainant], grabbed the diaper bag, and walked out the door. Ashley remembered that [Pearson] said that he had saved the diaper and asked him for it. [Pearson] pulled the diaper out of the trash can. [Pearson] suggested to Donna that “someone could have snuck in at night.” [Pearson] also told Donna that “he didn’t want to get blamed for what happened.”

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Ashley took [the complainant] to Bayshore Hospital, where she was told that injuries were the result of sexual assault. Michael Anderson, an officer with the Deer Park Police Department, went to the hospital to investigate the possible sexual assault of a child. Anderson testified that [the complainant] “was seriously bruised all over her head to point where it didn’t look like she had a normal round skull. It was red and purple, discolorations all over. There was bruising and marking on her extremities as well to the point that you knew something significant had taken place.” [The complainant] was transported to TCH for a sexual assault examination.

Tammy Herrera-Aguilera, a registered nurse and sexual assault nurse examiner at TCH, testified that [the complainant] had extensive bruising on her head and entire body, including “oval or almost fingertip-type of bruises” on her forearms. [The complainant] also had a torn frenulum—the tissue that attaches the lip to the upper gum. As to [the complainant’s] genital area, there were no injuries noted on the labia majors folds such as bleeding, tears, or abrasions, but dried blood was noted as to the inner folds. There was a tear through the posterior fourchette extending through the vestibule tissue along the fossa all the way to the edge of the hymen; the tear was three centimeters, which is a “big tear” on a child [the

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complainant's] size. There also was a complete tear through the hymenal tissue, with bleeding, bruising to the hymen, and a tear to the anus.

On July 8, 2009, Detective Ian Sawtell of the Deer Park Police Department took [Pearson] into custody when he was stopped for a traffic violation. [Pearson] agreed to talk to Sawtell, "ma[king] mention that he figured [Sawtell] wanted to talk to him about [the complainant]." [Pearson] made a recorded statement and, when asked, let the police take the clothes he was wearing when he was picked up. The police also took a saliva sample from [Pearson]. Ashley gave Sawtell [the complainant's] pink hoodie that was stained with what appeared to be chocolate and a pair of black shorts that belonged to [Pearson].

Christy Smejkal, a DNA analyst at the Harris County Institute of Forensic Sciences, testified that no sperm or other person's DNA was found on [the complainant's] body or diapers. The pink hoodie contained stains that were [the complainant's] blood, and a presumptive test for semen was positive. A mixture of [the complainant's] and [Pearson]'s DNA was found on the hoodie. After performing another test on the pink hoodie, Smejkal confirmed that the stain was semen, but there was not enough DNA to get a profile. A blood stain on [Pearson]'s black shorts, three inches from the crotch,

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tested positive for [the complainant's] DNA. [The complainant's] blood was found on the back side of the jeans [Pearson] was wearing when he was arrested. There were also three blood stains on the boxer shorts [Pearson] was wearing when he was arrested; the blood stain in the crotch area was consistent with [the complainant's] DNA, and [Pearson] could not be excluded.

[Pearson] testified that the first day he watched the children, July 6, 2009, Fred hit [the complainant] in the head with a toy, and [the complainant] choked on a penny. He put ice on [the complainant's] head; there was an indentation, but no knot on her head. [Pearson] stated that he texted Ashley, but she did not want the ice on her head. He let [the complainant] run around, and her head was not swollen at the end of the day.

[Pearson] testified that he retrieved the penny from [the complainant's] throat with his finger. [Pearson] said that there "was a mixture of a little bit of mucus and blood all over [his] finger." [Pearson] explained that he "might have put [the penny] in [his] pocket." He did not tell Ashley or Sawtell about the incident with the penny.

[Pearson] testified he did not wake up that night or hear anything out of the ordinary that night.

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He heard Fred crying before Ashley left for work and he brought Fred to their bedroom and went back to sleep with Fred in their bed. [Pearson] stated that he did not have a problem with [the complainant] sleeping in their bed, but he had a problem with her sleeping with them every night because it interfered with his sexual relationship with Ashley.

[Pearson] testified that Tonya showed him the knot on [the complainant's] head, which got bigger as the day went on. He called and texted Ashley about the knot on [the complainant's] head.¹ Shortly after showing [Pearson] the first knot, the girls showed him a second knot on [the complainant's] head. Tonya showed [Pearson] the blood on the diaper, which he did not throw away, but instead saved for Ashley. He suggested that the girls give her a warm bath. When [Pearson] could not reach Ashley immediately, he called his mother about the blood in the diaper. He testified that he had not heard of Cody until December 2008. [Pearson] wondered if [the complainant] was his daughter, but Ashley told him that he was not the father. [Pearson] testified that his semen could be on the hoodie because he used it to wipe himself after having sex with Ashley.

Both the State and [Pearson] presented testimony regarding whether [the complainant] or another person could have caused her

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injuries. Herrera-Aguilera testified [the complainant's] injuries were "very extensive injuries for a child her age. These [were] very painful injuries." Moreover, "whatever caused these injuries was even more painful." In her opinion, Herrera-Aguilera did not believe that [the complainant] caused these injuries. Herrera-Aguilera further testified the injuries were not consistent with a straddle injury, where the child falls and strikes something, because there was no bruising or swelling injury to the outside labia majora folds. Moreover, straddle injuries are usually one-sided, with bruises on just the left side or right side, and, here, there was bruising on both the left and right sides. Herrera-Aguilera stated it was possible that an adult male penis or another item caused the injuries. Herrera-Aguilera also stated "[a]ny showering or washing can rid the body of evidence."

Marcella Donaruma, a pediatrician at TCH, testified that [the complainant's] injuries were not caused by an accident and it was not possible for [the complainant] to have caused her own injuries. Moreover, a six-year-old child would not have the strength to cause the anal or genital injuries; instead, it would take someone with "adult size and strength" to cause [the complainant's] injuries. In Donaruma's medical opinion, the injuries were caused by blunt force penetrating trauma to the vagina, breaching

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the hymen and the anus. Donaruma explained that “[h]ymenal tear means that unequivocally something was inside of her vagina.” Donaruma opined that [the complainant’s] injuries were the result of sexual abuse because of the nature of the trauma sustained to the vaginal and anal areas and the absence of any history or explanation for the injuries.

With respect to [the complainant’s] torn frenulum, Herrera-Aguilera explained that “[t]he torn frenulum is normally consistent with either a strike on the mouth or someone holding a hand or something over the mouth and the person struggling against that can cause a frenulum tear.” Donaruma testified that a frenulum can be torn by the forceful introduction of an object into the mouth, hitting a flat surface, or “forcible pressure over the mouth that’s being resisted.”

Larry Parker, an obstetrician/gynecologist, testified as [Pearson]’s expert. Parker testified that a physician cannot make a diagnosis of sexual abuse because sexual abuse is not a medical diagnosis but is a legal opinion. Parker explained that [the complainant’s] injuries should have been “investigated for potential of sexual assault,” but he would not have diagnosed the situation as sexual assault because he would not have had enough information to make that determination. Parker testified that indirect

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blunt trauma can mimic sexual abuse, he could not tell from looking at the injuries whether they were intentional or accidental, and a four or six-year-old child could have caused [the complainant's] injuries.

Pearson, 2012 WL 3765000, at *1-5 (internal footnotes omitted).¹ The Texas Court of Criminal Appeal refused his petition for discretionary review on January 9, 2013. *Id.* Pearson filed his state application for habeas corpus on April 7, 2014. On February 25, 2020, the state habeas court conducted an evidentiary hearing regarding Pearson's habeas application.² On October 6, 2021, the Texas Court of Criminal Appeals denied his application without written order based on the findings of the trial court and its independent review of the record. Doc. No. 16-25 (Action Taken Sheet). On October 7, 2021, Pearson filed this federal petition.

Pearson asserts that he was denied effective assistance of counsel at the guilt-innocence stage because counsel: (1) failed to challenge Juror No. 27, who was molested as a child, for cause or use a peremptory strike on her based on bias; (2) did not timely object to the prosecutor's repeated reference to Pearson as a "monster"; (3) elicited testimony from the complainant's mother that the complainant was scared of him; (4) elicited testimony from the complainant's

1. The intermediate appellate court used pseudonyms for the minor children, including the complainant. The state habeas court and this Court refer to her as "the complainant."

2. *See* Doc. No. 17-14 (Hearing Transcript).

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mother that the complainant's injuries were the result of sexual assault, that Pearson caused the injuries, and that the complainant could not have caused them herself; (5) elicited testimony from Ian Sawtell, the lead detective, regarding his opinion that there were "many suspicious parts" of Pearson's story; (6) failed to object to medical expert testimony that the injuries were caused by an adult and not by a child; and (7) failed to file a pre-trial motion to exclude prior convictions, elicited one of them on direct examination, and did not object to the details of another conviction when the State used it for impeachment. *See* Doc. No. 1 at 3-9.

II. LEGAL STANDARD

The writ of habeas corpus provides an important, but limited, examination of an inmate's conviction and sentence. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) (noting that "state courts are the principal forum for asserting constitutional challenges to state convictions"). The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), codified as amended at 28 U.S.C. § 2254(d), "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt"; it also codifies the traditional principles of finality, comity, and federalism that underlie the limited scope of federal habeas review. *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quotations omitted).

AEDPA "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in

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[28 U.S.C.] §§ 2254(d)(1) and (d)(2).” *Richter*, 562 U.S. at 98. “When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” *Id.* at 99. For AEDPA to apply, a state court need not state its reasons for its denial, nor must it issue findings, nor need it specifically state that the adjudication was “on the merits.” *Id.* at 98-99.

To the extent that the petitioner exhausted his claims, they were adjudicated on the merits by state courts. This Court, therefore, can only grant relief if “the state court’s adjudication of the merits was ‘contrary to, or involved an unreasonable application of, clearly established Federal law.’” *Berghuis v. Thompson*, 560 U.S. 370, 378 (2010) (quoting 28 U.S.C. § 2254(d)(1)). The focus of this well-developed standard “is not whether a federal court believes the state court’s determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.” *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Where a claim has been adjudicated on the merits by the state courts, relief is available under § 2254(d) *only* in those situations “where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with” Supreme Court precedent. *Richter*, 562 U.S. at 102.

Whether a federal habeas court would have, or could have, reached a conclusion contrary to that reached by the state court on an issue is not determinative under § 2254(d). *Id.* (“even a strong case for relief does not

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mean that the state court's contrary conclusion was unreasonable."). Thus, AEDPA serves as a "guard against extreme malfunctions in the state criminal justice systems," not as a vehicle for error correction. *Id.* (citation omitted); *see also Wilson v. Cain*, 641 F.3d 96, 100 (5th Cir. 2011). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

"Review under § 2254(d)(1) focuses on what a state court knew and did." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). Reasoning that it would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court," *Pinholster* explicitly held that "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Id.* at 185. Thus, "evidence introduced in federal court has no bearing on § 2254(d)(1) review." *Id.*

III. DISCUSSION

Pearson claims that he was denied effective assistance of counsel during the guilt/innocence phase of his trial. The Sixth Amendment to the United States Constitution conveys the right to the effective assistance of counsel, among other things. *See* U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *see also McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (observing that "the right to counsel is the right to the effective assistance of counsel"). Claims for ineffective

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assistance of counsel are analyzed under the following two-prong standard:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. Thus, to prevail under the *Strickland* standard, a defendant must demonstrate both constitutionally deficient performance by counsel and actual prejudice because of the alleged deficiency. See *Williams v. Taylor*, 529 U.S. 390, 390-91 (2000).

The first prong of the governing standard is only satisfied where the defendant shows that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687. Scrutiny of counsel's performance must be "highly deferential," and a reviewing court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable

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professional assistance.” See *United States v. Molina-Uribe*, 429 F.3d 514, 518 (5th Cir. 2005) (citing *Strickland*, 466 U.S. at 687-88), *cert. denied*, 547 U.S. 1041 (2006). In the Fifth Circuit, “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).” *Rhoades v. Davis*, 852 F.3d 422, 434 (5th Cir. 2017).

To prove prejudice, the second prong under *Strickland*, a defendant must demonstrate a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

1. Failure to Challenge a Juror

Pearson claims that his trial counsel, Neal Davis III, was ineffective for failing to challenge for cause or exercise a peremptory strike against a juror who disclosed that she had been sexually molested as a child (Ground One). The record indicates that, after voir dire examination but before the parties had selected the jury, Juror No. 27 sent a note to the judge stating that she had been molested as a child but that she thought she could be fair. The judge mentioned the juror note to the attorneys at a bench conference regarding the selection of jurors, but neither attorney responded to the judge’s comment nor moved to strike the juror for cause.

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Trial counsel Davis stated in his affidavit that he did not recall the judge mentioning the note and believes that he did not hear the judge make a statement about Juror No. 27.³ He also stated that he would have stricken the juror had he known that she had been molested as a child.⁴

The state habeas court found that Davis's affidavit was credible and that the facts stated therein were true.⁵ The state court further found that, after voir dire examination but before challenges and strikes were completed, Juror No. 27 sent a note that the judge read out loud to the parties at the bench, wherein the juror stated that she was molested as a child and did not want to speak up in front of everyone about it but thought she could be fair.⁶ The court further found that Davis did not recall the judge mentioning the note from Juror No. 27 and that Davis believes it is possible that he did not hear the judge talk about the note.⁷

The state court found that Pearson failed to show that Juror No. 27 was biased against him, failed to show that Juror No. 27 was challengeable for cause, and failed to establish that trial counsel was deficient for failing to challenge for cause or exercise a peremptory strike on

3. Doc. No. 17-26 at 85, State Habeas Corpus Record ("SHCR") at 00083 (Aff. of Neal Davis, III).

4. *Id.*

5. *Id.* at 164, SHCR at 000162 (Finding of Fact No. 8).

6. *Id.* at 165, SHCR at 000163 (Finding of Fact No. 12).

7. *Id.* (Finding of Fact No. 14).

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Juror No. 27.⁸ The state court also found that Pearson failed to show that there is a reasonable probability that the result of the proceeding would have been different if Juror No. 27 had been stricken from the panel.⁹

The Sixth Amendment guarantees the right to an impartial jury. *Buckner v. Davis*, 945 F.3d 906, 910 (5th Cir. 2019). A defendant seeking a new trial based on juror bias must show that “the complained-of juror failed to provide an honest answer to a material question and that a truthful response would have provided a valid basis to challenge the juror for cause.” *Id.* at 910-11 (citing *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 556 (1984)).

The Fifth Circuit has explained that “[o]n federal habeas review, state court findings concerning a juror’s impartiality are factual determinations entitled to a presumption of correctness.” *Id.* at 910 (citing *Patton v. Yount*, 467 U.S. 1025, 1036 (1984); *Virgil v. Dretke*, 446 F.3d 598, 610 n.52 (5th Cir. 2006)). In *Buckner*, the court noted that “Texas courts have found that a juror who was the victim of a similar crime but who credibly states he will not be affected by that fact is not biased.” *Id.* at 911. The Fifth Circuit has held that a defendant is not denied an impartial jury “in cases in which potential jurors have disclosed the grounds for possible bias but have stated that they could be *fair*.” *Id.*

8. *Id.* (Finding of Fact Nos. 15-17).

9. *Id.* at 166, SHCR at 000164 (Finding of Fact No. 18).

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In *Buckner*, where the defendant was on trial for aggravated sexual assault of a child, a juror came forward after the jury had been selected but before the start of trial to disclose privately to the judge and the attorneys that he had a family history of abuse but that he initially failed to disclose it because he was “too embarrassed to answer during voir dire.” *Id.* at 908. The Fifth Circuit noted that the fact that the juror came forward was an indication that he was not biased. *Id.* at 911. The juror in *Buckner* stated that he could be fair, and there was no indication that he had concealed his family information due to bias or to secure a place on the jury. *Id.* The Fifth Circuit affirmed the district court’s denial of habeas relief based on actual or implied jury bias, concluding that the case was “outside the ‘extreme genre of cases’ that would warrant revisiting whether this Court recognizes the implied-bias doctrine as clearly established law.” *Id.* at 915.

Like the juror in *Buckner*, the juror here disclosed her personal experience with sexual abuse to the judge privately after voir dire but stated that she thought she could be fair. The trial court concluded that Pearson failed to show that Juror No. 27 was biased or that the result of the proceeding would have been different had she been stricken from the panel. A state court’s determination of no actual bias is a factual determination entitled to deference and “the presumption of correctness” on federal habeas review. *Id.* at 910. The state habeas court considered Juror No. 27’s note stating that she thought she could be fair and found that Pearson failed to show that she was biased. Pearson does not show that this finding is based on an unreasonable determination of the facts based on the evidence in the record. *See* 28 U.S.C. § 2254(d)(2).

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Nonetheless, Pearson contends that Juror No. 27's disclosure that she had been molested as a child indicates implied bias and argues that bias should be presumed as a matter of law. Implied bias exists only in "extreme situations' such as "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Solis v. Cockrell*, 342 F.3d 392, 395 (5th Cir. 2003) (quoting *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring)).

The Fifth Circuit has repeatedly declined to settle the issue of whether it recognizes the implied bias doctrine as clearly established law. *See Buckner*, 945 F.3d at 913, 915 (explaining that the issue is unsettled in this circuit and declining to revisit whether the Fifth Circuit recognizes the implied bias doctrine as clearly established law); *Uranga v. Davis*, 893 F.3d 282, 288 (5th Cir. 2018) (holding that it was unnecessary to "delve into [the implied bias question] based on the peculiar facts of the case" where the juror discovered, during trial, that the defendant was the person who had damaged the juror's own lawn during the defendant's flight from the police).

Although Juror No. 27 disclosed that she had been molested as a child, there is no indication that she had any connection to this case, to the witnesses, to the prosecution, or to Pearson. Other courts in this circuit have found that a juror is not impliedly biased where they state that they were the victim of a similar crime but there

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was no other indication of a connection to the case. *Green v. Quarterman*, 213 F. App'x 279, 281 (5th Cir. 2007) (holding that no implied bias existed where some of the jurors were victims of similar crimes but there was no other indicia of a connection to the case); *see also Awan v. Lumpkin*, No. 4:20-cv-135-A, 2020 WL 7345658, at *11 (N.D. Tex. Dec. 14, 2020) (holding that no implied bias existed in a child sex abuse case where, as here, the juror disclosed that she had previously been a victim of sexual abuse but no other connection to the case was evident); *Escobedo v. Lumpkin*, No. SA-21-CA-0006-OLG, 2023 WL 7394461, at *4 (W.D. Tex. Nov. 8, 2023) (holding that there was no showing of implied bias where two of the jurors stated that they had been victims of sexual abuse because “the juror’s life experiences cannot be described as the functional equivalent of one of the ‘extreme situations’ necessary for a finding of implied bias”); *see also Nunez v. Lumpkin*, No. 1:21-CV-131, 2022 WL 4239368, at *3, 7 (S.D. Tex. Aug. 23, 2022), *rec. adopted*, 2022 WL 4239354 (S.D. Tex. Sept. 14, 2022), *appeal dism’d*, No. 22-40659, 2023 WL 2754716 (5th Cir. Mar. 7, 2023) (holding that there was no implied bias where the victim had been one of the juror’s former students and the juror indicated that she could not be “100 percent certain she could be fair, though she would try her best,” and finding no other evidence of a close connection between the juror and the victim). Like the defendants in these other cases, Pearson “does not present the type of evidence where bias may be presumed” because “[t]here are no additional factors that would suggest these experiences were the type that ‘would inherently create in a juror a substantial emotional involvement, adversely affecting impartiality.’” *Green*, 213 F. App'x at 281.

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In sum, the state court's conclusion that Pearson failed to show that Juror No. 27 was biased is not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor is it an unreasonable factual determination based on the evidence in the record. In addition, "[i]f a juror is not biased, counsel's failure to challenge that juror does not support a claim for ineffective assistance of counsel." *Wiley v. Grimmer*, 476 F. App'x 292, 294 (5th Cir. 2012) (citation omitted).

Accordingly, under the doubly deferential standard applying AEDPA and *Strickland* to Pearson's ineffective assistance of counsel claim for failing to object to Juror No. 27, the state habeas court's decision that Pearson failed to show ineffective assistance for this claim is not contrary to, or an unreasonable application of clearly established Supreme Court precedent or an unreasonable factual determination based on the evidence in the record. See *Woodfox v. Cain*, 609 F.3d 774, 806 (5th Cir. 2010) ("We stress again that the issue before us is not whether we would have ruled differently, or even whether [the petitioner] has made the necessary showing under *Strickland*; rather, the issue is whether the state court's decision that [the petitioner] has not made that showing was unreasonable.") (citing *Gonzales v. Quarterman*, 458 F.3d 384, 390 (5th Cir. 2006); *Busby v. Dretke*, 359 F.3d 708, 717 (5th Cir. 2004)); *Rhoades*, 852 F.3d at 434 (holding that federal habeas review of an ineffective assistance of counsel claim for a state court conviction is "doubly" deferential). Ground One is denied.

*Appendix B***2. Failure to Object to “Monster” Comments by Prosecution**

Pearson contends that counsel was ineffective for failing to object when the prosecution referred to him as a “monster” in its opening statement and closing argument (Ground Two). Under Texas law, “proper jury argument generally falls within one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to an argument of opposing counsel; and (4) plea for law enforcement.” *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011) (citation omitted). Similarly, the Fifth Circuit has held that the prosecution may permissibly argue to the jury the “inferences and conclusions” it should draw from the evidence and “unflattering characterizations of a defendant will not provoke a reversal when such descriptions are supported by the evidence.” *United States v. Delgado*, 672 F.3d 320, 336 (5th Cir. 2012) (quoting *United States v. Windom*, 510 F.2d 989, 994 (5th Cir. 1975)) (finding no error where a prosecutor called the defendant a “con artist”).

Under federal habeas review, “counsel’s failure to object to improper remarks by a prosecutor is not ineffective assistance unless the remarks are so prejudicial as to render the trial fundamentally unfair.” *Jones v. Estelle*, 632 F.2d 490, 492-93 (5th Cir. 1980). Other courts in this circuit have found that a “prosecutor’s use of harsh descriptions of a criminal defendant is not misconduct if they are supported by the evidence.” *Smith v. Dir., TDCJ-CID*, No. 3:20-CV-2947-G (BT), 2022 WL 18359120, at *9 (N.D. Tex. Oct. 28, 2022), *rec. adopted*, 2023 WL 289721 (N.D. Tex. Jan. 18, 2023) (rejecting the petitioner’s claim

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on federal habeas review where the prosecutor told the jury that the defendant accused of continuous sexual abuse of a child “had a monster inside of him” because the state court could have reasonably concluded that the evidence supported the prosecution’s comment); *Rosales v. Dir., TDCJ-CID*, No. 4:16CV530, 2021 WL 2006481, at *8 (E.D. Tex. Feb. 10, 2021), *rec. adopted*, 2021 WL 1998781 (E.D. Tex. May 19, 2021) (holding that the state’s referral to the defendant, who was later convicted of two counts of continuous sexual abuse of a child and one count of indecency with a child, as a “monster” in closing argument did not render the trial fundamentally unfair); *see also United States v. Cook*, 432 F.2d 1093, 1106-07 (7th Cir. 1970) (finding no error where the prosecution in closing argument characterized the defendant as a “sub-human man” with a “rancid, rotten mind” and a “true monster” when the evidence presented at trial indicated the defendant plotted to kill his wife by activating a bomb on a crowded airplane). “[P]rosecutorial remarks are a sufficient ground for habeas relief only if they are so prejudicial that they render the trial fundamentally unfair.” *Harris v. Cockrell*, 313 F.3d 238, 245 (5th Cir. 2002) (citation omitted). The Fifth Circuit has explained that “such unfairness exists ‘only if the prosecutor’s remarks evince either persistent and pronounced misconduct or . . . the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred.’” *Id.* (citing cases) (internal quotation marks omitted).

The state habeas court found that the prosecution referred to Pearson as a “monster” twice in the opening statement before trial counsel objected on the third

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reference, and once during closing argument without an objection from trial counsel.¹⁰ The state habeas court further found that this failure to object was inadvertent and not strategic.¹¹ The state court also found that Pearson was found guilty of super aggravated sexual assault of a child, that “the evidence at trial demonstrated that the 23-month old complainant sustained serious injuries to her entire body, including vaginal and anal injuries,” and that Pearson failed to show that counsel was deficient regarding proper jury argument allowable under Texas law.¹² The state court concluded that Pearson failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel timely objected and obtained an adverse ruling.¹³

As the state habeas court found and the record at trial reflects, the evidence showed that the complainant suffered serious vaginal and anal injuries to such a degree that the medical provider examining her consulted the pediatric gynecologist regarding whether the genital and anal tears on this child who was less than two years old required surgery.¹⁴ The Texas Court of Criminal

10. Doc. No. 17-26 at 166, SHCR at 000164 (Finding of Fact Nos. 20-21).

11. *Id.* (Finding of Fact No. 22).

12. *Id.* at 166-67, SHCR at 000164-165 (Finding of Fact Nos. 23-24).

13. *Id.* at 167, SHCR at 000165 (Finding of Fact No. 25).

14. *See* Doc. No. 16-9, Reporter’s Record (“RR”) Vol. 7 at 140:1-4 (Testimony of Tammy Herrera-Aguilera, RN and Sexual Assault Nurse Examiner at Texas Children’s Hospital) (“Once

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Appeals could have reasonably concluded that the evidence presented at trial regarding the abuse and severe injuries to the complainant's whole body and the penetrating injuries to her genital and anal areas supported the prosecution's comments. The state court's finding that Pearson failed to show that counsel was deficient or that there is a reasonable probability that the result of the proceeding would have been different if counsel had objected to the "monster" comments is not contrary to, or an unreasonable application of clearly established Supreme Court precedent, nor is it an unreasonable determination of the facts based on the evidence in the record. Ground Two is denied.

3. Eliciting Improper Opinion and Hearsay Testimony

Pearson contends that counsel rendered ineffective assistance when he elicited improper opinion and hearsay testimony from the complainant's mother that (1) the complainant became scared of Pearson (Ground Three) and (2) that complainant's injuries were the result of a sexual assault, that Pearson caused the injuries, and that the complainant could not have caused them herself (Ground Four).

The state habeas court made the following findings of fact regarding the complainant's mother's testimony:

the exam was completed, we actually contacted our pediatric gynecology specialist to come in to evaluate the tear itself to see if they wanted to surgically repair it.").

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27. The trial court finds, based on the credible affidavit of Davis, that Davis's line of questioning with the complainant's mother was strategic. Davis wanted to attack the mother's credibility that the complainant did not get along with the applicant, as Davis had other witnesses that would testify that the complainant had always gotten along with the applicant. Davis also wanted to elicit the mother's opinion that she did not think the applicant was capable of sexually assaulting a child, and that she had only convinced herself he was guilty based on the influence of others.

28. The trial court finds, based on the appellate record, that on cross examination, trial counsel specifically elicited the following testimony from the complainant's mother: (1) that she had a close relationship with the applicant's family; (2) that the applicant had never been abusive to her or her girls; (3) that her girls were not afraid of the applicant and called him "Dad"; and (4) that the complainant became afraid of the applicant a few months after the applicant moved in, but that she never told anyone during that time period that the complainant was afraid of the applicant or that she believed the applicant was hurting the complainant.

29. The trial court finds, based on the appellate record, that on cross examination,

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trial counsel also specifically elicited the following testimony from the complainant's mother: (1) that she was told by Bayshore Hospital staff that the complainant's injuries were from sexual assault, but she did not see the complainant's injuries herself; (2) that she had previously believed that the complainant was harming herself, but did not bring this up at Bayshore Hospital or at Texas Children's Hospital; (3) that she does not know anything more than what she was told by the hospital staff; and (4) that she has known the applicant a long time and never thought all these years he could do this.

30. The trial court finds, based on the appellate record, that during the defense's case-in-chief, trial counsel elicited testimony from both Octavia Pearson and Ronnie Pearson that the complainant was not afraid of the applicant.

31. The trial court finds that the applicant fails to show there is a reasonable probability that the result of the proceeding would have been different had trial counsel not elicited this testimony from the complainant's mother.

Doc. No. 17-26 at 167-68, SHCR at 000165-166 (Finding of Fact Nos. 27-31).

"A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally

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ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.” *Lave v. Dretke*, 416 F.3d 372, 380 (5th Cir. 2005) (quoting *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002)). Trial counsel stated that his cross examination of the complainant’s mother was part of his strategy to show that she lacked credibility regarding whether complainant was afraid of Pearson and that she had convinced herself of Pearson’s guilt based on the influence of others and not on her own experience with Pearson. Pearson now contends that counsel’s line of questioning harmed him, but disagreement with his counsel’s trial strategy is not a basis for an ineffective assistance of counsel claim. *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. 1999). There is no indication that this line of question permeated the trial with unfairness, and such conscious and informed trial strategy is entitled to “a heavy measure of deference.” *Jones*, 287 F.3d at 331.

The state habeas court’s finding that Pearson failed to show that trial counsel was deficient and that there was a reasonable probability that, but for counsel’s actions, the result of the trial would have been different is not contrary to, or an unreasonable application of clearly established Supreme Court precedent, nor is it an unreasonable determination of the facts based on the evidence in the record. Grounds Three and Four are denied.

4. Eliciting Opinion Testimony from State’s Lead Investigator

Pearson claims that counsel was ineffective when he elicited allegedly improper opinion testimony from

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the lead investigator, who stated that Pearson's story had "many suspicious parts" (Ground Five). Pearson argues that counsel allowed the investigator to testify to his opinion that Pearson's statement to the police was untruthful and that this caused him prejudice.

Regarding this claim, the state habeas court made the following findings:

34. The trial court finds, based on the credible affidavit of Davis, that Davis's line of questioning with the lead detective was strategic.

35. The trial court finds, based on the appellate record, that on cross examination, trial counsel asked the lead detective, "The one glaring suspiciousness of his story, of Donnie's story is that he does not know what happened; isn't that correct?"; and that the lead detective responded, "Well, there were many suspicious things but —"; and that trial counsel interrupted and re-asked the question: "The one glaring one was he didn't know what happened, right?"; to which the lead detective responded "Yes sir."

36. The trial court finds that the applicant fails to show trial counsel was deficient for eliciting this testimony from the lead detective.

37. The trial court finds that the applicant fails to show there is a reasonable probability

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that the result of the proceeding would have been different had trial counsel not elicited this testimony from the lead detective.

Doc. No. 17-26 at 169, SHCR at 000167 (Finding of Fact Nos. 34-37).

“[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.’” *Strickland*, 466 U.S. at 689 (citation omitted). Trial counsel stated in his affidavit that his line of questioning was strategic and that he wanted to elicit testimony that Pearson had stated to the detective that he did not know what happened. As set forth above, the state court found counsel’s affidavit to be credible and further found that his line of questioning was strategic.

The Supreme Court has cautioned reviewing courts not to “second-guess counsel’s assistance” and conclude that a particular act or omission was unreasonable in hindsight. *Id.* Pearson does not show that counsel’s strategy of questioning the lead detective to highlight that Pearson did not know what had happened to the complainant was “so ill chosen that it permeates the entire trial with obvious unfairness.” *Lave*, 416 F.3d at 380. Therefore, the trial court’s finding that Pearson failed to show that trial counsel was deficient or that there was a reasonable probability that the result of the proceeding would have been different had counsel not elicited this testimony

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was not contrary to, or an unreasonable application of clearly established Supreme Court precedent, nor was it an unreasonable determination of the facts based on the evidence in the record. Ground Five is denied.

5. Failing to Challenge the Testimony of the State's Medical Expert

Pearson claims that trial counsel was ineffective for failing to object to and seek to exclude the State's medical expert's opinion that the complainant's injuries were caused by an adult male and that a child could not have caused her injuries (Ground Six).

Regarding this claim, the state court found that:

39. The trial court finds that, based on the credible affidavit of Davis, that Davis did not believe that there was any evidence that the applicant caused the injuries and that it was just as likely that the complainant caused them herself or that another person did, including another child. Davis knew that the State was going to call Dr. Marcella Donaruma to the stand, and he was prepared to rebut her testimony with his own expert, Dr. Parker. Davis's strategy with Dr. Parker was to rebut Dr. Donaruma's conclusion that the complainant's injuries were consistent with sexual assault, and Davis believes he rebutted Dr. Donaruma's conclusion in his case-in-chief.

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40. The trial court finds, based on the appellate record, that on direct examination, Dr. Marcella Donaruma testified to the following: (1) that she finds it unlikely that a child under the age of six could have caused the complainant's vaginal and anal injuries; (2) that it is more likely that someone with adult force or adult size and strength caused the complainant's injuries; and (3) that she does not think it is possible that the complainant caused her own injuries because of (i) the bilateral and biplanar nature of the bruising; (ii) the inability of the complainant to reach some of the areas of her body that were bruised; and (iii) the difficulty in being able to cause bruising to come of the areas of her body that were bruised.

41. The trial court finds, based on the appellate record, that on direct examination, trial counsel specifically elicited the following testimony from Dr. Larry Parker: (1) that sexual abuse is a legal opinion and not a medical diagnosis; (2) that there is no lesion that equals sexual abuse, and there can be other causes for a lesion; (3) the perineum injuries in children should be investigated, but they do not necessarily mean there was a sexual assault as demonstrated by a study where child victims of car accidents had similar perineum injuries; (4) that he would not have diagnosed the complainant's injuries as being caused by a sexual assault; (5) that just because there is no explanation for a child's injuries does not

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mean that a sexual assault occurred; (6) that there could be alternative explanations for the complainant's injuries other than sexual assault; (7) that he disagrees with Dr. Donaruma's opinion that the complainant presented with blunt force trauma to the vagina as a result of a sexual assault; and (8) that it is possible that a four-year-old or a six-year-old could have caused the complainant's injuries.

42. The trial court finds that the applicant fails to show that Dr. Donaruma was not qualified as an expert.

43. The trial court finds that the applicant fails to show trial counsel was deficient for failing to object to Dr. Donaruma's expert opinion. The trial court finds, based on the credible affidavit of Davis, that Davis's decision not to object to Dr. Donaruma's expert opinion was strategic as to allow applicant's expert Dr. Parker to testify that complainant's injuries were not the result of sexual assault and that complainant's injuries could have been caused by someone other than an adult.

44. The trial court finds that the applicant fails to show there is a reasonable probability that the result of the proceeding would have been different had trial counsel objected to Dr. Donaruma's expert opinion and had Dr. Donaruma's expert opinion been excluded.

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Doc. No. 17-26 at 169-70, SHCR at 000167-68 (Finding of Fact Nos. 39-44).

Pearson “admits that Donaruma is a qualified expert” but that “her specific opinion that [the complainant’s] injuries were caused by an adult and could not have been caused by a child was *beyond the scope of her expertise or, alternatively, was unreliable and irrelevant in this particular case.*” Doc. No. 9 at 55 (emphasis in original).

The trial record reflects that the State presented the testimony of medical experts Dr. Marcella Donaruma and Sexual Assault Nurse Examiner Tammy Herrera-Aguilera.¹⁵ Both medical experts testified about the complainant’s head and bodily injuries, including the serious head bruising and genital and anal tearing. Herrera-Aguilera explained why such injuries were unlikely to have been caused accidentally or by the complainant herself, but on cross-examination, trial counsel was able to elicit testimony from her that a penetrating trauma could have been an accidental injury.¹⁶

Dr. Donaruma additionally testified that it was “unlikely” that a child caused the injuries and that it was her opinion that it is “much more likely” that the injuries,

15. The State also called clinical psychologist Dr. Lawrence Thompson, Jr., Director of Therapy and Psychological Services at the Harris County Children’s Assessment Center (“CAC”), to opine regarding child behavior and self-harm in response to trauma or anxiety. *See* Doc. No. 16-11, RR Vol. 9 at 10:10-12; 14:10-22.

16. Doc. No. 16-9, RR 7 at 148:16-149:24 (direct); 174:11-21 (defense cross-examination).

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which included significant “tissue injury in pretty much every level of entry to her vagina through her hymen,” were caused by someone with the size and force of an adult.¹⁷

As set forth above, the state habeas court found, based on Davis’s credible affidavit, that Davis’s strategy was to present his own medical expert, Dr. Larry Parker, to refute the State’s experts. Indeed, Dr. Parker testified that a person could not determine whether the injuries were intentional or accidental.¹⁸ He further opined that it was unlikely that a 15-month-old child could have caused the injuries but that a 4-year-old could cause the injuries and a 6-year-old child “definitely” could have caused the injuries.¹⁹ He testified that whether the complainant was sexually abused was a legal opinion and not a medical diagnosis.²⁰

The state habeas court found that Davis made a strategic decision to rely on rebutting the State’s medical experts’ testimony to bolster the defensive theory that someone else besides Pearson caused the injuries or that it was an accident. Under *Strickland*, courts afford great deference to an attorney’s strategic choices. See *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009) (“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually

17. See Doc. No. 16-10, RR 8 at 111:13-17; 114:9-12; 123:7-11.

18. See Doc. No. 16-11, RR 9 at 115:17-18.

19. *Id.* at 117:3-10.

20. *Id.* at 72:18-20.

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unchallengeable.”) (quoting *Strickland*, 466 U.S. at 690); accord *Ex parte Flores*, 387 S.W.3d 626, 633 (Tex. Crim. App. 2012). The “highly deferential” assessment of counsel’s performance, together with the AEDPA analysis under 28 U.S.C. § 2254(d), creates a ‘doubly deferential’ standard of review that gives both the state court and the defense attorney the benefit of the doubt.” *Burt v. Titlow*, 571 U.S. 12, 13 (2013) (quoting *Cullen*, 563 U.S. at 190).

The defense’s medical expert, Dr. Parker, opined that the complainant’s injuries could have been accidental or caused by a child rather than Pearson. The jury heard the medical opinions of the defense and prosecution experts and was in the best position to weigh the evidence presented by both sides. Pearson does not show that Davis’s strategy in relying on a medical expert rebuttal witness like Dr. Parker to present alternative evidence of causation rather than seeking to exclude Dr. Donaruma’s testimony was “so ill chosen that it permeates the entire trial with obvious unfairness.” *Lave*, 416 F .3d at 380.

In addition, Pearson fails to show that Davis could have successfully challenged Dr. Donaruma’s qualifications or her methodology and obtained a ruling excluding her opinion about causation. Indeed, as explained above, Pearson acknowledges that Dr. Donaruma is qualified as a medical expert to opine on the complainant’s injuries but challenges her testimony that it was much more likely that someone with adult force or size caused the injuries.

The record reflects that Dr. Donaruma supported her opinions through the medical evidence and her experience

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in examining hundreds of children who presented with injuries or outcries concerning for sexual abuse. She, along with Nurse Herrera-Aguilera, testified that she did not think the injury could be an accidental straddle injury based on the lack of any bruising to the labia majora area.²¹ Nurse Herrera-Aguilera stated that it was possible that an adult penis or an adult finger could have caused the complainant's injuries.²² Similarly, Dr. Donaruma opined, based on the extent of the penetrating injuries to the toddler's genital and anal areas that required a surgical consult, that it was "much more likely" that someone with adult force or adult size and strength caused the injuries and that it was unlikely that a child caused them.²³ Regarding her training and experience, Dr. Donaruma stated that she has examined hundreds of children yearly in the sexual abuse clinic and that the complainant's injuries were concerning for sexual assault.²⁴

21. See Doc. No. 16-9, RR Vol. 7 at 148:14 — 149:16 (Nurse Herrera-Aguilera's testimony that it was "not consistent with a straddle injury" and explaining the basis for that opinion); Doc. No. 1610, RR. Vol. 8 at 114:23-116:6 (Dr. Donaruma discussing how this injury was "absolutely not a straddle injury" and explaining the basis for that opinion).

22. See Doc. No. 16-9, RR Vol. 7 at 150:7-10, 176:3-6 (Nurse Herrera-Aguilera's testimony that it is possible an adult penis caused the injuries); *id.* at 181:19-24 (Nurse Herrera-Aguilera's testimony that it is possible an adult finger could have caused the complainant's injuries, "depending on how much of a fight she put up when it occurred").

23. See Doc. No. 16-10, RR Vol. 8 at 123:7-11.

24. *Id.* at 94:3-9, 126:16-17, 128:15-16, 153:1-3, 13-15.

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Under Texas law, medical experts may opine on causation as part of their expert testimony based on their experience supported by the medical evidence. *See e.g., Wolfe v. State*, 509 S.W.3d 325, 340-41 (Tex. Crim. App. 2017) (holding that the trial court did not abuse its discretion in admitting testimony from the prosecution’s medical experts that the injuries were caused by abusive head trauma based on the “particular constellation” of injuries sustained by the victim); *Ex parte Flores*, 387 S.W.3d 626, 630-33, 640 (Tex. Crim. App. 2012) (medical experts opined on cause of death for stillborn twins based on the medical evidence and holding that “[w]hen the evidence supports ‘reasonably equal competing theories of causation,’ it is the jury’s duty to determine which theory is the true one, and their decision will be upheld on review”).

Similarly, the United States Supreme Court has held that medical expert evidence as to causation in a criminal case is admissible and relevant if there is medical evidence to support it. *See, e.g., Cavazos v. Smith*, 565 U.S. 1, 7-8 (2011) (reversing the Ninth Circuit’s grant of habeas relief and holding that sufficient evidence of causation supported the verdict where the prosecution’s medical experts, looking at the medical evidence, testified that the injury was caused by shaken baby syndrome rather than the defense’s medical experts’ theory of sudden infant death syndrome, and it is the responsibility of the jury to decide what conclusions should be drawn from the evidence). Indeed, “the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary system: ‘Vigorous cross-examination [and] presentation of contrary evidence . . . are the traditional

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and appropriate means of attacking shaky but admissible evidence.” *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993)). Further, Pearson’s challenge goes to the bases for Dr. Donaruma’s opinion, which “affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury’s consideration.” *Primrose Operating Co. v. Nat’l Am. Ins. Co.*, 382 F.3d 546, 562 (5th Cir. 2004).

Pearson does not show that, had trial counsel moved to exclude Dr. Donaruma’s testimony, such a motion would have been granted or that the denial of such a motion would have been reversed on appeal, given Dr. Donaruma’s medical qualifications and her testimony based on the medical evidence in the record. Counsel is not ineffective for not pursuing a futile motion to exclude expert testimony. *See Shields v. Dretke*, 122 F. App’x 133, 153 (5th Cir. 2005) (“Trial counsel was not ineffective when he elected to rely on rebuttal witnesses to discredit [the State’s expert’s] testimony instead of futilely filing a *Daubert* motion.”); *see also Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994) (no ineffective assistance of counsel for failing to make an objection that would have been overruled); *accord Harper v. Lumpkin*, 64 F.4th 684, 699 (5th Cir.), *cert. denied*, 144 S. Ct. 429 (2023) (holding that the defendant did not show ineffective assistance of counsel for failing to exclude an expert’s testimony because such a motion would have been futile).

Pearson fails to overcome the deference accorded to counsel for his strategic decision to challenge the State’s

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medical experts by calling a rebuttal medical expert. He further fails to overcome the deference to the state court's determination that counsel was not deficient regarding this strategy under the AEDPA. Pearson does not show that the state habeas court's conclusion on this issue was unreasonable based on clearly established Supreme Court precedent. In sum, the state habeas court's conclusion that Pearson failed to show that counsel was deficient regarding the State's medical expert was not contrary to or an unreasonable application of Supreme Court precedent, nor was it an unreasonable factual determination based on the evidence in the record. Ground Six is denied.

6. Failure to File a Motion to Exclude Prior Convictions

Pearson argues that trial counsel was ineffective for failing to file a motion under *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992) (en banc) ("*Theus* motion"), to exclude his prior convictions and eliciting testimony about one of Pearson's convictions (Ground Seven). The state intermediate appellate court considered whether Pearson's conviction for DWI was admissible under Texas Rule of Evidence 609 on appeal and explained:

Once a defendant testifies, he places his credibility at issue and may thereafter be impeached like any other witness. *Bowley v. State*, 310 S.W.3d 431, 434-35 (Tex. Crim. App. 2010); *Alexander v. State*, 740 S.W.2d 749, 763 (Tex. Crim. App. 1987). Pursuant to Rule 609, evidence that a witness has been convicted of

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a crime is admissible to attack the witness's credibility if the crime was a felony or involved moral turpitude and the court determines that the probative value of the evidence outweighs its prejudicial effect. TEX.R. EVID. 609(a). In determining whether the probative value of the evidence outweighs the prejudicial effect, courts apply the following factors: (1) the impeachment value of the crime; (2) the temporal proximity of the past crime relative to the charged offense and the witness's subsequent history; (3) the similarity between the past crime and the offense being prosecuted; (4) the importance of the defendant's testimony; and (5) the importance of the credibility issue. *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992). Having considered the *Theus* factors, we conclude that the trial court's decision to admit evidence of the prior DWI conviction was within the zone of reasonable disagreement.

Pearson, 2012 WL 3765000, at *9. The state intermediate appellate court then held that even if the trial court erred in allowing the testimony regarding the DWI conviction, such error was harmless because it was a non-constitutional error, if any, and did not have a substantial or injurious effect on the jury's verdict. *Id.*

Likewise, the state habeas court found that Pearson: (1) raised this claim on direct appeal, (2) failed to show that trial counsel was deficient for failing to object to the State's impeachment of him with his prior convictions, and

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(3) failed to show that there was a reasonable probability that the result of his trial would have been different had trial counsel objected to the State's impeachment of Pearson with his prior convictions.²⁵

Under the Texas Rules of Evidence, if a criminal defendant chooses to testify, evidence that he has been convicted of a crime is admissible to attack his credibility if the crime was a felony or involved moral turpitude and the court determines that the probative value of the evidence outweighs its prejudicial effect. TEX. R. EVID. 609(a). The record reflects that the State notified Pearson prior to trial that it intended to use Pearson's extraneous acts and prior convictions at trial.²⁶ The notice included Pearson's August 11, 2005 felony conviction for DWI with a child and his June 25, 2007 revocation of probation for that conviction, and his November 13, 2008 conviction for misdemeanor assault of a family member.²⁷ Trial counsel asked Pearson about the misdemeanor assault conviction and the State asked Pearson about the DWI with a child conviction and subsequent revocation of probation.²⁸

25. See Doc. No. 17-26 at 171-172, SHCR at 000169-170 (Finding of Fact Nos. 45-52).

26. See Doc. No. 16-2, Clerk's Record ("CR") at 26-32, 107-114, CR at 00019-00026, 00100-00107 (indicating that Pearson was convicted in 2005 of Driving While Intoxicated with a Child in Galveston County cause number 15264, and in 2008 of Assault on a Family Member in Galveston County Court at Law cause number 83292).

27. *Id.*

28. See Doc. No. 16-13 at 6:9-14 (arrested for assault in November 2008); 29:20-30:25 (2005 felony conviction for DWI with Child).

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Pearson acknowledges that the misdemeanor assault is a crime of moral turpitude under Texas law.²⁹ Further, his DWI with a child conviction is a felony. Thus, both convictions occurred within ten years of the instant offense and were eligible to be used to impeach Pearson, so long as their probative value was not substantially outweighed by prejudice. As explained by the state intermediate appellate court in deciding this issue on Pearson's direct appeal, whether a prior conviction should be excluded because of unfair prejudice is based on the following factors under Texas law: (1) the impeachment value of the crime; (2) the temporal proximity of the past crime relative to the charged offense and the witness's subsequent history; (3) the similarity between the past crime and the offense being prosecuted; (4) the importance of the defendant's testimony; and (5) the importance of the credibility issue. *Pearson*, 2012 WL 3765000, at *9 (citing *Theus*, 845 S.W.2d at 880).

As explained above, the misdemeanor assault on a family member is considered a crime of moral turpitude, and his conviction for DWI with child passenger is a felony. Both convictions have impeachment value under Texas Rule of Evidence 609; the first *Theus* factor does not favor exclusion of these convictions. In addition, the assault conviction occurred in 2008, in close temporal proximity to the instant crime. Likewise, the DWI conviction occurred in 2005, with the revocation of probation in 2007, also within close temporal proximity to the instant crime.

29. Doc. No. 9 at 66 (citing *Lopez v. State*, 990 S.W.2d 770, 778-79 (Tex. App.—Austin 1999, no pet.)).

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Thus, the second *Theus* factor does not favor exclusion of these convictions.

Regarding the third *Theus* factor, neither conviction involves a sexual assault of a child, and, therefore, is not sufficiently similar to the instant offense to cause unfair prejudice. Therefore, the third *Theus* factor does not favor exclusion of these convictions. Finally, the fourth and fifth factors do not favor exclusion because Pearson's testimony and his credibility were important in this case. Pearson does not establish that prejudice substantially outweighed the probative value of disclosing these convictions at trial. Hence, even if trial counsel had moved for their exclusion under Texas Rule of Evidence 609, he does not show that such a motion would have been granted or that a denial of that motion would have been reversed on appeal.

Pearson fails to show that any objection to the use of these convictions by his trial counsel would not have been futile. Counsel is not deficient for failing to object or make a frivolous motion. *Roberts v. Thaler*, 681 F.3d 597, 611 (5th Cir. 2012); *Smith v. Puckett*, 907 F.2d 581, 585 n.6 (5th Cir. 1990) ("Counsel is not deficient for, and prejudice does not issue from, failure to raise a legally meritless claim."). Pearson fails to show that the state court's conclusion that counsel was not ineffective regarding the admission of his prior convictions for DWI with a child and for assault was contrary to or an unreasonable application of United States Supreme Court precedent. Ground Seven is denied.

Pearson fails to show entitlement to federal habeas relief on any of his claims for ineffective assistance of counsel. Therefore, his petition must be dismissed.

*Appendix B***IV. CERTIFICATE OF APPEALABILITY**

Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. *See* 28 U.S.C. § 2253. A certificate of appealability will not issue unless the petitioner makes “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate “that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Tennard*, 542 U.S. at 282 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Under the controlling standard, this requires a petitioner to show “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where denial of relief is based on procedural grounds, the petitioner must show not only that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right,” but also that they “would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

A district court may deny a certificate of appealability, *sua sponte*, without requiring further briefing or argument. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). For reasons set forth above, the Court concludes that jurists of reason would not debate whether the Court’s ruling in this case was correct. Therefore, a certificate of appealability will not issue.

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V. CONCLUSION AND ORDER

Based on the foregoing, the Court **ORDERS** as follows:

1. The habeas corpus petition is **DISMISSED** with prejudice.

2. All pending motions, if any, are **DENIED as MOOT**.

3. A certificate of appealability is **DENIED**.

The Clerk will enter this Order and provide a copy to the parties.

SIGNED this 21st day of February 2024.

/s/ Andrew S. Hanen
Andrew S. Hanen
United States District Judge