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APPENDIX (A)

Fifth Circuit's (DENIAL) for authorization
to file second or successive 28 U.S.C. § 2254

No. 25-20177

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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

July 29, 2025

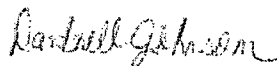
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 25-20177 In re: Jesse Curry, Jr.

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____

Dantrell L. Johnson, Deputy Clerk
504-310-7689

Mr. Jesse Randolph Curry, Jr.

25-20177

Mr. Jesse Randolph Curry, Jr.
#939167
CID Clements Prison
9601 Spur 591
Amarillo, TX 79107-9606

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

July 29, 2025

Lyle W. Cayce
Clerk

No. 25-20177

IN RE JESSE RANDOLPH CURRY, JR.,

Movant.

Motion for an Order Authorizing
the United States District Court
for the Southern District of Texas
to Consider a Successive 28 U.S.C. § 2254 Application

UNPUBLISHED ORDER

Before SOUTHWICK, DUNCAN, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

Jesse Randolph Curry, Jr., Texas prisoner # 939167, moves for authorization to file a successive 28 U.S.C. § 2254 application challenging his conviction for aggravated assault. Curry contends that he has new DNA evidence to show that two individuals contributed to the sperm fraction of the vaginal swab taken from his wife following the assault.

Before a prisoner may file a successive § 2254 application in the district court, this court must determine that he has made “a prima facie showing that the application satisfies the requirements” of 28 U.S.C. § 2244(b). *Id.* § 2244(b)(3)(C). The prisoner must show that the claim “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” *id.*

§ 2244(b)(2)(A), or that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence” and “the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense,” *id.* § 2244(b)(2)(B).

To the extent that Curry seeks to assert his actual innocence as a gateway to overcome the bar to successive filing, the effort fails because there is no actual innocence exception beyond the statutory provisions of § 2244(b). *See Jackson v. Lumpkin*, 25 F.4th 339, 341-42 (5th Cir. 2022).

Curry fails to make the required prima facie showing. Accordingly, IT IS ORDERED that the motion for authorization is DENIED.



A True Copy

Certified order issued Jul 29, 2025

Steph W. Cayer

Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX (B)

Curry's MOTION FOR LEAVE to file second or successive 28 U.S.C. § 2254; with proposed 2254 Brief and its attached (EXHIBITS A-N)

No. 25-20177

25-20177

Mr. Jesse Randolph Curry, Jr.
#939167
CID Clements Prison
9601 Spur 591
Amarillo, TX 79107-9606

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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

May 30, 2025

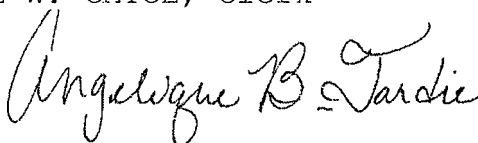
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 25-20177 In re: Jesse Curry, Jr.
USDC No.

The court has granted in part an extension of time to and including July 7, 2025 for returning a sufficient motion for authorization to file a successive 2254 petition in this case.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in cursive script that reads "Angelique B. Tardie".

By:

Angelique B. Tardie, Deputy Clerk
504-310-7715

Mr. Jesse Randolph Curry Jr.

APPENDIX (E)

[FIRST] § 2254, federal court findings
and judgment and Curry's [FIRST] § 2254, Brief in Support

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

JESSE RANDOLPH CURRY, JR.,
TDCJ No. 939167

Petitioner,

v.

RICK THALER,

Respondent.

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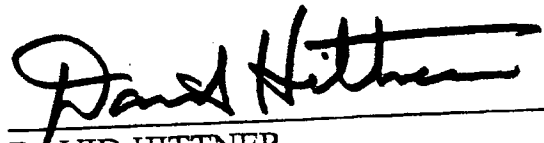
CIVIL ACTION H-09-2119

FINAL JUDGMENT

For the reasons stated in the Court's Memorandum on Dismissal entered this date, this action is **DISMISSED** with prejudice.

This is a **FINAL JUDGMENT**.

Signed at Houston, Texas, on Sept 3, 2010.



DAVID HITTNER
UNITED STATES DISTRICT JUDGE

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

JESSE RANDOLPH CURRY, JR.,
TDCJ No. 939167

Petitioner,

v.

RICK THALER,

Respondent.

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CIVIL ACTION H-09-2119

MEMORANDUM ON DISMISSAL

Pending before this Court is a Motion for Summary Judgment filed by Rick Thaler, Director of the Texas Department of Criminal Justice-Correctional Institutions Division (TDCJ). Based on consideration of the pleadings, the motion, the record, and the applicable law, this Court **GRANTS** the motion.

I. BACKGROUND AND CLAIMS

Petitioner, Jesse Randolph Curry, Jr., filed this petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is incarcerated in the TDCJ. He is serving a sentence in cause number 838,340 in the 337th District Court of Harris County, Texas. Petitioner was indicted for aggravated assault. He pled not guilty. On June 6, 2000, the jury found Petitioner guilty and sentenced him to life in prison.

Petitioner appealed the conviction. *See Curry v. State*, No. 01-00-00864-CR (Tex.App.-Houston [1st Dist.] 2001). The Texas Court of Appeals affirmed the

conviction. Petitioner filed a Petition for Discretionary Review (PDR). The Texas Court of Criminal Appeals refused the PDR on March 13, 2002.

On March 31, 2003, Petitioner filed a state habeas corpus application under Article 11.07 of the Texas Code of Criminal Procedure. *Ex Parte Curry*, Application No. 53,885-06. The Texas Court of Criminal Appeals denied the application without written order on March 18, 2009. *Id.*, State Habeas Record (HR), at cover.

Petitioner raises these grounds for relief in this application:

I. Trial counsel was ineffective at the guilt-innocence stage for:

A. Failing to present a viable defense by not investigating the victim's history of falsely accusing people of sexual and physical abuse, not getting a warrant for a sample of Dale Fowler Sr.'s blood, and not interviewing and subpoenaing defense witnesses, especially James Griffin.

B. Eliciting, opening the door, and failing to object to testimony from the victim that Curry had previously beat her, causing her to miscarry, that her children were afraid of him because he beat them with a belt and left welts, and that he had been in prison before and was on parole.

C. Failing to object to inadmissible hearsay and opinion testimony that the police and a nurse did not believe the victim's initial story that someone else beat her, and that a detective used this case in domestic violence training sessions because it is a textbook family violence/battered wife case.

D. Failing to object to inadmissible victim impact testimony that the victim had nightmares and her children had various problems as a result of Curry's conduct.

E. Failing to object to the jury charge authorizing conviction for aggravated assault, without requiring the jury to unanimously agree on whether applicant used a deadly weapon or caused serious bodily injury.

F. Failing to request a jury instruction on the lesser included offense of assault-bodily injury.

G. Failing to make a meaningful closing argument.

II. Trial counsel was ineffective at punishment for:

A. Failing to call character witnesses.

B. Failing to object to extraneous offense testimony that Curry assaulted a police officer, placed his penis in the victim's mouth and anus, and assaulted a dog because the State did not give notice of intent to introduce this evidence.

C. Failing to object to evidence that previous charges of aggravated assault and assault had been dismissed.

D. Waiving closing argument.

E. Failing to object to the prosecutor's improper argument that Curry's father and friends were so terrified of him that they would not testify.

III. Appellate counsel was ineffective on appeal for:

A. Failing to raise the issue that the jury charge was fundamentally defective because it authorized a conviction for aggravated assault without requiring that the jury unanimously agree on whether Curry used a deadly weapon or caused serious bodily injury.

B. Failing to raise the issue that the affirmative finding of a deadly weapon should be deleted from the judgment because it was not made by the jury.

The Texas Court of Appeals recitation of the background of the case follows.

Because they were homeless, appellant, his wife (the complainant), and her four children shared one room in the home of Dale Fowler, Sr. (Dale). On the night of June 24, 1998, appellant came home late from work intoxicated, agitated, and visibly angry.

As appellant questioned the complainant about her day, he became angry, threw his keys at her face, and cut her lip. Appellant had heard that she had "done something," and did not believe her denials. He hit her with his fist and accused her of lying. Appellant picked up one of the complainant's crutches and hit her on the chest, arms, and legs until she fell on the bed. He continued to beat her with the crutch until he saw headlights through the window. He left the room to speak to Dale Fowler, Jr. (Jr.) who had just returned home.

Appellant returned to the room, and beat the complainant with a crutch until its grip broke. He threatened to break the complainant's legs. After the second crutch broke, appellant stopped the beating, ordered the complainant to remove her clothing, and sexually assaulted her with the end of the broken crutch. He called her a "lying slut" and insisted that he was going to "pimp her out."

Appellant then left the room and returned with Jr. Appellant told Jr. that he wanted to demonstrate how to deal with "women who are not good." When Jr. left, and appellant recommenced the beating, he shoved the complainant against the wall, and pressed a piece of the crutch against her neck. Appellant told her that he wanted her to know what dying was like. The complainant slid from his grip and fell on the bed, where appellant continued to hit her. Appellant pinned the complainant to the bed and began to choke her saying, "Goodnight. Goodnight." During the entire episode, the complainant's four children were lying on blankets on the floor of the room.

After appellant finally stopped his beating, he threatened to kill the complainant's children. He said that he would put the children on their knees and shoot them in the back of their heads because they never liked him anyway. Appellant, the complainant, and the children then drove to his sister's house in Lufkin. Appellant instructed the children to throw the crutches out the car window during the drive.

During the two-hour drive to Lufkin, appellant constructed a "story" to explain the complainant's grievous condition: Dale had raped and beaten the complainant earlier that day, and he had came home to find her

beaten. The complainant agreed to the story because she feared appellant. When they arrived at his sister's house in Lufkin, appellant repeated his story and the complainant concurred. Appellant's brother-in-law drove appellant and the complainant to the hospital. Once there, appellant remained close by the complainant's side, and she reported to police and hospital personnel that Dale had beaten and raped her.

*2 After the complainant was released from the hospital, she and appellant returned to his sister's house in Lufkin. The complainant called her father and told him that she had been in a car wreck and asked for money. The complainant, appellant, and the children then drove ten hours to Kansas to complainant's father's house.

Two weeks later, appellant returned to Pasadena to meet with his parole officer. The complainant became frightened and told her step-mother that appellant had beaten her. The police were called, and appellant was arrested.

The complainant recanted her initial story about Dale to a Pasadena detective investigating the case. In a telephone interview, the complainant told the detective that appellant was her assailant, not Dale. She had originally reported otherwise because she was afraid of appellant.

Curry v. State, 2001 WL 1299279, *1-2 (Tex. App.- Hous. [1st Dist.], 2001).

II. THE SUMMARY JUDGMENT & AEDPA STANDARDS

A party seeking summary judgment bears the initial burden of informing the district court of the basis for the motion, and identifying those portions of the record, which the moving party believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, (1986). In considering a motion for summary judgment, a court must review the material factual issues and give the

non-moving party the benefit of every reasonable inference with respect to the facts alleged by that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") was signed into law. Pub. L. No. 104-132, 110 Stat. 1214 (1996). The AEDPA amended the federal habeas corpus statutes to place these restrictions on applications for habeas corpus relief:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

.....

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254 (Supp. 1996).

III. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

To establish ineffective assistance of counsel, a petitioner must show: (1) that his lawyer's performance was deficient and (2) that this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The prejudice component requires a "showing that counsel's errors were so serious as to deprive the

defendant of a fair trial, a trial whose result is reliable.” *Id.*, at 691. Petitioner claims ineffective assistance of trial counsel under the following claims.

A. Failure to Investigate & Present Defense

Petitioner claims his defense counsel failed to present a viable defense by not investigating the victim’s history of falsely accusing people of sexual and physical abuse, not getting a warrant for a sample of Dale Fowler, Sr.’s blood, and not interviewing and subpoenaing defense witnesses. Petitioner claims that Dale Fowler, Sr., assaulted the complaining witness.

The state habeas corpus court made these fact findings:

10. The Court finds that the affidavits and writings from the applicant’s friends and relatives attached to the applicant’s *pro se* writ application, in support of his claim that counsel could have discovered evidence that the complainant had previously accused a relative of sexual abuse and that the complainant had previously inflicted harm upon herself and accused the applicant of doing so, are not credible, not persuasive, and carry no evidentiary value.

11. The applicant fails to show that admissible evidence exists, which counsel failed to discover, which would prove that the complainant had previously accused a relative of sexual abuse and that the complainant had previously inflicted harm upon herself and accused the applicant of doing so.

12. The Court finds, based on the appellate record, that testimony elicited during the punishment phase of trial demonstrated that the applicant could not be excluded as a contributor to a mixture of DNA found on the complainant’s vaginal swab; that the DNA analyst further testified that there could have been someone else’s DNA type “that would fall in between the mixture;” that the complainant readily testified that she initially reported – under duress from the applicant – that Dale Fowler had committed the assault, but she recanted that

concocted story as soon as she was free from the applicant's control; and, that the complainant was married to the applicant and the question of his identity was never at issue (5 R.R. at 10-26).

13. The applicant fails to show that counsel's conduct was deficient in failing to obtain additional DNA testing to determine whether Dale Fowler's DNA was present along with the applicant's DNA in the sexual assault kit; furthermore, he fails to show a reasonable probability that even had additional testing been conducted, the result of the proceeding would have been different.

14. The Court finds, based on the appellate record and the appellate opinion, that the State presented overwhelming testimony of the extensive and horrific injuries that the applicant inflicted upon the complainant; that the severity of the beating was confirmed by photographs taken at the hospital which show the complainant with obvious bruising over her entire body and a severely traumatized arm; that the medical records show (1) bruising from the complainant's head to pelvis and a right wrist deformity suspicious for fracture; (2) an X-ray report indicating a displaced fracture of the right wrist; and (3) an operative report dated August 1, 1998, for an open reduction and internal fixation of a right wrist fracture for malunion; and that the complainant lost some function of her hand as a result of the assault. *Curry*, 2001 WL 1299279, at *3.

15. The Court finds that the affidavits of James Griffin attached to the applicant's writ application, in support of his claim that counsel was ineffective for failing to call Griffin as a defense expert, are not credible, not persuasive, and carry no evidentiary value; the applicant fails to show that counsel's conduct was deficient for not presenting Griffin's testimony; the applicant further fails to show a reasonable probability that, had counsel presented Griffin's testimony, the result of the proceeding would have been different.

HR, 659-660.

These state court fact findings show that any failure by counsel to investigate, interview or obtain defense witnesses concerning prior false accusations by the complaining witness was not a deficient performance because the witnesses would not

have been credible or persuasive. Furthermore, the state habeas court found there was no viable evidence which could have been presented to show that the complainant had previously made false charges or accusations against Petitioner or others.

The state habeas court found that there was no valid basis on which to claim that Dale Fowler, Sr., rather than Petitioner, had assaulted the complainant, based on two reasons. See Fact Finding No. 12 (hereafter FF 12). First, contrary to Petitioner's contentions, the DNA evidence did not exclude him. *Id.* Second, the evidence showed that the complainant recanted her "concocted" story about Fowler committing the assault. The state habeas court also found no reasonable probability of a different outcome even if more DNA testing had been done. FF 15. The habeas court found that Griffin's potential testimony would not have been credible, persuasive, or of any evidentiary value and therefore counsel was not deficient for failing to call the witnesses and this failure did not affect the outcome of the trial.

There is no showing that any deficient performance by counsel resulted in the jury otherwise having a reasonable doubt concerning guilt. *Emery v. Johnson*, 139 F.3d 191, 196 (5th Cir. 1997) (a petitioner "must show a 'reasonable probability' that the jury would have otherwise harbored a reasonable doubt concerning guilt" under the prejudice prong). The direct testimony at trial from the complainant strongly supports this conclusion. See Reporter's Record, Vol. III, pp. 10-80, State's Exhs. 1-13. The

state court fact findings by the habeas court show that counsel's performance was not deficient under this claim and they also show the absence of a reasonable probability of an acquittal, *i.e.*, they show no prejudice.

The fact findings that are subsidiary to an ineffective assistance of counsel determination and implicitly underlie that determination are fact questions governed by 28 U.S.C. § 2254(e)(1). *Black v. Collins*, 962 F.2d 394, 405-06 (5th Cir. 1992) (discussing a prior version of § 2254(d)). The state habeas findings are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Petitioner has not met his burden of rebutting the presumption of correctness of these fact findings by clear and convincing evidence. This Court is therefore precluded from granting relief on this ineffective assistance ground because the state habeas court's fact findings concerning counsel's ineffectiveness have not been rebutted by clear and convincing evidence. *Id.*

The state habeas corpus court made this conclusion of law:

3. The applicant fails to show that counsel's conduct fell below an objective standard of reasonableness and that, but for counsel's alleged deficient conduct, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*; *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting the *Strickland* standard in Texas).

HR, 675-76. The state habeas judge concluded Petitioner did not receive ineffective assistance of trial counsel. *Id.*

Whether counsel was ineffective is a mixed question of law and fact and is controlled by the "unreasonable application" part of section 2254(d). *See Moore v. Johnson*, 101 F.3d 1069, 1075-76 (5th Cir. 1996). Under the record, the state habeas court's adjudication on assistance of counsel was not incorrect or erroneous, much less also unreasonable. *Williams v. Taylor*, 529 U.S. 362, 411 (2000). The state court's adjudication that trial counsel was not ineffective under this ground is not contrary to and did not involve an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1).

Petitioner has not rebutted with clear and convincing evidence the state court's findings establishing the lack of ineffective assistance nor shown that the state court's decision was contrary to or an unreasonable application of clearly established federal law under *Strickland* on his claim concerning a failure to investigate and present a defense. Furthermore, the trial record does not show, that but for counsel's unprofessional errors, there was a reasonable probability of an acquittal by the jury.

B. Eliciting and Failing to Object to Harmful Testimony

Petitioner claims that his attorney elicited and opened the door to unhelpful testimony and failed to object to testimony from the victim that Petitioner had previously beat her, causing her to miscarry, that her children were afraid of him because he beat them with a belt and left welts, and that he had been in prison before

and was on parole. The state habeas corpus court made these fact findings:

20. The Court finds, based on the appellate record, that trial counsel cross-examined the complainant regarding the history and nature of her relationship with the applicant to show that they had dated and were married and that the applicant took care of her children. Specifically, the complainant testified on cross examination that they dated in 1992, but that relationship ended when the applicant assaulted her and went to prison in 1996 and then married two months later; that the complainant had several children, and the applicant provided for those children, even though none of them were fathered by the applicant; and that the complainant had been pregnant by the applicant, but she miscarried that child when she was beaten by the applicant in 1992 (3 R.R. at 74-77).

21. The Court finds, based on the September 1, 2007 affidavit of trial counsel, that the applicant led counsel to believe that he and the complainant were "friendly" in 1992 and that counsel could elicit testimony from the complainant to show "a period of amiable accord" between the applicant and the complainant; the Court further finds that, based on information provided by the applicant, counsel could not have reasonably anticipated that the complainant would testify that the applicant's prison trip interrupted their years of dating, that the applicant had abused the complainant physically in 1992, and that the applicant's abuse had caused her miscarriage.

22. The Court finds, based on the appellate record, that the complainant testified on direct examination that in connection with the primary offense, her children were in the room while the applicant assaulted her but that they did not move, pretending to be asleep, because they were afraid of the applicant due to his prior abuse (3 R.R. at 66-67).

23. The Court finds, based on the appellate record and the affidavits of trial counsel, that counsel made the reasonable strategic decision not to object to testimony by the complainant that the applicant had beaten her previously and caused a miscarriage, not to object to testimony by Dale Fowler, Sr., that the applicant had accused him of committing the assault even though he knew the applicant had been violent toward the

complainant in the past, and not to object to testimony by the complainant explaining why her children did not move during the aggravated assault and why they were afraid of the applicant.

24. The Court finds, based on the appellate record, that the complainant testified that after the assault, the applicant held her in a hotel for three days and prohibited her from leaving because he was on parole and was afraid he was going to get caught; that the complainant further testified that the applicant then took the complainant and her children to her parents home in Kansas, where they stayed approximately two weeks before the applicant left them temporarily to return to Houston to report to his parole officer, that the complainant testified it was only then, after the applicant had gone, that she was able to tell a family member about the assault, report it to the police, and move into a safe home.

25. The Court finds, based on the appellate record, that the State made no mention of the applicant's parole status or the fact that he had been previously convicted of a felony during its closing arguments at guilt (4 R.R. at 98-101). HR, 662-65.

The state court conclusions of law follow:

5. Because the State made no mention of the applicant's parole status or the fact that he had been previously convicted of a felony during its closing argument, and because the evidence of the applicant's guilt in the primary case was overwhelming, the applicant fails to show a reasonable probability that, but for counsel's failure to object to witness testimony that the applicant had previously gone to prison and was on parole when he committed the offense in the primary case, the result of the proceeding would have been different. *Ex parte Ellis*, 233 S.W .3d 324, 330 331 (Tex. Crim. App. 2007).

6. The applicant fails to show a reasonable probability that, but for counsel's failure to object to testimony about the various extraneous offenses committed by the applicant, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686; *Hernandez*, 726 S.W .2d at 57. HR, 676-77.

The state habeas court found that the prosecutor did not mention, much less

emphasize, the unhelpful testimony Petitioner raises in this claim. The state court concluded that counsel's failures concerning this testimony had no effect on the jury's finding of guilt, *i.e.*, that Petitioner has not shown prejudice under *Strickland*.

Petitioner has not rebutted with clear and convincing evidence the state court's fact findings on this claim nor shown that the state court's decision was contrary to or an unreasonable application of clearly established federal law under *Strickland* concerning eliciting and failing to object to harmful testimony.

C. Failing to Object to Hearsay and Opinion Testimony

Petitioner claims counsel failed to object to inadmissible hearsay and opinion testimony that the police and a nurse did not believe the victim's initial story that someone else beat her, and that a detective used this case in domestic violence training sessions because it is a textbook family violence/battered wife case.

The state court issued these conclusions of law:

26. The Court finds, based on the appellate record, that the complainant was the State's first witness in its case-in-chief; that the complainant testified on direct examination that the applicant, after savagely beating her, drove her from Houston to a hospital in Lufkin, Texas; that during the trip, the applicant told the complainant to tell the police officers at the hospital that Dale Fowler had raped and beaten her; that the applicant took the complainant to his sister's house in Lufkin, where he told his sister that Dale Fowler had beaten and raped her; that the applicant made the complainant repeat the Dale Fowler story back to him several times before they got to the hospital, telling her she was a "good girl" when she got the story right; that the applicant told the hospital staff in Lufkin that

he found the complainant beaten when he arrived home; that the complainant told Detective Libby Parish at the hospital that Fowler had beaten and raped her; that the complainant testified that Detective Parish did not believe her, but that Parish told the complainant that she could not do anything unless the complainant told the truth (3 R.R. at 38-44).

27. The Court finds, based on the record, that trial counsel cross-examined the complainant about her statements to hospital personnel and police officers that she had been beaten and raped by Dale Fowler.

28. The Court finds, based on the appellate record, that Detective Libby Parish, Lufkin Police Department, testified on direct examination that she interviewed the complainant when she was first brought into the Lufkin hospital emergency room; that the complainant was very upset, sobbing, frightened, and in extreme pain; that the complainant was very concerned about her children; that the complainant had reported to Parish that Dale Fowler had beaten and sexually assaulted her; that the complainant's story did not "ring true" because there seemed to be information missing and because the complainant would turn away and cry even harder whenever Parish asked her if the applicant was the only one who actually beat and sexually assaulted her (4 R.R. at 14-18).

29. The Court finds, based on the appellate record, that nurse Valerie Murphy testified on direct examination that she treated the complainant when she was first brought in to the Lufkin hospital emergency room; that the complainant reported that she had been raped by someone [that] she and the applicant had been living with, and that the complainant's husband had brought her all the way to Lufkin for treatment; that Murphy thought it "very strange" that the complainant was so very distant and withdrawn from her husband; and that based on her training and experience, she believed that some things "did not seem to fit the story".

30. The Court finds, based on the appellate record, that Detective R.J. McAninch, Pasadena Police Department, testified on direct examination that he learned from Detective Parish that the complainant had recanted her first version of the attack after she was taken to Kansas, and that the complainant said it was actually the applicant who assaulted her, that

McAninch interviewed Dale Fowler, that McAninch confirmed the change in her statement with the complainant, and that McAninch eliminated Fowler as a suspect based in part on that information.

31. The Court finds, based on the appellate record, that Sgt. Susan Clifton, Pasadena Police Department, testified on direct examination that she investigated Dale Fowler as a suspect; that Clifton and McAninch eliminated Fowler as a suspect and focused their investigation on the applicant; that based on her training and experience, the facts of the primary case were a textbook family violence case; and that Clifton has used the facts in the primary case in training sessions on domestic violence (4 R.R. at 47-49).

32. The Court finds that the testimony in question by Parish, Murphy, McAninch, and Clifton does not constitute improper opinion testimony, nor was it offered to show that the complainant was credible or to explain the complainant's character for truthfulness; the Court further finds that the testimony of Parish, Murphy, McAninch, and Clifton was rationally based on their perceptions and was helpful to the clear understanding of the witness' testimony and the jury's determination of the facts in issue. TEX. R. EVID. 701; *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004). HR, 664-66.

The state court's conclusion of law follows:

7. Because the testimony of Parish, Murphy, McAninch and Clifton was admissible and was not offered to show that the complainant was credible or to explain the complainant's character for truthfulness, the applicant cannot show that counsel was ineffective for failing to object to such testimony. TEX. R. EVID. 701; *Ex parte White*, 160 S.W. 3d 46 (Tex. Crim. App. 2004). HR, 677.

The state court's fact findings show that there was a factual and reasonable basis for the nurse and police officers to question the veracity of the complainant's statements that Fowler beat her. The state judge found "that the testimony of Parish,

Murphy, McAninch, and Clifton was rationally based on their perceptions” of the circumstances, and complainant’s conversations with some of them.

The state habeas judge was the same judge who presided at Petitioner’s trial. HR, Clerk’s Summary Sheet. In *Vuong v. Scott*, the Fifth Circuit noted with approval that “[u]nder Texas law, judges may use, among other things, ‘personal recollection’ to resolve any unresolved facts raised by a state habeas petitioner.” *Vuong v. Scott*, 62 F.3d 673, 683 (5th Cir. 1995); *see also Armstead v. Scott*, 37 F.3d 202, 208 (5th Cir. 1994) (noting that the state habeas judge who made fact findings was the trial judge at the original hearing and that the judge had the opportunity to assess the credibility of the defendant and trial counsel). Because the habeas judge presided at Petitioner’s trial, he had the opportunity to assess the credibility of the witnesses and could use his personal recollection to resolve any disputed or conflicting facts.

Petitioner has not rebutted with clear and convincing evidence the state court’s fact findings nor shown that the state court’s decision was contrary to or an unreasonable application of clearly established federal law on his claim concerning failing to object to hearsay and opinion testimony.

D. Failing to Object to Victim Impact Testimony

Petitioner claims counsel failed to object to inadmissible victim impact testimony that the victim had nightmares and her children had various problems as a result of

Curry's conduct.

The state court made these fact findings:

33. The Court finds, based on the appellate record, that the complainant testified on direct examination that her children were in the room while the applicant assaulted her; that the children acted as if they were asleep and did not move; that they were very afraid of the applicant; that it was only after the applicant left that the children told the complainant what they had seen and heard during the assault; and that the complainant could not get the assault out of her mind.

34. The Court finds, based on the appellate record, that the prosecutor's questions were designed to elicit testimony that the complainant had a vivid recollection of the events that took place and to elicit testimony which would explain that the complainant's children were not asleep during the assault, that they did not move or say anything during the assault because they were scared, but yet they could testify about events during the assault based on what they saw and heard.

35. The Court finds that the complainant's testimony in this regard was not offered as victim-impact testimony, but was admissible relevant evidence explaining the circumstances of the assault and the children's ability to perceive the assault. HR, 666-67.

The state court conclusions of law follow:

8. Because the complainant's testimony (that her children were in the room while the applicant assaulted her, that the children acted as if they were asleep and did not move, that they were very afraid of the applicant, that it was only after the applicant left that the children told her what they had seen and heard during the assault, and that the complainant could not get the assault out of her mind) was not victim-impact testimony and was relevant admissible evidence, counsel was not deficient in failing to object. *McFarland*, 845 S.W .2d at 846.

9. Because the complainant's testimony in this regard was relevant, admissible evidence, the applicant fails to show that, even had counsel objected to the testimony on that basis, the trial court would have committed error in overruling

the objection. *Vaughn*, 931 S.W.2d at 566. HR, 667.

The state court fact findings show that under state law, counsel's failure to object did not constitute a deficient performance. Furthermore, Petitioner has not shown prejudice. Petitioner has not rebutted with clear and convincing evidence the state court's fact findings nor shown that the state court's decision was contrary to or an unreasonable application of clearly established federal law on his claim concerning victim impact testimony.

E. Failure to Object to the Jury Charge

Petitioner claims his attorney failed to object to a jury charge which authorized a conviction for aggravated assault, without requiring the jury to unanimously agree on whether applicant used a deadly weapon or cause serious bodily injury.

The state court made these fact findings:

36. The Court finds, based on official trial court records, that the offense in the primary case was committed on June 24, 1998, and that the trial in the primary case occurred in August 2000.

37. The Court finds, based on the clerk's record, that the indictment in the primary case alleged one offense in three paragraphs, with each paragraph alleging the alternate methods of committing the offense; that the applicant committed aggravated assault by causing bodily injury using a crutch as a deadly weapon, by causing bodily injury using his hand as a deadly weapon, and by causing serious bodily injury by striking the complainant with a crutch and by striking the complainant with his hand (1 C.R. at 2); *see Marinos v. State*, 186 S.W.3d 167, 175, n.3 (Tex. App. Austin 2006, pet. ref'd) TEX. CODE CRIM. PROC.art. 21.21 (a)(b)(two or more offenses may be joined in a single

indictment, with each offense stated in a separate count; each count may contain as many separate paragraphs charging the same offense as necessary); *Gonzales v. State*, 191 S.W.3d. 741, 747, n. 2 (Tex. App.-Waco 2006, pet. ref'd).

38. The Court finds that the applicant fails to cite any authority prior to 2006 wherein the Court of Criminal Appeals or an intermediate appellate court dealt with the question of whether the statutory language of TEX. CODE CRIM. PROC. art 22.02 creates multiple offenses or one offense capable of being committed multiple ways.

39. The Court finds that the state of the law at the time of trial in the primary case was that TEX. CODE CRIM. PROC. art. 22.02 created one offense of aggravated assault, with several means of commission. *See, e.g., Brown v. State*, 2002 WL 32341850, at *4 (Tex. App. -Eastland January 24, 2002).

40. The Court finds that the state of the law at the time of trial in the primary case was that although an indictment may allege differing methods of committing a single offense of aggravated assault in the conjunctive, it was proper for a jury to be charged in the disjunctive with a general verdict form; the Court further finds that the practice of charging both aggravated assault by injury (both bodily injury and serious bodily injury) and aggravated assault by threat in a single indictment, as alternate means of committing the offense of aggravated assault, was routine and not challenged on direct appeal. *See, e.g., Martinez v. State*, 2002 WL 31118318, at *4 (Tex. App-Austin September 26, 2002, no pet.) *see also Townsend v. State*, 2006 WL 2106990, at *2 (Tex. App - Tyler July 31, 2006) (Tex. App. - Tyler November 14, 2001) *Wesber v. State*, 2004 WL 792829, at *1 (Tex. App. - Eastland, April 15, 2004). HR,667-69.

The state court's conclusion of law follows:

10. Because the State of the law at the time of trial in the primary case was, at the very least, unsettled as to whether aggravated assault causing bodily injury using a deadly weapon and aggravated assault causing serious bodily injury against the same complainant on the same occasion are two separate offenses, counsel was not ineffective for failing to object to the jury charge on the basis that it authorized a conviction for aggravated assault without requiring the jury to unanimously agree on whether the applicant used a deadly weapon or caused

serious bodily injury. *Ex parte Chandler*, 182 S.W.3d 350, 357-359 (Tex. Crim. App. 2005); *Vaughn*, 931 S.W.2d at 567 (Tex. Crim. App. 1996); *see also Cooks v. United States*, 461 F.2d 530, 532 (5th Cir. 1972). HR, 678.

The state judge found that under Texas law, there was no basis to object to the jury charge. This Court cannot reinterpret a Texas court's determination of Texas law. *Weeks v. Scott*, 55 F.3d 1059 (5th Cir. 1995). In any event, Petitioner has not rebutted with clear and convincing evidence the state court's findings nor shown that the decision was contrary to or an unreasonable application of clearly established federal law.

F. Failure to Request a Lesser Included Offense Instruction

Petitioner claims his attorney failed to request a lesser included offense instruction on assault with bodily injury. The state court made these fact findings:

41. The Court finds, based on the appellate record, that the applicant presented no direct evidence at the guilt stage of trial; that counsel cross-examined the State's witnesses with the apparent trial strategy to undermine the complainant's trial testimony by focusing on the complainant's initial statements that Dale Fowler, and not the applicant, had committed the aggravated assault; and that the applicant presented no direct evidence that the applicant did not cause serious bodily injury or did not use or exhibit a deadly weapon.

42. The Court finds, based on the appellate record, that there was no evidence in the record that would permit a rational jury to find that if the applicant were guilty, he was guilty only of the lesser included offense of assault. HR, 669.

The state court conclusions of law follow:

11. Because the applicant fails to show that there was sufficient evidence in the

record that would permit a rational jury to find that if the applicant were guilty, he was guilty only of the lesser included offense of assault, the applicant cannot show that the trial court was required to charge the jury on a lesser included offense of assault. *Bignall v. State*, 887 S.W. 2d 21, 23 (Tex. Crim. App. 1994)(holding charge on lesser-included offense is not required if defendant either presents evidence that he committed no offense or presents no evidence, and there is no evidence otherwise showing that defendant is guilty only of lesser-included offense); *Johnson v. State*, 84 S.W. 3d 726, 730 (Tex. App. - Houston [1st Dist.] 2002, pet. ref'd).

12. Because the applicant cannot show that the court was required to charge the jury on a lesser-included offense of assault, he fails to show that counsel's performance was deficient for failing to request the lesser-included offense instruction. *Fuentes v. State*, 991 S.W. 2d 267(Tex. Crim. App. 1999). HR, 678-69.

The state trial judge found that under Texas law and the testimony before the jury, there was no evidentiary basis for requesting or obtaining an instruction in the jury charge on a lesser included offense. Petitioner has not rebutted with clear and convincing evidence the state court's fact findings nor shown that the state court's decision was contrary to or an unreasonable application of clearly established federal law. As with the previous claim, this Court cannot reinterpret a Texas state court's determination of Texas law. *Weeks*, 55 F.3d at 1063.

G. Failure to Make a Meaningful Closing Argument

Petitioner claims that his attorney's closing argument in the guilt-innocence stage was very short. He states counsel asked for a fair trial, not an acquittal. Petitioner contends counsel did not discuss the evidence or the law. He asserts counsel did not

address proof beyond a reasonable doubt on serious bodily injury or whether Petitioner's hand or the crutch was a deadly weapon.

The State habeas court made the following fact findings and conclusions of law:

43. The Court finds, based on the appellate record, that counsel's closing argument at the guilt stage of trial reminded the jury of the State's duty to meet its burden of proof beyond a reasonable doubt, that the jury was the sole judge of the evidence presented, and that any evidence of additional misconduct by the applicant could not be considered as proof of his guilt of the primary offense.

44. The Court finds, based on the September 1, 2007 affidavit of Wallace Wilson, that Wilson made the reasonable strategic decision, based on his experience and based on his personal observations of the evidence presented at trial and the jury's reaction to that evidence, to counsel, and to the applicant, not to give a detailed closing argument and not to remind the jury of the facts alleged by the State, for fear that the jury would only be further inflamed and likely to convict the applicant.

45. The Court finds, based on the official trial court records, that the jury retired to deliberate on a verdict at the guilt stage of trial at 2:55 p.m., and that the jury announced it had reached a verdict at 3:00 p.m.

46. The Court finds, based on the official trial court records, the appellate record, and its personal recollection, that the evidence presented at trial, including the very credible testimony of the complainant, was so overwhelming that any additional argument by counsel would not have made a difference in the jury's verdict. Hr, 669-670.

The state court conclusions of law follow:

13. Trial counsel was not ineffective for making the reasonable, strategic decision to limit his closing argument at the guilt stage of trial. *Passmore v. State*, 617 S.W.2d 682, 686 (Tex. Crim. App. 1981)(fact that another attorney might have pursued different strategy will not support finding of ineffectiveness of counsel); *see also Ex parte Ewing*, 570 S.W.2d 941 (Tex. Crim. App. 1978).

14. The applicant fails to show a reasonable probability that the result of the proceeding would have been different if counsel had presented a different or additional closing argument. *Strickland*, 466 U.S. at 686. HR, 679.

An attorney's decision, "based on trial tactics and strategy, cannot form the basis for federal habeas corpus relief unless it is so ill-chosen that it permeates the entire trial with obvious unfairness." *Green v. Johnson*, 116 F.3d 1115, 1122 (5th Cir. 1997). Petitioner has not shown that counsel's determination on the argument to present to the jury constituted a deficient performance. Furthermore, Petitioner does not show there is a reasonable likelihood that the jury would have acquitted Petitioner had counsel made a different jury argument. Moreover, the state court's fact findings and conclusions of law preclude federal habeas corpus relief on this claim.

H. No Prejudice at Guilt-innocence Stage

On Petitioner's seven claims of ineffective assistance at the guilt-innocence stage, the Texas courts made fact findings and legal conclusions showing that counsel's performance was not deficient and counsel's representation caused no prejudice. Petitioner has not rebutted these findings with clear and convincing evidence and has not shown that the state court's decisions were contrary to or an unreasonable application of clearly established federal law under *Strickland*.

When a defendant attacks his verdict of guilt, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a

reasonable doubt" on guilt. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). In determining whether there is prejudice to the petitioner, the court must consider all the evidence before the judge or jury. *Id.* Petitioner has not shown, under the unchallenged evidence before the jury, that there is a reasonable probability of an acquittal. Furthermore, Petitioner has not rebutted with clear and convincing evidence the state habeas findings on deficient performance or prejudice with clear and convincing evidence nor shown that the state court's determinations as to deficient performance and prejudice concerning assistance of counsel were incorrect or erroneous, much less also unreasonable.

The bottom line is that despite the many serious claims of deficient performance by counsel, the record shows the absence of prejudice to Petitioner. Based on the direct testimony by the complainant of the assault and the unchallenged testimony, there is no reasonable probability that the jury would have acquitted Petitioner had counsel done everything Petitioner claims he should have done.

IV. INEFFECTIVE ASSISTANCE AT PUNISHMENT

Petitioner claims his counsel was ineffective at the punishment phase.

A. Failure to Call Character Witnesses

Petitioner claims counsel was ineffective for failing to call any character witnesses at the punishment phase. In his brief in support of this claim, Petitioner cites

his exhibits 4-8 and 13-21 filed in this Court. Brief in Support, p. 29 [Docket Entry No. 2-1, p. 8]. Exhibits 4 through 7 essentially concern guilt-innocence issues except to generally state that the potential witnesses believe Petitioner has good character. Exhibits 8 and 13 are affidavits by James Griffin, M.D. Griffin's first affidavit mainly concerns guilt-innocence except that Griffin states Petitioner has good character, is well behaved, "went to church regular [*sic*]," and is not a menace or danger to society. *Id.*, Ex. 8 [Docket Entry No. 2-4, pp. 21-22]. This Court notes this affidavit, purportedly signed by a medical doctor, has several misspellings and typographical errors. Exhibit 13 is not signed as an affidavit, although it has a notary stamp.

Exhibit 14 is a typed statement labeled "Deposition" with no signature, notary stamp, or closing. It is simply a typed narrative. There is no exhibit 15 attached to Petitioner's pleading. The affiants in exhibits 16, 17, and 18 essentially address guilt-innocence issues and the affiant in exhibit 18 states Petitioner is a loving and caring person who was always available to help others. The affiant in exhibit 19 states Petitioner is a loving and caring person who always wanted to help others and has a "hero type personality." The affiant in exhibit 20 states she is a volunteer at the Harris County Jail and that Petitioner loved for her to teach him the scriptures and to sing Bible songs. The affiant says Petitioner was always appreciative, polite, and attentive during their visits. Many of the purported affiants indicate they were willing to testify

on behalf of Petitioner. Affidavit number 21 was executed by Petitioner's appellate counsel.

The state habeas court made the following fact findings:

16. The Court finds that the applicant claimed on direct appeal that trial counsel was ineffective for failing to present witness testimony at the punishment phase of trial; the Court further finds that the Court of Appeals held that the applicant did not show a reasonable probability that, had counsel presented such testimony, the result of the proceeding would have been different. *Curry*, 2001 WL 1299279, at *6.

17. The Court finds that James Griffin, Billy D. Miller, Karlen Courtney, Amber Hooper, Juanita Christine Rogers and Ruby Simoneaux are all friends or relatives of the applicant, that their purported trial testimony set forth in their affidavits is biased and conclusory, and that their affidavits are neither credible nor persuasive. The Court further finds that the applicant fails to show that the jury's assessment of punishment would have been less severe had counsel presented the testimony of these witnesses in the punishment phase of trial. HR, 660-61.

The state habeas court's conclusions of law covering this claim follow:

3. The applicant fails to show that counsel's conduct fell below an objective standard of reasonableness and that, but for counsel's alleged deficient conduct, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*; *Hernandez v. State*, 726 S.W .2d 53, 57 (Tex. Crim. App. 1986) (adopting the *Strickland* standard in Texas). [HR, 676].

26. The totality of the representation afforded the applicant was sufficient to protect his right to reasonably effective assistance of counsel at trial and on direct appeal in the primary case. [HR, 683].

The state habeas court found the affidavits to be not credible and not persuasive,

consistent with this Court's determinations above. In its conclusions of law, the state court determined there is no showing that the counsel's failure to call the witnesses at the punishment stage of the trial affected the jury's assessment of punishment. The court also noted that the Texas Court of Appeals made the same determination. The Court of Appeals addressed Petitioner's claim that counsel had not prepared a defense for the punishment stage and had not brought witnesses who Petitioner said would have given favorable testimony. The Court of Appeals concluded, assuming a deficient performance by counsel, that the witnesses' testimony could not "conceivably have persuaded a jury to assess a lesser punishment in light of the horrific details of [the] crime." *Curry*, 2001 WL 1299279, at *8.

To sustain an ineffective assistance claim on punishment, the petitioner must show that absent his attorney's deficient performance "there is a reasonable probability that the defendant's sentence would have been significantly less harsh." *Dale v. Quarterman*, 553 F.3d 876, 880 (5th Cir. 2008). Under *Dale*, the Court should take into "account such factors as the defendant's actual sentence, the potential minimum and maximum sentences that could have been received, the placement of the actual sentence within the range of potential sentences, and any relevant mitigating or aggravating circumstances." *Id.* Petitioner has not shown a reasonable probability that his sentence would have been significantly less harsh absent counsel's claimed

deficient performance in failing to call character witnesses. Although the jury assessed the maximum punishment available, the mitigating circumstances are very weak and the aggravating circumstances are very strong. Moreover, Petitioner has not rebutted with clear and convincing evidence the state habeas court's fact findings nor shown that the state habeas and appellate courts' decisions were contrary to or an unreasonable application of clearly established federal law on his claim concerning character witnesses at punishment.

B, C. Failure to Object to Extraneous Offense and to Evidence that Prior Charges Had Been Dismissed

Petitioner claims his attorney did not object to testimony that he assaulted a police officer, placed his penis in the victim's mouth and anus, and assaulted a dog. He states his attorney should have objected because the State did not give notice on introducing this evidence. In a related claim, Petitioner contends counsel failed to object to evidence that his prior charges of aggravated assault had been dismissed.

The state habeas corpus court made these fact findings on these two claims:

47. The Court finds, based on the appellate record, that the complainant testified on direct examination at the punishment stage of trial about prior assaults committed by the applicant for which the State had given notice; that the complainant testified that a neighbor called the police on one occasion when the applicant assaulted the complainant while she was pregnant; that the police came out of the scene and made several attempts to locate the applicant; that a neighbor's dog began barking and the applicant hit the dog; that the police finally located and arrested the

applicant at his residence, and that the applicant struggled with police while being taken into custody and he assaulted one of the officers (5 R.R. at 34-36).

48. The Court finds, based on the clerk's record, that the applicant was also charged in cause number 793179 with committing aggravated sexual assault against the complainant on June 24, 1998 in connection with the primary aggravated assault; that the indictment charged the applicant with committing aggravated sexual assault by placing a crutch in the female sexual organ of the complainant, by placing his male sexual organ in the female sexual organ of the complainant, and by placing his male sexual organ in the mouth of the complainant; and that cause number 793173 was dismissed on March 10, 2000, and re-filed as the primary case (1 C.R. at 6, 94).

49. The Court finds, based on the appellate record, that the complainant testified on direct examination at the punishment stage of trial about details of the events surrounding the aggravated assault made the basis of the primary case, including a sexual assault committed various ways, that while the applicant was physically assaulting the complainant with the crutches, he placed the crutch inside her vagina, attempted to have sexual intercourse with the complainant, and forced the complainant to perform oral sex on him (5 R.R. at 40-43).

50. The Court finds, based on the affidavit of counsel Wallace Wilson, that Wilson believed the State had given sufficient notice of these acts and believed that evidence of these acts was relevant and admissible; the Court further finds that Wilson made the reasonable strategic decision not to object to testimony by the complainant about these acts. HR, 670-71.

51. The Court finds, based on the appellate record, that the State introduced into evidence a pen packet, jail card, and judgment which reflected that the applicant had been previously convicted of criminal mischief and burglary of a habitation with intent to commit aggravated assault; the Court further finds that these documents also referenced an aggravated assault charge and an assault charge against the applicant that had been dismissed (VI R.R., at SX 18A,20,22).

52. The Court finds that the applicant fails to show that the State questioned any witnesses about the dismissed charges or that the State referenced the dismissed charges during closing arguments; the applicant also fails to show that the jury considered any of the dismissed charges in assessing punishment.

53. The Court finds, based on the affidavit of Wallace Wilson, that Wilson made the reasonable strategic decision not to object to the pen packet; jail card and judgment on the basis that they contained references to two charges that had been dismissed. HR,671-72.

The state court conclusions of law concerning both claims follow:

15. Because the complainant's testimony about the extraneous acts committed by the applicant during the course of assaulting her on previous occasions and in connection with the primary offense was admissible to show the context in which these criminal acts occurred, trial counsel was not deficient for failing to object to the complainant's testimony, nor can the applicant show that the trial court would have erred in overruling such an objection. *Westbrook v. State*, 129 S.W .3d 103, 115 (Tex. Crim. App. 2000), *Vaughn*, 931 S.W .2d at 566.

16. The applicant fails to show that counsel's strategic decision to not object to the complainant's testimony about extraneous offenses committed by the applicant was unreasonable and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's failure to object. *Strickland*, 466 U.S. at 686.

17. The applicant fails to show that counsel's strategic decision to not object to the pen packet, jail card and judgment admitted at trial on the basis that they also referenced charges that had been dismissed was unreasonable and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's failure to object. *Strickland*, HR, 679-80.

~~Petitioner does not show, under Dale, a reasonable probability that absent~~

counsel's deficient performance under this claim, his sentence would have been "significantly less harsh." *Dale*, 553 F.3d at 880. The state court found that the prosecutor did give prior notice on introducing the evidence in question (FF 47) and that the dismissed charges were re-filed as the primary case (FF 48). Furthermore, the state court findings and conclusions of law show the lack of a deficient performance and the absence of a reasonable probability of a different punishment based on counsel's performance set forth in Petitioner's claim regardless of whether counsel performed deficiently. Petitioner has not rebutted with clear and convincing evidence the state court's fact findings nor shown that the state court's decision was contrary to or an unreasonable application of clearly established federal law on these claims.

D. Waiver of Closing Argument

Petitioner claims counsel did not make a jury argument at punishment.

54. The Court finds, based on the March 28, 2005 and September 1, 2007 affidavits of Wallace Wilson and the appellate record, that the applicant was obviously hostile, contentious and lacking remorse even at the punishment stage of trial, and that the applicant insisted on testifying at the punishment stage of trial against his counsel's advice.

55. The Court finds, based on the September 1, 2007 affidavit of Wallace Wilson, that Wilson made the reasonable strategic decision, based on his experience and based on his personal observations of the evidence presented at trial and the jury's reaction to that evidence, to counsel, and to applicant, not to give a closing argument and not to remind the jury of the facts, alleged by the State, for fear that the jury would only be further inflamed against the applicant.

56. The Court finds, based on the official trial court record, the appellate record, its personal recollection, the very credible testimony by the complainant, the applicant's decision to testify and the harmful effects of his testimony, that the evidence presented at the guilt and punishment stages of trial was so overwhelming that any additional argument by counsel would not have made a difference in the jury's verdict at punishment. HR, 672-73.

The state court conclusions of law follow:

18. Trial counsel was not ineffective for making the reasonable, strategic decision to waive closing argument at the punishment stage of trial. *Passmore*, 617 S.W.2d at 686.

19. The applicant fails to show a reasonable probability that the result of the proceeding would have been different if counsel had presented closing argument at the punishment stage of trial. *Strickland*, 466 U.S. at 686. HR 680-81.

Petitioner does not show that had counsel made a closing argument his sentence would have been less harsh, let alone significantly less harsh. Furthermore, Petitioner has not rebutted with clear and convincing evidence the state court's fact findings nor shown that the state court's decision was contrary to or an unreasonable application of clearly established federal law particularly concerning prejudice.

E. Failure to Object to Argument Witnesses Were Terrified of Petitioner

Petitioner claims his attorney did not object to the prosecutor's argument that Petitioner's father and his friends were so terrified of Petitioner that they would not testify.

The state habeas corpus court made these fact findings:

57. The Court finds, based on the reporter's record, that the applicant testified on cross examination that his lawyer was supposed to have subpoenaed witnesses, but they did not show up for trial to testify (5 R.R. at 64-66).

58. The Court finds, based on the reporter's record, that the prosecutor argued in summation during punishment phase of trial that everybody that met the applicant was terrified of him, that the applicant's father was under subpoena but did not come down to talk to him, and that none of the applicant's friends testified at trial (5 R.R. at 73-74).

59. The Court finds, based on the reporter's record, that the prosecutor's argument was both summation of the evidence and a reasonable deduction from the evidence. *Sterling v. State*, 840 S.W .2d 114, 120 (Tex. Crim. App. 1992); *Staley v. State*, 887 S.W .2d 885, 895 (Tex. Crim. App. 1994). HR 673.

The state court conclusions of law follow:

20. Because the prosecutor's argument was both a summation of the evidence and a reasonable deduction from the evidence, the applicant fails to show that counsel's conduct was deficient for failing to object. *Sterling*, 840 S.W .2d at 120; *Stanley*, 887 S.W .2d at 895.

21. In the alternative, because the prosecutor's argument, in light of the record as a whole, was not extreme or manifestly improper, was not violative of a mandatory statute, and did not inject new facts, harmful to the accused, into the trial, the applicant fails to show a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Felder v. State*, 848 S.W .2d 85, 95 (Tex. Crim. App. 1992); *Drew v. State*, 743 S.W.2d 207, 220-21 (Tex. Crim. App. 1987). HR 681.

Here again, Petitioner does not show that had counsel objected to the prosecutor's argument about Petitioner's father and his friends being afraid of him that his sentence would have been significantly less harsh. Furthermore, Petitioner has not rebutted with clear and convincing evidence the state court's fact findings nor shown

that the state court's decision was contrary to or an unreasonable application of clearly established federal law, particularly as to prejudice.

F. No Prejudice at Punishment Stage from Counsel's Performance

This Court recognizes that Petitioner raises serious and troubling claims of ineffective assistance of counsel at the punishment stage of his trial. This Court further recognizes that the jury punished Petitioner with a life sentence, the maximum sentence available. As explained in the preceding sections, this Court, however, determines that Petitioner fails to show prejudice at the punishment stage resulting from counsel's claimed deficient performance. Petitioner fails to show a reasonable probability of a shorter sentence, much less a significantly shorter sentence.

The Texas Court of Appeals said the following on direct appeal about Petitioner's claim on the lack of character witnesses at punishment:

In his eighth point of error, appellant argues that his trial counsel was ineffective for not preparing a defense during the punishment phase of trial. Specifically, appellant asserts that he had witnesses who could have given favorable testimony about his character.

.....
It is difficult to imagine how the admittedly biased, non-specific testimony of a parent and a life-long friend could conceivably have persuaded a jury to assess a lesser punishment in light of the horrific details of this crime. It is also difficult to imagine, and appellant has not shown, *how anything argued* by defense counsel would have averted the jury's assessment of punishment. (emphasis added).

Curry v. State, 2001 WL 1299279, *5-6 (Tex.App.-Hous. [1st Dist.], 2001). The

details of the crime submitted to the jury include that Petitioner:

beat the complainant with a crutch until its grip broke. He threatened to break the complainant's legs. After the second crutch broke, appellant stopped the beating, ordered the complainant to remove her clothing, and sexually assaulted her with the ... crutch.

Id., at 1. Under another related claim, the Court further stated that Petitioner:

sexually assaulted the complainant with the broken end of a crutch and choked her against the wall with another piece. The complainant testified that she was in fear for her life during the beating.

Id., at 3. This Court notes the complainant's four children were in the room on the floor during the entire episode. *Id.*, at 1. The Texas Court of Appeals said, in concluding its discussion on Petitioner's claim of ineffective assistance of counsel during the punishment stage of his trial:

We conclude that appellant has not met his burden in demonstrating that the jury's assessment of punishment would have been less severe in the absence of counsel's deficient performance.

Id., at 1.

As stated above, to sustain an ineffective assistance of counsel claim on punishment, the petitioner must show that absent his attorney's deficient performance at punishment "there is a reasonable probability that the defendant's sentence would have been significantly less harsh." *Dale*, 553 F.3d at 880. As stated above, *Dale* instructs that the Court should to take into "account such factors as the defendant's

actual sentence, the potential minimum and maximum sentences that could have been received, the placement of the actual sentence within the range of potential sentences, and any relevant mitigating or aggravating circumstances." *Id.*

Applying the *Dale* analysis, Petitioner received the maximum sentence in a potential range from five years to life, the uppermost sentence in a wide range. On the other hand, as stated above, the aggravating circumstances are very strong in the conviction and the mitigating circumstances are very weak. The record does not show a reasonable probability that Petitioner's sentence would have been significantly less harsh absent counsel's claimed deficient performance, considering the brutal nature of the crime and the surrounding circumstances, and the appropriately admitted punishment evidence. *Dale*, 553 F.3d at 880. This Court determines that, given the trial testimony and assuming counsel's performance suffered from the deficiencies claimed by Petitioner, he has not shown a reasonable probability that his sentence would have been significantly less harsh absent the deficient performance.

This Court's determination is governed by the constraints imposed by the AEDPA review standards in 28 U.S.C. § 2254. The Texas Courts, on both direct and collateral review, made fact findings and conclusions of law which show that at the punishment stage there was not a reasonable probability that, absent counsel's deficient performance, that Petitioner's sentence would have been less harsh, let alone

significantly less harsh. Also as stated above, Petitioner has not overcome these state court fact findings with clear and convincing evidence nor shown the conclusions of law to be contrary to or unreasonable applications of clearly established Supreme Court law.

V. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The *Strickland* standard applies on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). A petitioner claiming ineffective appellate counsel must show that (1) appellate counsel acted objectively unreasonably in failing to raise a particular issue on appeal, and (2) absent counsel's deficient performance, there was a reasonable probability that defendant's appeal would have been successful before the state appellate court. *Id.*

A. Failure to Raise Issue on Jury Unanimity

Petitioner claims appellate counsel should have argued on appeal that the jury charge was fundamentally defective because it authorized a conviction for aggravated assault without requiring the jury to unanimously agree on whether Petitioner used a deadly weapon or caused serious bodily injury.

The state habeas corpus court made these fact findings:

60. The Court finds that the State of the law at the time of trial in the primary case was unsettled as to whether aggravated assault causing bodily injury using a deadly weapon and aggravated assault causing serious bodily injury against the same complainant on the same occasion were two separate offenses. *See Findings Nos. 36-40 hereinabove.*

61. The Court finds, based on the affidavit of appellate counsel Jim Leitner, that Leitner did not challenge the jury charge on direct appeal, on the grounds that it authorized conviction for aggravated assault without requiring that the jury unanimously agree on whether the applicant used a deadly weapon or caused serious bodily injury, because Leitner did not believe the issue was worthy of raising on direct appeal. HR 674.

The state court conclusions of law follow:

22. Because appellate counsel Leitner's decision not to challenge the jury charge on direct appeal was reasonable professional judgment, the applicant fails to show his conduct fell outside the professional norms. *Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App. 1994).

23. Because the applicant fails to show that the settled state of the law at the time of the applicant's trial supported challenging the jury charge on direct appeal as suggested by the applicant, the applicant fails to show that, even if counsel had raised the issue, there is a reasonable probability that the results would have been different. *Ex parte Chandler*, 182 S.W .3d at 357-359; *Vaughn*, 931 S.W .3d at 567; *Cooks*, 461 F. 2d at 532. HR, 681-82.

This claim is the appellate counterpart to Petitioner's claim number I.E., that counsel at trial was ineffective for failing to object to the jury charge authorizing conviction for aggravated assault, without requiring the jury to unanimously agree on whether Petitioner used a deadly weapon or caused serious bodily injury. The state habeas court concluded "that the state of the law at the time of trial in the primary case was that although an indictment may allege differing methods of committing a single offense of aggravated assault in the conjunctive, it was proper for a jury to be charged in the disjunctive with a general verdict form; the Court further-[found] that the practice

of charging both aggravated assault by injury (both bodily injury and serious bodily injury) and aggravated assault by threat in a single indictment, as alternate means of committing the offense of aggravated assault, was routine and not challenged on direct appeal." *See* FF 40, HR 668-69.

Many of the state court appellate opinions cited by the state habeas court were issued from 2002 through 2006. *See* FF 40, HR 667-69. These opinions show that well after Petitioner's trial it was not improper under Texas law for a jury to be charged on aggravated assault in the manner Petitioner's jury was charged. Petitioner's appellate counsel filed his appeal brief on February 20, 2001. *See* Brief for Appellant, No. 01-00-0864-CR, Texas First Court of Appeals. Therefore, appellate counsel was not ineffective for failing to raise this claim on appeal for the same reason that trial counsel was not ineffective for failing to object to the jury charge.

Petitioner has not rebutted with clear and convincing evidence the state court's fact findings nor shown that the state court's decision was contrary to or an unreasonable application of clearly established federal law. Furthermore, as stated above on the underlying jury-charge claim, this Court cannot reinterpret a Texas court's determination of Texas law. *See Weeks*, 55 F.3d at 1063.

B. Failure to Raise Deadly Weapon Issue on Appeal

Petitioner claims appellate counsel should have raised the issue that the

affirmative finding of a deadly weapon should be deleted from the judgment because it was not made by the jury.

The state habeas court made these fact findings:

62. The Court finds, based on the affidavit of appellate counsel Jim Leitner, that Leitner did not challenge the affirmative deadly weapon finding on direct appeal because Leitner did not believe the issue was worthy of raising on direct appeal.

63. The Court finds, based on the clerk's record, that the indictment in the primary case specifically alleged that the applicant used both a crutch and his hand as deadly weapons (I C.R.at 2).

64. The Court finds, based on the clerk's record, that the jury returned a general verdict that the applicant was "guilty as charged in the indictment" (I C.R. at 131).

65. The Court finds, based on the clerk's record, that the jury charge included three application paragraphs which paralleled the three charging paragraphs in the indictment; the Court further finds that the charge also instructed the jury that "deadly weapon" meant "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." HR, 674-75.

The state court conclusions of law follow:

24. Because appellate counsel Leitner's decision not to challenge the affirmative deadly weapon finding on direct appeal was reasonable professional judgment, the applicant fails to show his conduct fell outside the prevailing professional norms. *Ex parte Butler*, 884 S. W .2d at 783.

25. Because the applicant fails to show that the affirmative finding of a deadly weapon in the judgment was improper, the applicant fails to show that, even if counsel had raised the issue, there is a reasonable probability that the results would have been different. *Ex parte Chandler*, 182 S.W .3d at 357-359, *Vaughn*, 931 S.W .3d at 567; *Cooks*, 461 F .2d at 532.. HR, 682.

The habeas judge found that Petitioner did not receive ineffective assistance of appellate counsel by counsel's failure to raise a deadly-weapon ground of error on appeal. Petitioner has not rebutted with clear and convincing evidence the state court's fact findings nor shown that the state court's decision was contrary to or an unreasonable application of clearly established federal law. The state habeas court's conclusions relate to the raising of a purely state law issue on appeal (the validity of the deadly-weapon finding) in a Texas appellate court. *See Weeks*, 55 F.3d at 1063.

Petitioner has not rebutted with clear and convincing evidence the state court's fact findings nor shown that the state court's decision was contrary to or an unreasonable application of clearly established federal law under *Strickland* on Petitioner's claims of ineffective assistance of appellate counsel.

VII. CONCLUSION

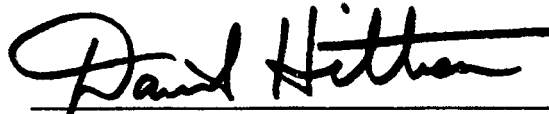
The record before this Court does not raise a genuine issue of material fact that Petitioner is in custody in violation of the Constitution. Respondent is entitled to summary judgment on Petitioner's habeas corpus claims raised in this action.

Respondent's Motion for Summary Judgment [Docket Entry No. 15] is **GRANTED** and this habeas corpus application is **DENIED** with prejudice under Rule 56. All other pending motions and requests for relief are **DENIED**.

This Court finds that Petitioner has not made a substantial showing of the denial

of a constitutional right. The issues raised here are not debatable among jurists of reason, could not be resolved in a different manner, and do not deserve encouragement to proceed further. *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). This Court finds that a Certificate of Appealability should not issue in this case.

Signed at Houston, Texas, on Sept 3, 2010.

A handwritten signature in black ink, appearing to read "David Hittner", written over a horizontal line.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

APPENDIX (F)

Texas Court of Criminal Appeals DISMISSLE of
Curry's petition for second § 11.07, § 11.073,
Habeas Application

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02 7W
0008034838 MAR 21 2025

3/17/2025

CURRY, JESSE RANDOLPH Tr. Ct. No. 838340-B WR-53,885-08

On this day, the application for 11.07 Writ of Habeas Corpus has been received and presented to the Court.

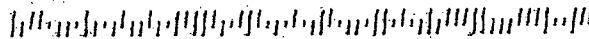
Deana Williamson, Clerk

*Received on or
About MARCH 27th 2025*

JESSE RANDOLPH CURRY JR
CLEMENTS UNIT - TDC # 939167
9601 SPUR 591
AMARILLO, TX 79107-9606

7H 16B

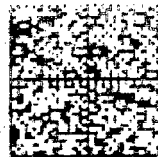
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CURRY, JESSE RANDOLPH Tr. Ct. No. 838340-B WR-53,885-08

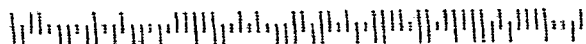
The Court has dismissed without written order this subsequent application for a writ of habeas corpus. TEX. CODE CRIM. PROC. Art. 11.07, Sec. 4(a)-(c).

Deana Williamson, Clerk

JESSE RANDOLPH CURRY JR
CLEMENTS UNIT - TDC # 939167
9601 SPUR 591
AMARILLO, TX 79107-9606

7H 16B

01ZUAAB 79107



APPENDIX (G)

United States Court Southern District of
Texas order [GRANTING] leave to proceed in forma pauperis

AND

ORDER [GRANTING] APPOINTMENT OF COUNSEL
DEFENDANT TO POOR TO EMPLOY COUNSEL, 337th District Court
OF HARRIS COUNTY

CAUSE NO.: 0838340

OFFENSE: Agg Aslt - Ser. Bod. Inj.

THE STATE OF TEXAS

337th DISTRICT COURT

VS.

OF

Curry, Jesse Randolph

HARRIS COUNTY, TEXAS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Curry, Jesse Randolph Defendant in the above styled and numbered cause, and respectfully petitions the Court to appoint counsel to represent him in said felony cause and would show to the Court that he is too poor to employ counsel, on appeal.

Defendant further states under oath that defendant is without funds, property or income; that because of his poverty he is unable to pay for a transcript of the evidence which is necessary to be filed with the court of Criminal Appeals of the State of Texas;

WHEREFORE, he prays that the Court appoint counsel to represent him on appeal and that the Court direct the Court Reporter to prepare a statement of facts; as provided by law; in question and answer form; for use on appeal.

x Jesse Randolph
DEFENDANT

SUBSCRIBED AND SWORN to before me, this

6 day of June

A.D., 2000

CHARLES BACARISE
District Clerk

JUN 06 2000

Time: Harris County Texas

By: Deputy

[Signature]
DEPUTY DISTRICT CLERK
337th DISTRICT COURT
HARRIS COUNTY, TEXAS

ORDER APPOINTING COUNSEL ON APPEAL

On this the 06 day of June, A.D., 192000, it appearing to the Court that the above named defendant has executed an affidavit stating that he is without counsel and is too poor to employ counsel, it is ordered that the attorney listed below is appointed to represent the above named defendant in said cause, on appeal.

JIM LEITNER
ATTORNEY

1314 TEXAS #1806
ADDRESS

HOUSTON, TX 77002
CITY STATE ZIP

(713) 237-8707
PHONE

12187900
Bar Number

ORDER TO PREPARE STATEMENT OF FACTS ON APPEAL

This the 06th day of June, A.D., 2000, after hearing testimony on the above affidavit and it appearing that the defendant is entitled to the relief prayed for, it is ORDERED that the Court Reporter of this Court prepare a statement of facts in question and answer form of the testimony in said cause. It is further ORDERED that the clerk of this Court mail a copy of the Order to the Court Reporter: Brenda Burleigh by certified mail, return receipt requested.

[Signature]
JUDGE PRESIDING
337th DISTRICT COURT
HARRIS COUNTY, TEXAS

221926
DISTRICT CLERK

000141

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS



20180622-128

Jesse Randolph Curry
939167 Mark Stiles Unit
3060 FM 3514
Beaumont, TX US 77705

CLERK OF COURT
P.O. BOX 61010
HOUSTON, TEXAS 77208
<http://www.txs.uscourts.gov>

Date: Friday, June 22, 2018
Case Number: 4:09-cv-02119
Document Number: 35 (2 pages)
Notice Number: 20180622-128
Notice: The attached order has been entered.

ENTERED

June 22, 2018

David J. Bradley, Clerk

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

JESSE RANDOLPH CURRY, JR.,
TDCJ #939167,

Petitioner,

v.

LORIE DAVIS, Director, Texas
Department of Criminal Justice -
Correctional Institutions Division,

Respondent.

§
§
§
§
§
§
§
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§
§

CIVIL ACTION NO. H-09-2119

APPEAL NO. 18-20354

**ORDER GRANTING LEAVE
TO PROCEED IN FORMA PAUPERS**

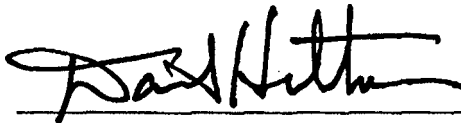
On September 3, 2010, the Court granted the respondent's motion for summary judgment and dismissed the federal habeas corpus petition filed by state inmate Jesse Randolph Curry, Jr. (TDCJ #939167). On May 7, 2018, the Court denied Curry's motion for leave to file a motion for relief from the final judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Curry has filed a notice of appeal from that decision (Docket Entry No. 28) and he requests leave to proceed *in forma pauperis* on appeal (Docket Entry No. 33). Curry has provided a certified copy of his inmate trust fund account statement in support of that request (Docket Entry No. 34).

Because the motion and supporting documentation demonstrate that Curry is unable to pay the \$505.00 appellate docketing fee, it is **ORDERED** that the motion

to proceed *in forma pauperis* on appeal (Docket Entry No. 33) is **GRANTED**.

The Clerk will provide a copy of this order to the parties.

SIGNED at Houston, Texas, on June 22, 2018.

A handwritten signature in black ink, appearing to read "David Hittner", written over a horizontal line.

DAVID HITTNER
SENIOR UNITED STATES DISTRICT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**