IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

JARED MORRISON, Petitioner,	§	
v.	§	Civil Action No. MO:15-CV-69-RAJ
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§	

RESPONDENT STEPHENS'S ANSWER WITH BRIEF IN SUPPORT

Petitioner Jared Morrison was properly convicted of sexual assault of a child and was sentenced to sixteen years' imprisonment by a Texas state court. This Court should dismiss with prejudice Morrison's petition because it is barred by the statute of limitations in part and because he fails to show the state court unreasonably denied his remaining claims, which are without merit.

JURISDICTION

Morrison seeks habeas corpus relief in this Court pursuant to 28 U.S.C. § 2254, which provides the Court with jurisdiction over the subject matter and the parties, as Morrison was convicted within this Court's jurisdiction. *See* 28 U.S.C. § 124(d)(7) (Midland County, Texas, is within the Midland-Odessa Division of the Western District of Texas).

PETITIONER'S ALLEGATIONS

Respondent William Stephens ("the Director") understands Morrison to allege the following grounds for relief:

(1) His revocation counsel was ineffective for:

a. Failing to properly advise him that a new trial was unlikely, thus causing him to reject a seven-year plea offer;
b. Failing to request a separate punishment hearing to allow character witnesses to testify;
c. Denying him the right to be heard after the hearing;
d. Failing to investigate the facts of the case and object to the Court of Appeals' interpretation of the unconstitutional sexual assault of a child statute.

(2) Courts are not applying the appropriate culpable mental state in Texas Penal Code § 22.011, in violation of the separation of powers doctrine.

(3) Texas Penal Code § 22.011 is unconstitutional, facially and as applied, because it violates the Equal Protection Clause with regard to married and unmarried persons.

(4) Texas Penal Code § 22.011 is unconstitutionally applied because it does not penalize persons who are within three years of age of the victim.

(5) Texas Penal Code § 22.011 is unconstitutional because it requires a culpable mental state but is being interpreted as strict liability.

(6) Texas Penal Code § 22.011 is unconstitutional because it is overbroad with regard to strict liability.

(7) Texas Penal Code § 22.011 is unconstitutionally vague and ambiguous in its culpable mental state.

(8) The trial court abused its discretion by:

a. Refusing to continue his revocation hearing so that he could file a post-conviction writ of habeas corpus; and

b. Failing to appoint counsel to effectively counsel him regarding a writ of habeas corpus.

(9) His appellate counsel was ineffective for failing to raise the trial court's denial of his motion for continuance on appeal.

(10) His original guilty plea counsel was ineffective for:

a. Failing to investigate the facts of the case and culpable mental state of Texas Penal Code § 22.011;
b. Failing to object to the Court of Appeals' interpretation of the culpable mental state in Texas Penal Code § 22.011; and
c. Failing to object to Texas Penal Code § 22.011 on the basis that it violates the Equal Protection Clause.

Fed. Writ Pet. at 6.1–7.8; Pet. Memo at 11–162.

GENERAL DENIAL

The Director denies each allegation of fact made by Morrison except those supported by the record and those specifically admitted herein.

STATEMENT OF THE CASE

Morrison challenges the Director's custody of him pursuant to the judgment and sentence of the 385th Judicial District Court of Midland County, Texas, in cause number CR29320. CR[1] at 151–67. Morrison was charged by indictment with sexual assault of a child. *Id.* at 3. On May 6, 2004, Morrison signed a written judicial confession and pleaded guilty to the offense. *Id.* at 27–

[1] "CR" refers to the Clerk's Record of pleadings and documents filed with the trial court in cause number 11-11-00191-CR. "SHCR" refers to the State Habeas Clerk's Record for Morrison's state writ application number 83,021-01. SHCR is preceded by the volume number and followed by the pertinent page number. Finally, "RR" refers to the reporter's record in Morrison's trial court proceeding, also preceded by the volume number and followed by the page numbers.

48. The trial court deferred adjudication of Morrison's guilt contingent upon his completing nine years of community supervision, pursuant to a plea agreement. *Id.* at 25–48.

After the State filed a motion to revoke his community supervision, Morrison was adjudicated guilty on April 28, 2011, and sentenced to sixteen years' imprisonment. CR at 151–67. The Texas Eleventh Court of Appeals affirmed Morrison's conviction on May 30, 2013. *Morrison v. State*, No. 11-11-00191-CR, 2013 WL 2407088, at *1 (Tex.App.—Eastland 2013) (pet. ref'd) (mem. op.). The Texas Court of Criminal Appeals refused Morrison's petition for discretionary review on October 23, 2013. *Morrison v. State*, No. PD-0767-13 (Tex. Crim. App. 2013).

Morrison signed a state application for writ of habeas corpus challenging his conviction on December 19, 2014; the trial court file-stamped the application December 30, 2014. I SHCR at 27, 1. The Texas Court of Criminal Appeals denied this application without written order on the findings of the trial court without a hearing on April 29, 2015. *Id.* at Action Taken Sheet. The instant federal petition, which also challenges his conviction, was filed on May 7, 2015, and this proceeding followed. Fed. Writ Pet. at 10.

STATE RECORDS

Records of Morrison's state trial, appellate, and habeas proceedings are being electronically filed simultaneously with this Answer.

EXHAUSTION / LIMITATIONS / SUCCESSIVE PETITION

Morrison's petition is not successive as defined by 28 U.S.C. § 2244(b) and is exhausted under § 2254(b), (c). Seven of his claims, however, are barred

by the statute of limitations under 28 U.S.C. § 2244(d). *See* Section I, *infra*. The Director reserves the right to raise exhaustion or any other procedural bar should Morrison or the Court disagree with the Director's construction of the claims presented or should Morrison attempt to add new claims or evidence.

ANSWER

I. Morrison's Claims Relating to His Original Guilty Plea Proceeding Are Barred by the Statute of Limitations (Claims 2, 3, 4, 5, 6, 7, and 10).

The record conclusively establishes that Morrison filed the instant federal petition outside of AEDPA's one-year limitation period with respect to seven of his grounds for relief; thus, such claims should be dismissed with prejudice as barred by the federal statute of limitations. AEDPA provides:

> (d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (West 2014).

A. Morrison's claims relating to his original guilty plea proceeding are barred because his one-year limitations period ended on June 5, 2005.

As a preliminary matter, Morrison's instant petition does not concern a constitutional right recognized by the Supreme Court within the last year and made retroactive to cases on collateral review. In addition, the record does not reflect that any unconstitutional "State action" impeded Morrison from filing for federal habeas corpus relief prior to the end of the limitations period. Further, the factual predicate date will not salvage his claims. Thus, the provisions of 28 U.S.C. § 2244(d)(1)(B), (C), and (D) do not apply to Morrison's claims. Instead, Morrison challenges his custodial conviction for sexual assault of a child in cause number CR29320. Fed. Writ. Pet. at 2. Therefore, his limitations period began on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

Here, in his second, third, fourth, fifth, sixth, seventh, and tenth claims, Morrison alleges that the statutory provision to which he pleaded guilty is unconstitutional for various reasons and that his original trial counsel was ineffective for failing to investigate or object to it on those bases. Fed. Writ Pet.

at 7.1–7.3, 7.6–7.7; Pet. Memo at 74–131, 153–54. These claims clearly attack his original plea of guilty that led to the order of deferred adjudication entered on May 6, 2004. CR at 37–48. An order of deferred adjudication is a "judgment" for AEDPA purposes. *Tharpe v. Thaler*, 628 F.3d 719, 724 (5th Cir. 2010) (holding that a deferred adjudication order and a judgment of conviction and sentence are two separate and distinct judgments); *see also Caldwell v. Dretke*, 429 F.3d 521, 528–29 (5th Cir. 2005) (holding that a deferred adjudication is a separate, final judgment for purposes of triggering AEDPA's limitations period). Therefore, Morrison's one-year AEDPA limitations period for raising claims related to the trial court's deferred adjudication order began to run on June 5, 2004, when this order became final upon the expiration of Morrison's thirty-day period for taking a direct appeal. *See* 28 U.S.C. § 2244(d)(1)(A); Tex. R. App. P. 26(2)(1)(1); *Tharpe*, 628 F.3d at 722 (finding that, under Texas law, if a judge defers an adjudication of guilt, and the defendant wishes to raise issues related to his guilty plea or deferred adjudication, he must do so on direct appeal from the deferred adjudication order immediately after it is imposed and may not wait until after he violates the terms of his probation and is adjudicated guilty); *see also Caldwell*, 429 F.3d at 530. Accordingly, with respect to Morrison's second, third, fourth, fifth, sixth, seventh, and tenth claims for relief, his federal limitations period expired on June 5, 2005, absent tolling.

A properly filed state writ application tolls the limitations period; however, Morrison's state application does not toll the limitations period because it was filed after the limitations period had ceased to operate. I SHCR

at 27 (state writ not filed until December 19, 2014); 28 U.S.C. § 2244(d)(2); *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (holding that petitioner's "state habeas application did not toll the limitation period under § 2244(d)(2) because it was not filed until *after* the period of limitation had expired" (emphasis in original)). Thus, Morrison's instant federal petition, filed on May 7, 2015, was over nine years and eleven months too late. Fed. Writ Pet. at 10. These claims should be dismissed with prejudice as time-barred. 28 U.S.C. § 2244(d).

B. Morrison is not entitled to equitable tolling.

Finally, Morrison has not alleged any facts that could support a finding that equitable tolling applies. *See Holland v. Florida*, 560 U.S. 631 (2010) (holding that AEDPA's statute of limitations is subject to equitable tolling). It is Morrison's burden to show he is entitled to equitable tolling. *See Phillips v. Donnelly*, 216 F.3d 508, 511 (5th. Cir. 2000). The Fifth Circuit has long held that equitable tolling is available only in "rare and exceptional circumstances." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1999); *Flores v. Quarterman*, 467 F.3d 484, 486 (5th Cir. 2006) (citing *Felder v. Johnson*, 204 F.3d 168, 170–71 (5th Cir. 2000) (citation omitted)). It principally applies where the plaintiff is "actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Flores*, 467 F.3d at 487 (quoting *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (citation omitted)). But, a "garden variety claim of excusable neglect" does not support equitable tolling. *Lookingbill v. Cockrell*, 293 F.3d 256, 264 (5th Cir. 2002) (citing *Rashidi v. Am. President Lines*, 96 F.3d 124, 128 (5th Cir. 1996)).

"Where [petitioner] could have filed his claim properly with even a modicum of due diligence, we find no compelling equities to justify tolling." *Rashidi*, 96 F.3d at 128; *see Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999); *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006) (same). To be entitled to equitable tolling, Morrison must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Morrison's case does not present the necessary "rare and exceptional circumstances" to merit such tolling. *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999).

Moreover, "[i]n order for equitable tolling to apply, the applicant must diligently pursue his § 2254 relief." *Coleman*, 184 F.3d at 403. Morrison has failed to diligently pursue such relief. "[E]quity is not intended for those who sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (citing *Covey v. Ark. River Co.*, 865 F.2d 660, 662 (5th Cir. 1989)). Here, Morrison has failed to diligently pursue his § 2254 relief. In fact, Morrison allowed more than ten years to lapse after his conviction became final before finally filing a state habeas application that would toll his federal limitations period. *See Stroman v. Thaler*, 603 F.3d 299, 302 (5th Cir. 2010) (finding, in considering whether petitioner was entitled to equitable tolling, the fact that petitioner's state habeas application was filed when only five months of his one-year limitation period remained to be among the indicia of the petitioner's lack of diligence); *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th. Cir. 2000) (finding that petitioner did not act with diligence by squandering the entire

one-year period); *Schmitt v. Zeller*, 2009 WL 4609850 at *2 (5th Cir. 2009) (unpublished) ("[S]quandering most of the year available under § 2244 is a factor in deciding whether equitable tolling should be allowed for problems that arise in later filing the federal petition."). Morrison provides no explanation for the delay. It cannot be said that Morrison was diligent in pursuing relief. Thus, his instant claims two, three, four, five, six, seven, and ten should be dismissed with prejudice as untimely.

II. AEDPA Standard of Review

Morrison's petition is governed by the standard of review provided by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2254; *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (holding AEDPA only applies to those noncapital habeas corpus cases filed after its effective date of April 24, 1996). Under 28 U.S.C. § 2254(d), a federal court may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the relevant constitutional claim by the state court (1) "'was contrary to' federal law then clearly established in the holdings of" the Supreme Court; or (2) "'involved an unreasonable application of'" clearly established Supreme Court precedent; or (3) "'was based on an unreasonable determination of the facts' in light of the record before the state court." *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011) (quoting (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 412 (2000)); 28 U.S.C. § 2254(d). Moreover, review of a state court's decision "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011).

The Supreme Court has explained that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court precedent, yet reaches an opposite result. *Williams*, 529 U.S. at 405–06. And a "run-of-the-mill" state court decision applying the correct Supreme Court rule to the facts of a particular case is to be reviewed under the "unreasonable application" clause. *Id.* at 406. Thus, a state court unreasonably applies Supreme Court precedent only if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407–09. In order to determine if the state court made an unreasonable application, a federal court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask *whether it is possible fairminded jurists could disagree that those arguments* or theories are inconsistent with the holding in a prior decision of this Court." *Richter*, 131 S. Ct. at 786 (emphasis added). Indeed, this is the "only question that matters under § 2254(d)(1)." *Id.* (citations omitted).

Thus, "a state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree'" on the correctness of the state court's decision. *Richter*, 131 S. Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)); *see also Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) (federal habeas relief is only merited where the state court's decision is both incorrect and objectively unreasonable, "whether or not [this Court] would reach the same conclusion"). Moreover,

"evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough*, 541 U.S. at 664. This is particularly true when reviewing a state court's application of *Strickland v. Washington*, 466 U.S. 668 (1984), which when analyzed in conjunction with § 2254(d), creates a difficult to surmount, "doubly" deferential assumption in favor of the state court denial. *Richter*, 131 S. Ct. at 786.

"It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 131 S. Ct. at 786.

> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is *no possibility fairminded jurists could disagree* that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a "guard against *extreme malfunctions* in the state criminal justice systems," *not a substitute for ordinary error correction through appeal*.

Id. (emphasis added) (internal citations omitted).

Moreover, it is the state court's "ultimate decision" that is to be tested for unreasonableness, not every jot of its reasoning. *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc); *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001); *see also Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002) (". . . we review only the state court's decision, not its reasoning or written opinion . . . ."). Indeed, state courts are presumed to know and follow the law. *Woodford*, 537 U.S. at 24. And, even where the state court fails to cite to applicable Supreme Court precedent or is unaware of such precedent, AEDPA's

deferential standard of review nevertheless applies "so long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent]." *Early v. Packer*, 537 U.S. 3, 8 (2002); *Richter*, 131 S. Ct. at 786.

If the Supreme Court has not "broken sufficient legal ground to establish [a] . . . constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar" under either the contrary to or unreasonable application standard. *Williams*, 529 U.S. at 381. Stated differently:

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was *an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement*.

Richter, 131 S. Ct. at 786–87 (emphasis added). A federal court must, thus, be wary of circumstances in which it must "extend a [legal] rationale" of the Supreme Court "before it can apply to the facts at hand . . ." because such a process suggests the proposed rule is not clearly established. *Yarborough*, 541 U.S. at 666.

AEDPA also provides that the state court's factual findings "shall be presumed to be correct" unless the petitioner meets "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001). This presumption is heightened where the trial judge and the state habeas judge are the same, as they are in this case.

Miller-El v. Johnson, 261 F.3d 445, 449 (5th. Cir. 2001) (citing *Clark v. Johnson*, 202 F.3d 760, 764, 766 (5th Cir. 2000)); II SHCR at 396 (indicating Honorable Robin M. Darr as presiding over Morrison's state habeas court proceedings); CR at 151 (showing that Judge Darr also presided over Morrison's revocation proceedings).

And except for the narrow exceptions contained in § 2254(e)(2), the evidence upon which a petitioner would challenge a state court fact-finding must have been presented to the state court. *Cullen*, 131 S. Ct. at 1398. Because a federal habeas court is prohibited from granting relief unless a decision was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," it follows that demonstrating the incorrectness of a state court fact finding based upon evidence not presented to the state court would be of no avail to a habeas petitioner. 28 U.S.C. § 2254(d)(2).

Finally, an evidentiary hearing is precluded unless: (1) the petitioner's claims rely on a new rule of constitutional law or a factual predicate previously undiscoverable through the exercise of due diligence; and (2) the petitioner establishes by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty. 28 U.S.C. § 2254(e)(2). A failure to meet this standard of "diligence" will bar a federal evidentiary hearing in the absence of a convincing claim of actual innocence that can only be established by newly discovered evidence. *(Michael) Williams v. Taylor*, 529 U.S. 420, 436 (2000). For example, a petitioner who does not present controverted, previously unresolved factual issues to the state court is

sufficient to constitute "failure" under the plain meaning of § 2254(e)(2). *Id.* at 433. However, § 2254(e)(2) has "force [only] where § 2254(d)(1) does not bar federal habeas relief." *Pinholster*, 131 S. Ct. at 1401. Accordingly, even if a petitioner can leap the § 2254(e)(2) hurdle, "evidence introduced in federal court has no bearing on § 2254(d)(1) review." *Id.* at 1400. And whatever discretion remains after *Pinholster* to hold an evidentiary hearing, it still remains appropriate to deny such a hearing if sufficient facts exist to make an informed decision on the merits. *Schriro v. Landrigan*, 550 U.S. 465, 474–75 (2007).

III. Morrison is Not Entitled to Relief on his Trial Court Error Claim (Claim 8).

In his eighth claim for relief, the Director understands Morrison to allege that the trial court's denial of his motion for continuance was error because it prevented him from a filing a post-conviction[2] state writ of habeas corpus challenging his original plea of guilty that led to the order of deferred adjudication. Fed. Writ Pet. at 7.3–7.4; Pet. Memo at 132–42. The Director also understands Morrison to allege that the trial court again committed error when it failed to appoint Morrison counsel to represent or counsel him on the post-conviction writ he wished to file. Fed. Writ Pet. at 7.4; Pet. Memo at 132–

[2] Morrison refers to the state habeas as a "pre-conviction" writ; however, because he seeks to challenge his order of deferred adjudication, such a writ would be properly considered post-conviction. *See* 3 RR 5–6 ("MR. ROGERS: . . . Essentially, Mr. Morrison's position on the Motion for Continuance, Judge, is that he sent a letter to you that he believes is a Writ of Habeas Corpus. . . . I believe that he wants this court to hear the postconviction writ prior to commencing with this hearing."); CR at 148 ("The Defendant has filed a Post Conviction Writ or has attempted to file a Post Conviction Writ challenging the original conviction.").

42. Because Morrison's allegations essentially challenge the state habeas process vis-à-vis the guise of the revocation court's alleged error, Morrison fails to state a viable claim for federal habeas relief.

Indeed, "[f]ederal habeas relief cannot be had 'absent the allegation by a petitioner that he or she has been deprived of some right secured to him or her by the United States Constitution or the laws of the United States." *Malchi v. Thaler*, 211 F.3d 953, 957 (5th Cir. 2000) (quoting *Orellana v. Kyle*, 65 F.3d 29, 31 (5th Cir. 1995)). There is no federal constitutional right to a continuance of a revocation hearing for the purpose of filing a state habeas application attacking an underlying plea of guilty. *Cf. Vail v. Procunier*, 747 F.2d 277, 277 (5th Cir. 1984) (stating that "infirmities in state habeas corpus proceedings do not state a claim for federal habeas corpus relief"); *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995) ("An attack on a state habeas proceeding does not entitle the petitioner to habeas relief in respect to his conviction, as it is an attack on a proceeding collateral to the detention and not the detention itself." (internal quotation marks omitted)). Nor is there a federal constitutional right to state habeas counsel. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1979) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions . . . and we decline to so hold today."). Thus, Morrison has failed to establish any valid basis for habeas review with respect to this claim, and it should be dismissed.

And, moreover, to the extent that Morrison's claims are liberally construed as alleging the violation of his federal due process rights, they fare no better. While the Supreme Court has held that there is no difference

between parole and probation revocations for purposes of the minimal due process afforded them, the Director cannot find, and Morrison has not produced, clear Supreme Court authority establishing that these due process safeguards extend to deferred adjudication revocation proceedings. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *see also Morrissey v. Brewer*, 408 U.S. 471, 485–89 (1972) (holding that a parolee is entitled to a minimum due process which includes a preliminary hearing and a final revocation hearing). That is, the Supreme Court noted in both *Gagnon* and *Morrissey* that neither parole nor probation, *for which a sentence has been previously imposed*, is part of a criminal prosecution, and thus, a defendant is not entitled to the full panoply of rights at revocation.[3] *Gagnon*, 411 U.S. at 782 n.3 (noting that "[d]espite the undoubted minor differences between probation and parole, the commentators have agreed that revocation of probation where sentence *has been imposed previously* is constitutionally indistinguishable from the revocation of parole"); *Morrissey*, 408 U.S. at 480 ("Parole arises *after the end of a criminal prosecution, including imposition of sentence*."). But, the Supreme Court has not yet addressed the issue in a pre-judgment case, such as this one, where there has not been a previously imposed sentence. *See* Tex. Code Crim.

[3] A defendant is instead entitled only to certain minimum safeguards in these contexts, which include: (1) written notice of the alleged parole violations; (2) disclosure of the evidence against him; (3) the opportunity to be heard personally and to present evidence; (4) the right to confront and cross-examine witnesses against him; (5) a hearing before a neutral and detached body; and (6) a written statement by the fact finders describing the evidence reviewed and the reasons for revoking parole. *Morrissey*, 408 U.S. at 489. To the extent such safeguards also apply in a deferred adjudication revocation proceeding, none of Morrison's claims allege that any of these limited due process rights were violated. *See* Fed. Writ Pet. at 7.3–7.4; Pet. Memo at 132–42.

Pro. art. 42.12 § 5 (a), (c) (West 2016) (stating that a judge may, after finding that the evidence substantiates a defendant's plea of guilty or nolo contendere, "defer further proceedings *without entering an adjudication of guilt*, and place the defendant on community supervision" and that, should the defendant successfully comply with the conditions of his release, the judge shall "dismiss the proceedings" and "discharge [the defendant]"); *see e.g. Williams v. Dretke*, Civil No. H-05-1735, 2006 WL 492404, at *10 (S.D.Tex. Feb. 28, 2006) (noting that the "precise level of due process required for the hearing and related proceedings on revocation of deferred adjudication probation is unclear"). Thus, because this issue is not settled by existing Supreme Court precedent, relief is precluded under both AEDPA and *Teague v. Lane*. 489 U.S. 288 (1989); *see also Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (when the Supreme Court has not provided a clear answer to a legal question, "it cannot be said that the state court unreasonbl[y] appli[ed] clearly established federal law") (quoting *Carey v. Musladin*, 549 U.S. 70, 77 (2006)); *Williams v. Taylor*, 529 U.S. 362, 380 (2000) ("It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.").

Further still, the state habeas court has already considered and rejected this claim. SHCR at Action Taken Sheet. The state habeas court specifically found that, while Morrison "had every right under Article 11.072 [Texas Code of Criminal Procedure] to file an application for postconviction writ of habeas corpus to attempt to set aside his deferred adjudication and community

supervision for the offense of sexual assault of a child entered on May 6, 2004," a prisoner "does not have a right to the appointment of counsel for the purposes of filing a postconviction writ of habeas corpus." II SHCR at 375–76. The court found that, nonetheless, Morrison was effectively counseled by both his original trial counsel and his revocation counsel with regard to the issues Morrison wished to raise in his habeas application. *Id.* at 377–78. More importantly, Morrison had "6 years, 11 months, and 22 days from the date of his deferred adjudication on May 6, 2004 to the date of the hearing on the State's motion to revoke community supervision on April 28, 2011 to file an application for postconviction writ of habeas corpus." *Id.* at 376. And, "[a] court is not required to continue a hearing on a motion to revoke community supervision to allow the defendant to file an application for postconviction writ of habeas corpus . . . to attack the underlying community supervision." *Id.* Thus, the court found that overruling Morrison's request for a continuance "did not prevent [Morrison] from exercising his constitutional right for Writ of Habeas Corpus in the trial court." *Id.* The state habeas court therefore found Morrison's claim to be without merit. *Id.* at 380.

Morrison has not shown that the state court's decision was an unreasonable application of clearly existing federal law as established by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). Therefore, Morrison has failed to overcome the "relitigation bar" as embodied in AEDPA, and his claim should be dismissed with prejudice.

IV. Morrison has Failed to Demonstrate that the State Habeas Court's Denial of His Ineffective Assistance of Revocation Counsel Claims Was Unreasonable as Required by AEDPA.

In his first ground for relief, Morrison alleges that his counsel was ineffective at his deferred adjudication revocation proceeding in five instances: a) failing to properly advise him that a new trial was unlikely, thus causing him to reject a seven-year plea offer; b) failing to request a separate punishment hearing to allow character witnesses to testify; c) denying him the right to be heard after the hearing; d) failing to investigate the facts of the case and object to the Court of Appeals' interpretation of the unconstitutional sexual assault of a child statute. Fed. Writ Pet. at 6.1, 7.5, 7.7–7.8; Pet. Memo. at 11–29, 143–49, 155–58. Morrison's claims should be dismissed with prejudice as *Teague* barred and alternatively because they lack merit.

The burden of proof in a habeas corpus proceeding attacking the effectiveness of counsel is on the petitioner, who must demonstrate both ineffectiveness and resultant prejudice. *Carson v. Collins*, 993 F.2d 461, 466 (5th Cir. 1993). However, while the Supreme Court has determined that there is a limited right to counsel in a parole or probation revocation context, *Gagnon*, 411 U.S. at 778, Morrison has failed to produce Supreme Court authority establishing the level of representation to which a probationer is entitled. The Director is certainly not ready to concede that a parolee or probationer is entitled to the same level of representation that a criminal defendant is entitled to receive under *Strickland v. Washington*, 466 U.S. 668 (1984). More importantly, the Supreme Court has not addressed this issue. *See Wright*, 552 U.S. at 126 (when the Supreme Court has not provided a clear

answer to a legal question, "it cannot be said that the state court unreasonbl[y] appli[ed] clearly established federal law") (quoting *Carey*, 549 U.S. at 77). Therefore, until Morrison produces Supreme Court authority as to the standard of review that is applied to an ineffectiveness claim in deferred adjudication revocation context, these allegations are *Teague*/AEDPA barred. *See Teague*, 489 U.S. at 288.

Alternatively, even if Morrison had a right to counsel, he fails to meet his burden to prove that his counsel was deficient and that he was prejudiced. *Strickland*, 466 U.S. at 668. In rejecting these claims on state habeas, the state habeas court made a credibility choice against any assertion that Morrison's revocation counsel was ineffective. SHCR at Action Taken Sheet. This finding is presumed correct in this forum and compels rejection of this claim. 28 U.S.C. § 2254(e); *Marshall v. Lonberger*, 459 U.S. 422, 433 (1983) (applying presumption of correctness to implicit finding against the defendant's credibility, where that finding was necessarily part of the court's rejection of the defendant's claim); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001) (presumption of correctness applies to both explicit and implicit findings necessary to support a state court's conclusions of mixed law and fact).

A. Morrison's revocation counsel properly advised him of the law governing his original guilty plea (Claim 1a).

Morrison first alleges that his revocation counsel was ineffective because he failed to properly advise him that a new trial on his original guilty plea would be unlikely. Fed. Writ Pet. at 6.1; Pet. Memo at 11–29. Morrison alleges that counsel specifically failed to advise him that Morrison's "interpretation of the plain language of Texas Penal Code 22.011, 6.02, 8.02, and 2.01" as

entitling him to a mistake of fact defense was "an incorrect legal rule" or that his March 2011 letters would be considered "improperly filed pleadings" that "would be futile." Fed. Writ Pet. at 6.1. Morrison alleges that such failure to advise him caused Morrison to reject a seven-year plea offer. Fed. Writ Pet. at 6.1; Pet. Memo at 11–29. This claim lacks merit and should be dismissed.

In *Lafler v. Cooper*, the Supreme Court held that in order to prove prejudice, a petitioner must show that "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." 132 S. Ct. 1376, 1385 (2012); *see also Missouri v. Frye*, 132 S. Ct. 1399 (2012) (holding that the Sixth Amendment also extends to plea offers that lapse due to ineffective assistance of counsel). Morrison has not met his burden of proof here. He has not shown that, but for counsel's failure to advise him on the likelihood of a new trial on his original guilty plea, that a court would have accepted a seven-year sentence for such a heinous crime.

Moreover, trial counsel David Rogers addressed Morrison's allegation that he did not adequately advise him in his affidavit before the state habeas court, stating:

> Shortly after receiving the appointment, I had a jail conference with Mr. Morrison. I conveyed the plea offer of 7 years. He rejected the offer. . . . I informed him I read the [March 5, 2011] letter and also told him that the judge had not read the letter and considered

> it an ex parte communication that she was not going to review. Morrison was convinced he received ineffective assistance of counsel at his initial plea because he was not advised of any mistake of fact defense. . . . I informed him mistake of fact was not a defense, and knowledge or lack of knowledge about her age was not a defense. However, due to his insistence that it was, I told him I would find some case law to prove his position was incorrect. Further, I told him that the judge was not considering the letter as any type of request for post conviction relief. I told him his request was improper and he needed to file a proper writ as set forth in the Texas Code of Criminal Procedure.

I SHCR at 273. Counsel then summarized the legal research he did as follows:

> On March 23, 2011, I researched the issues related to the victim's age. I downloaded *Artiga v. State No. 14-97-01418-CR (1999 Tex. App. Lexis 2878)*. This case held that aggravated assault does not require that the defendant knew the age of the child was under 14. I also downloaded *Johnson v. State 967 S.W.2d 848 (Tex. Crim. 1998)*. This case held the State was not required to show that a defendant knew the victim's age. Additionally, I downloaded *Vasquez v. State 622 S.W.2d 864 (Tex. Crim. 1981)*. This case stated ignorance or mistake of law was not a defense. I downloaded *Mateo v. State 935 S.W.2d 512 (Tex. App—Austin 1996)*. This case held that the State is not required to allege or prove that the defendant knew the complainant's age, and it was not improper to refuse a mistake of fact instruction.

Id. at 273–74. Moreover, Rogers stated that, on March 28, 2011, he received a letter from Morrison explicitly acknowledging that Rogers had advised him of his improper filing. *Id.* at 274. Morrison confirmed that he realized he should have filed a habeas corpus and that Rogers had told him he had found case law. *Id.* Rogers noted that Morrison however "incorrectly represented that such case law was helpful to his arguments," although at no point did Rogers "ever tell Mr. Morrison that the case law [he] had found would be helpful in overturning his conviction." *Id.* Rogers then stated that, several days before

trial, he again explained to Morrison that "he was incorrect in his belief this case law supported his position," that "mistake of fact was not a defense," that the "state did not have to prove he knew the victim's age," and that "he had not filed a proper writ." *Id.*

In rejecting Morrison's instant claim, the state habeas court made a credibility choice in favor of counsel and thus counsel's statements in his affidavit are presumptively correct facts under 28 U.S.C. §2254(e). *See* SHCR at Action Taken Sheet. The state habeas court specifically found that Rogers "clearly and correctly informed [Morrison] of the law applicable to [Morrison]'s offense of sexual assault of a child." II SHCR at 353. The state habeas court also found that Morrison's March 2011 "letter to the court did not constitute an Application for postconviction writ of habeas corpus under Article 11. 072 C.C.P." and that Rogers "did in fact counsel [Morrison] about his improper pleading to the court and informed [Morrison] that his attempted request for relief through the letter was futile." *Id.* 359–60.

The record clearly supports the state habeas court's ultimate determination that this claim is without merit. *Valdez*, 274 F.3d at 948 n.11. The evidence in the record contradicts Morrison's assertion that counsel failed to adequately advise him of the likelihood of a new trial on his original guilty plea based on Morrison's interpretation of the law. Morrison's version of events is not supported by anything beyond his own self-serving account of counsel's performance. Morrison has completely failed to prove that his attorney's representation was deficient or that, but for his attorney's actions, the outcome of trial would have been different. Nor has Morrison established that the state

court's decision was contrary to, or an unreasonable application of Supreme Court law with respect to his claim. Morrison is not entitled to relief on this ground because he cannot show "that the state court's ruling on the claim being presented in federal court [is] so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 130 S.Ct. at 786–87. Therefore, Morrison's claim does not merit federal habeas relief and should be dismissed with prejudice.

B. Morrison was not denied his right to be heard (Claim 1c).

Morrison next alleges that revocation counsel was ineffective for denying him the right to address the court on his own behalf after the revocation had ended. Fed. Writ Pet. at 7.5; Pet. Memo at 147–49. This claim also lacks merit.

Reasonable strategic decisions can never be a basis for constitutionally ineffective assistance of counsel. *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983) ("A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.") (citations omitted); *see also Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993) ("Given the almost infinite variety of possible trial techniques and tactics available to counsel, this Circuit is careful not to second guess legitimate strategic choices."). Courts will not find ineffective assistance of counsel merely because of a disagreement with counsel's trial strategy. *See Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. 1999) (citing *Green v. Johnson*, 116 F.3d 1115, 1122 (5th Cir. 1997)).

Here, Morrison's claim is merely a disagreement with counsel's strategy after-the-fact. The record shows that, after punishment had been pronounced, Morrison asked if he could speak to the court, and his counsel Rogers said no. 3 RR 65–66 ("THE COURT: I hereby sentence you, Mr. Morrison, to 16 years in the Texas Department of Criminal Justice Institutional Division for the second-degree felony offense of sexual assault of a child. . . . THE DEFENDANT: Can I say something? MR. ROGERS: No."). The record also shows, however, that the court then gave Morrison an opportunity to consult with counsel, after which Morrison did not renew his request. 3 RR 66 ("THE COURT: You can consult with your lawyer."); *see also* I SHCR at 275 (counsel stating that "after [their] consultation, Mr. Morrison did not renew his request to speak with the Court"). Rogers explained their consultation and his strategy as follows:

> I told Mr. Morrison that he could not speak because I surmised that what he would say would be unhelpful to his case at that particular time in the proceedings. . . . I was able to explain to him why he would not benefit from speaking or addressing the Court. During our consultation, Mr. Morrison told me he wanted to address the issues he had raised in his letter. I told Mr. Morrison that if he was simply going to address his issues from the letter and contend he was not guilty of the underlying offense that these representations and arguments would not benefit him in regards to lessening the sentence the Court has just assessed. After our consultation, Mr. Morrison followed my advice and did not request to speak to the Court again. Mr. Morrison knew that this was his final hearing; that the Court would decide whether to adjudicate him; and that if the Court adjudicated his guilt, the Court would then sentence him.

I SHCR at 276. Thus, despite having an opportunity to renew his request to speak to the court, Morrison did not do so. And, Morrison fails to meet his

burden to prove that counsel was not employing sound trial strategy when he suggested that speaking to the court would not be helpful to Morrison's case after the hearing had already finished. *West v. Johnson*, 92 F.3d 1385, 1400 (5th Cir. 1996). Morrison certainly does not demonstrate that his counsel was ineffective for not allowing him to speak or was in some way objectively unreasonable in his actions.

Moreover, the state habeas court has already rejected Morrison's instant claim. II SHCR at 385 (finding that Morrison's claim is "without merit"). Morrison has not established that the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d). Thus, Morrison's claim does not merit federal habeas relief and should be dismissed with prejudice.[4]

C. Counsel conducted a thorough investigation, and objections would have been futile (claim 1d).

Morrison additionally alleges that his counsel was ineffective for "failing to investigate Morrison's case, and to research the law and recognize that the

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[4] To the extent that Morrison's claim could be construed as alleging a violation of any other constitutional right afforded him during a deferred adjudication revocation proceeding, the Director notes that Morrison had every opportunity to call witnesses prior to the end of the proceeding and that Morrison did not make a request to speak to the court until after the punishment had been assessed and the proceeding had ended. *See* 3 RR 66; *see also* Section IV.D, *infra* (addressing Morrison's claim that counsel was ineffective for not calling witnesses during punishment). Morrison does not point to any Supreme Court authority that establishes that he had any such right after the proceedings were done. *See* Pet. Memo at 148 ("Morrison is not sure what Supreme Court case deals with the right for a defendant to address the court on his own behalf, or if there is one at all . . . .").

Court of Appeals' strict liability interpretation was predicated on pre-1983 law." Fed. Writ. Pet. at 7.7; Pet. Memo at 155–58. Morrison further alleges that counsel should have investigated and objected to "the unconstitutional overbroad and vagueness effects that the strict liability interpretation has generated." Fed. Writ. Pet. at 7.7; Pet. Memo at 155. Morrison claims that counsel "also failed to investigate and object to the unconstitutional equal protection violations that are inherent in the statute." Fed. Writ. Pet. at 7.7; Pet. Memo at 155. Thus, the Director understands Morrison to allege that his counsel was ineffective for failing to investigate and object to the law governing his underlying guilty plea. However, this claim lacks merit.

Counsel is not required to file frivolous motions or make frivolous objections. *Green v. Johnson*, 160 F.3d 1029, 1037; *McCoy v. Lynaugh*, 874 F.2d 954, 963 (5th Cir. 1989). It is settled that "failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness . . . ." *Green*, 160 F.3d at 1037 (citing *Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995)); *accord McCoy*, 874 F.2d at 963. Further, the Supreme Court has noted that a petition that presents "conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

Additionally, to render effective assistance, the Sixth Amendment requires counsel "to make a reasonable investigation of defendant's case or to make a reasonable decision that a particular investigation is unnecessary." *Ransom v. Johnson*, 126 F.3d 716, 723 (5th Cir. 1997) (citing *Strickland*, 466

U.S. at 691); *see James Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985); *Martin v. Maggio*, 711 F.2d 1273, 1280 (5th Cir. 1983). The Supreme Court, however, has observed that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690–91. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*; *see also Bell v. Lynaugh*, 828 F.2d 1085, 1088 (5th Cir. 1987); *Lowenfield v. Phelps*, 817 F.2d 285, 290 (5th Cir. 1987).

The reasonableness of an investigation depends in large part on the information supplied by the defendant. *See Ransom*, 126 F.3d at 123; *McCoy v. Lynaugh*, 874 F.2d 954, 964 (5th Cir. 1989); *Mattheson v. King*, 751 F.2d 1432, 1440 (5th Cir. 1985) (in denying ineffective-assistance claim based on failure to investigate and pursue insanity defense, court noted defendant's failure to tell counsel that he either was presently insane or so intoxicated at time of offense as to be incapable of forming requisite intent). At a minimum, counsel should interview potential witnesses and independently investigate the facts and circumstances of the case, but defense counsel "is not required 'to investigate everyone whose name happens to be mentioned by the defendant.'" *Schwander v. Blackburn*, 750 F.2d 494, 500 (5th Cir. 1985) (quoting *Cockrell*, 720 F.2d at 1428); *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994).

As a preliminary matter, Morrison completely fails to specify at what point his revocation counsel should have raised objections to the criminal statute that led to Morrison's original plea of guilty and original deferred

adjudication order. *See* Fed. Writ Pet. at 7.7; Pet. Memo at 155–58. Nor does Morrison provide specific facts or law to support his claim that such investigation or objections would have changed the outcome of his *revocation* proceeding. A mere conclusory allegation does not raise a constitutional issue in a habeas proceeding. *See Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983) (citing *Schlang*, 691 F.2d at 798).

Moreover, the record plainly contradicts Morrison's assertion that his revocation counsel failed to investigate the Texas statute pursuant to which Morrison originally pleaded guilty. Indeed, as discussed in Section IV.A, *supra*, counsel thoroughly investigated Morrison's allegations that the Court of Appeals had improperly interpreted Texas Penal Code § 22.011. *Id.*; *see also* I SHCR at 273–74 (discussing the case law that held that mistake of fact was not a defense and that the state did not have to prove the victim's age). In rejecting Morrison's instant allegation, the state habeas court summarized the applicable case law as follows:

> The law is clear. Sexual assault of a child under Section 22.011 Penal Code is a strict liability offense and the actor's knowledge that the child was under the age of 17 is not an element of the offense, and the statute does not require that the State allege or prove that the action knew that the child was under the age of 17 at the time of the commission of the offense. The defense of mistake of fact under Section 8.02 Penal Code that the actor formed a reasonable but mistaken belief that the child was 17 years of age or older at the time of the offense does not apply to sexual offenses against children. The offense of sexual assault of a child under Section 22.011 Penal Code is not overbroad or vague in violation of the Constitution of the United States or the State of Texas and does not violate equal protection of the law under the United States Constitution or the Constitution of the State of Texas

II SHCR at 391–92. The state habeas court then correctly concluded that "[c]ounsel for the defense is not required to make meritless assaults on the law." *Id.* at 392; *Green*, 160 F.3d at 1037. Morrison does not establish that the state court's decision was contrary to, or an unreasonable application of Supreme Court law with respect to his claims. Therefore, Morrison's claim does not merit federal habeas relief and should be dismissed with prejudice.

D. A separate punishment hearing was unnecessary (claim 1b).

Morrison finally alleges that his counsel was ineffective because he failed to request a separate punishment hearing to allow character witnesses to testify. Fed. Writ Pet. 7.5; Pet. Memo at 143–46. Morrison specifically alleges that he wanted to call numerous witnesses, including Jana Morrison, Kim Rogers, Kim Garcia, Ross Bush, Jerry Moralas, and Jim O'Bannion, to testify at punishment as to his good character. Pet. Memo at 143–44. However, this claim is without merit and should be dismissed with prejudice.

Where the only evidence of a missing witness's testimony is from the defendant, a reviewing federal court should view a claim of ineffective assistance with great caution. *See Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986) (citing *Schwander v. Blackburn*, 750 F.2d 494, 500 (5th Cir. 1985)); *see also U.S. v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983) (Cockrell failed to produce the affidavit of the uncalled witness). Indeed, such complaints are not favored because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative. *See Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009); *Boyd v. Estelle*, 661 F.2d 388, 390 (5th Cir. 1981) (quoting *Buckelew v.*

U.S., 575 F.2d 515, 521 (5th Cir. 1978)). Hypothetical or theoretical testimony will not justify the issuance of a writ. *See Martin v. McCotter*, 796 F.2d 813, 819 (5th Cir. 1986) (quoting *Larsen v. Maggio*, 736 F.2d 215, 218 (5th Cir. 1984)). Further, unsupported claims should be dismissed as conclusory allegations. *See Ross*, 694 F.2d at 1011. Morrison's claim of ineffective assistance of counsel must fail because Morrison fails to provide any evidence to support his claim or to overcome the presumption that the challenged action might be considered sound trial strategy, and it is thus conclusory.

Additionally, for a petitioner to demonstrate the required *Strickland* prejudice, the petitioner must show not only that the witness's testimony would have been favorable, but also that the witness would have testified at trial. *See Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) (citing *Boyd v. Estelle*, 661 F.2d 388, 390 (5th Cir. 1981)); *Gomez v. McKaskle*, 734 F.2d 1107, 1109–10 (5th Cir. 1984). Morrison is required to produce an affidavit, or similar evidentiary support, from the uncalled witnesses. *See U.S. v. Cockrell*, 720 F.2d at 1427; *Sayre v. Anderson*, 238 F.3d 631, 636 (5th Cir. 2001). And, where a claim of ineffective assistance involves a non-capital sentencing proceeding, the Fifth Circuit has held that prejudice requires a showing of a reasonable probability that, absent counsel's unprofessional errors, the non-capital sentence would have been "significantly less harsh." *Daniel v. Cockrell*, 283 F.3d 697,706 (5th Cir. 2002) (*citing Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993)); *see also United States v. Grammas*, 376 F.3d 433, 438 n.4 (5th Cir. 2004) (reaffirming the *Spriggs* test for cases involving discretionary state sentencing regimes after adopting the "any amount of jail time" test from

Glover v. United States, 531 U.S. 198 (2001) in cases involving the federal guidelines). In making this determination, the court should consider four factors: 1) the actual amount of the sentence imposed on the defendant by the judge; 2) the minimum and maximum sentences possible; 3) the relative placement of the sentence actually imposed within that range; and 4) the various relevant mitigating and aggravating factors that were properly considered by the sentencer. *Spriggs*, 993 F.2d at 88–89. A showing of significant prejudice is required. *Id.* at 88, n.4.

Here, while Morrison does allege that the testimony of the alleged missing witnesses might have been favorable to his sentence, Morrison completely fails to produce any affidavits from any of the witnesses and is now barred from producing evidentiary support that he did not present to the state courts. *Williams v. Taylor*, 120 S.Ct. 1479, 1491–92 (2000) (AEDPA barred further development of Brady claim where petitioner had notice of the claim). The failure to produce affidavits (or similar evidentiary support) from the uncalled witnesses is fatal to the claim of ineffective assistance. *U.S. v. Cockrell*, 720 F.2d at 1427 (complaint of uncalled witnesses failed where petitioner failed to present affidavits from the missing witnesses); *Sayre*, 238 F.3d at 636 (same).

Moreover, Rogers also addressed this claim in his affidavit before the state habeas court. I SHCR at 275–76. Specifically, Rogers acknowledged that after adjudicating Morrison's guilt, the trial court "asked if there was any further evidence prior to assessing Mr. Morrison's punishment." *Id.* at 275; 3 RR 64 ("I am going to adjudicate your guilt. And I hereby find you guilty of

sexual assault of a child, as indicated on the judgment dated the 17th of—17th of May, 2005. Is there any further evidence for punishment purposes? MR. ROGERS: No, your Honor."). However, Rogers stated that Morrison never provided him "with the names of any witnesses to be called at the hearing." I SHCR at 276. Indeed, Rogers noted that Morrison had sent him a letter that "indicated he was not sure who could or could not help his case." *Id.* And, although Rogers discussed the strategy of the hearing with Morrison, "at no point did Mr. Morrison provide [him] with the names of any potential witnesses or ask [him] to contact anyone regarding the case." *Id.*

Based on counsel's statements, the state habeas court concluded that Morrison's complaint lacked merit. II SHCR at 382. Thus, Morrison fails to prove that, but for counsel's alleged deficiencies, his sentence would have been significantly less harsh. Thus, Morrison's ineffective assistance of counsel claim for failure to call witnesses at a separate punishment hearing should be dismissed with prejudice.

V. Morrison Received Effective Assistance of Appellate Counsel (Claim 10).

In his final claim for relief, Morrison alleges that his appellate counsel, David Rogers, was ineffective because he "did not raise on appeal the trial court's err in overruling his Motion for Continuance." Fed. Writ Pet. at 7.6; Pet. Memo at 150–52. However, Morrison fails to meet his burden to prove that his appellate counsel was ineffective, and his claim should be dismissed with prejudice.

The *Strickland* standard set forth above applies to claims of appellate counsel error. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). In considering the

deficient performance prong, an attorney's decision not to pursue a certain claim on appeal after considering the claim and believing it to be without merit falls within the "wide range of professionally competent assistance" demanded by *Strickland*. *Smith v. Murray*, 477 U.S. 527, 536 (1986). Indeed, the process of "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Id.* (quoting *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983)); *see also Robbins*, 528 U.S. at 288 (noting that, notwithstanding *Jones v. Barnes*, "it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent."); *United States v. Williamson*, 183 F.3d 458, 462–63, n.7 (5th Cir. 1999) (stating that because "factual differences will make authority easily distinguishable, whether persuasively or not . . . it is not necessarily providing ineffective assistance of counsel to fail to construct an argument that may or may not succeed.").

Prejudice in the context of appellate counsel error requires the petitioner to demonstrate a reasonable probability that he would have prevailed on appeal, *Robbins*, 528 U.S. at 285–86, and the prejudice inquiry is determined under the current state of the law, as opposed to the state of law in effect at the time of the underlying state court direct appeal. *Briseno v. Cockrell*, 274 F.3d 204, 211 (5th Cir. 2001); *Westley v. Johnson*, 83 F.3d 714, 723 (5th Cir. 1996).

In the instant case, Morrison alleges that his appellate counsel was ineffective because he failed to raise the trial court's denial of his motion for

continuance on appeal. Fed. Writ Pet. at 7.6; Pet. Memo at 150–51. However, the record shows that counsel did raise the trial court's denial of a continuance in his motion for new trial and motion in arrest of judgment. CR at 170. Additionally, counsel addressed his decision not to further pursue review of the trial court's denial in his appellate brief as follows:

> I did not raise the denial of the Motion for Continuance in Mr. Morrison's appeal. I did not believe it was a valid point of error. I could not show harm. Mr. Morrison did not have a proper writ before the Court, and even if he did have a proper writ before the Court, Mr. Morrison's legal basis was incorrect. I reviewed the file and transcript from an appellate standpoint and determined that my initial analysis was correct and that the denial of the motion was not an abuse of discretion. Thus, I did not include the denial of the motion for continuance as an issue on appeal.

I SHCR at 276. Moreover, the state court has already found this claim to be without merit. II SHCR at 387. And, the state habeas court's rejection of Morrison's separate and substantive claim similarly compels rejection of this claim of attorney error. *See* Section III, *supra*; SHCR at Action Taken Sheet, 376 (finding that the court was not required to continue a hearing on a motion to revoke community supervision to allow a defendant to file a postconviction writ of habeas corpus challenging the underlying guilty plea); *see Cantu v. Collins*, 967 F.2d 1006, 1017 (5th Cir. 1992) (holding that where issues petitioner faults appellate counsel for failing to raise on direct appeal were rejected by state and federal habeas courts, claim of appellate attorney error was "frivolous").

Thus, Morrison has not shown that the state court's decision regarding his claims was contrary to, or involved an unreasonable application of, clearly

established federal law as determined by the Supreme Court. Nor has he shown that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d). Therefore, Morrison's claim does not merit federal habeas corpus relief and should be dismissed with prejudice.

CONCLUSION

For the above reasons the Director respectfully requests this Court dismiss with prejudice Morrison's. The Director also respectfully requests this Court deny Morrison a certificate of appealability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing pleading was served by placing same in the United States mail, postage prepaid, on this the 20th day of January, 2016, addressed to:

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