No. 20-7638

IN THE

SUPREME COURT OF THE UNITED STATES

CESAR GOMEZ — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, DIRECTOR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CESAR GOMEZ, TDCJ#01839985
(Your Name)

2665 PRISON RD 1
(Address)

LOVELADY, TEXAS 75851
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1) In adopting the 12th Court of Appeals opinion, who used the State's 'harm analysis' standard, did the U.S.Dist.Court apply the harmless-error review in an "objectively unreasonable" manner?

2) Can Gomez' indictment be Constitutionally amended allowing the crime to be graded higher without the Grand Jury doing the broadening or amending?

3) If erroneously admitted evidence was not 'helpful' but in fact 'harmful' and prejudiced Gomez, was his Constitutional rights to due process and fair trial violated?

4) Was Gomez' trial fundamentally unfair due to prosecutorial misconduct during opening statement?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Gomez v. State of Texas,459 S.W.3d 651(Tex.App.-Tyler 2015,pet.ref'd) Judgement entered January 21,2015.

Gomez v. State of Texas, No.PD-0138-15(Tex.Crim.App.2015) Judgement entered June 17,2015.

Gomez v. Texas,136 S.Ct.1201(2016)Judgement entered April 1,2019.

Ex parte Gomez, WR-87,143-01(Tex.Crim.App.2017)Judgement entered October 25,2017.

Gomez v. Lumpkin,2019 U.S.Dist.LEXIS 101644(E.D.Tyler Div.) Judgement entered June 17,2019.
*Motion to Alter or Amend, 'Denied' September 29,2019.

Gomez V. Lumpkin,No.19-40916 (5th Cir.2020) Judgement entered October 7, 2020

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STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at No.19-40916 (5thCir.2020); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[X] reported at 2019 U.S.Dist.LEXIS 101644; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix E to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the 12th Court of Appeals court appears at Appendix F to the petition and is

[x] reported at 459 S.W.3d 651 (Tyler,Texas 2015); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 7, 2020.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was 10/25/2017. A copy of that decision appears at Appendix E.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S.CONST.,AMEND.V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shal private property be taken for public use without just compensation.

U.S.CONST.,AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.CONST.,AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254(d)

(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

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Texas Penal Code §21.02 (b)(1) and (b)(2)

(b) A person commits an offense if:

(1) During a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and

(2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense.

Texas Penal Code §22.021(a)(B)(ii)

(a) A person commits an offense:

(B) regardless of whether the person knows the age of the child at the time of the offense, intentionally or knowingly:

(ii) causes the penetration of the mouth of a child by the sexual organ of the actor

STATEMENT OF THE CASE

Cesar Gomez ("Gomez") was arrested on May 3,2012 and charged with continuous sexual abuse of a child under 14. Gomez went to trial on February 4,2013 and on February 6,2013 a jury of his peers found him guilty as charged in the indictment and assessed life in prison without the possibility of parole. Gomez was represented by trial counsel Donald S. Davidson ("Davidson").

On January 21,2015 in Cause No.12-13-0050-CR (see 459 S.W.3d 651 (Tex. App.-Tyler 2015,pet.ref'd))the Court of Appeals for the Twelfth District of Texas at Tyler ("12thCOA") 'affirmed' Gomez' conviction. Gomez then filed a Petition for Discretionary Review ("PDR") on April 17,2015, that the Texas Court of Criminal Appeals ("TCCA") 'refused' on June 17, 2015. Gomez v. State,No.PD-0138-15(Tex.Crim.App.2015) Gomez filed a writ of certiorari that was 'denied' in Gomez v. Texas,136 S.Ct.1201(2016).

On October 7,2016 Gomez filed a state application for writ of habeas corpus that was in turn 'denied' without written order on October 25,2017. Ex parte Gomez, WR-87,143-01 (Tex.Crim.App.2017). Gomez timely filed his 2254 on February 26,2018. Gomez' 2254 was 'dismissed' with prejudice on June 17,2019. 2019 U.S. Dist. LEXIS 101644 (U.S. District Court, Eastern District,Tyler Division). Gomez timely filed a motion to alter judgment on July 11,2019 that was 'denied' on September 29,2019. A Notice of Appeal was filed on time along with a motion to Proceed In Forma Pauperis on October 28,2019. Gomez' motion to proceed In Forma Pauperis was 'denied' by the U.S.Dist.Court("USDC"). On January 27,2020 Gomez filed his Certificate of Appealability ("COA") in the 5th Circuit, No.19-40916. The 5th Circuit. The COA was ultimately 'denied' on October 07, 2020. Gomez now files this Writ of Certiorari.

Gomez was indicted for the offense of continuous sexual assault of child younger than 14 years, a first-degree felony that is punishable by confinement in Texas Department of Criminal Justice ("TDCJ-CID") from 25 to 99 years or life, with no eligibility for parole. Texas Penal Code ("TPC") §§12.32,21.02.

Complainant ("FG") first reported the alleged offense to a school nurse on March 5,2012. According to the indictment, which was filed on April 19,2012, Gomez committed the offense during a period that was 30

or more days of duration from on or about August 15,2017 through November 21, 2011. Complainant, who was born on November 22,1997 turned 14 years old on November 22,2011.

Several months before trial, the State filed its Motion to Amend and Interlineate, asking the Court to allow amendment of the indictment so that the indictment would allege the date of offense from September 1,2007 through November 21,2011. The motion was 'granted' on February 1, 2013 without objection.

During a February 4,2013 pre-trial hearing, the State urged its theory of admissibility for evidence concerning sexual conduct that pre-dated September 1,2007 and post-dated November 21,2011.With respect to conduct before September 1,2007, the State would offer complainant's testimony about events during her second grade year, which began in the fall of 2006, including her testimony that Gomez touched her private part with his private part and put his private part inside complainant's private part.With respect to conduct after November 21,2011,the State would offer complainant's testimony that Gomez would "put [his] private part in your private part" from the second grade (2006) "until March 1st,2012."

The jury charge instructed the jury that Defendant was charged with Continuous Sexual Assault from Septemeber 1,2007 through November 21, 2011. The charge explained that the offense could only be committed against a child under age 14. The charge further instructed that the members of the jury were not required to agree unanimously "on the exact date" when the predicate offenses were committed. In the application paragraph, the trial court instructed the jury to consider conduct "from on or about September 1,2007 through November 21,2011." The charge states in relevant (CR 85-86)[2]:

> "You are instructed that the State is not bound by the specific date which the offense,if any, is alleged in the indictment to have been committed, but that a conviction may be had upon proof that the offense,if any, was committed at any time prior to the filing of the indictment which is within the period of limitations. There is no limitation period to the offense of continuous sexual abuse of a child."

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[2] Clerk's Record will be "CR" followed by page number (CR 85). Reporter's Record will be reflected by volume-RR-page number- line reference i.g.,(4RR27,1-5). Exhibits will berrefered to as "EX" followed by the exhibit letter(s).i.g.,EX"A".

The State explained to the jury (13RR120) that "when you get to September the 1st of 2007, that's when the statute was enacted," and the State acknowledged that complainant was only under 14 years old until November 21,2011.Still, the State argued in part (13RR119,19-22):

> The evidence shows that he began preying on her innocence in 2006, okay? It never ended. It never ended until March of 2012. She told--she gave her outcry on March the 5th of 2012.(13RR120,4-6)(MR.PARRISH) he committed the offense of aggravated sexual assault of a child from 2006 to 2012 hundreds and hundreds and hundreds of times on her.(13RR 121,4-8) So you know from her testimony that he's been preying on her since 2006 twice a week, twice a week from 2006, as a little-bitty second grader, as a little-bitty second grader.2007, he's still at it.(13RR121,18-19)So he was sexually penetrating her with his penis with his fingers, from 2006 to 2012. Now,why stop at November the 21st 2011?

Pursuant to the face of the verdict form, the jury found Gomez "guilty of continuous sexual assault of child, as charged in the indictment." The original indictment alleged that Gomez committed the offense beginning on August 15,2007.

The verdict form did not reference the allegation that the offense did not begin until September 1,2007. While the indictment as ordered amended or interlineated may have been read to the jury, Gomez' review of the Clerk's record does not indicate that any amended or physically-interlineated indictment was filed.

According to the written judgement, the Court construed the jury's verdict as indicating the "Date of Offense" of "8/15/07."(CR102). Thus, considering only the face of the written judgement,the Court concluded that the jury found that the offense transpired on or about August 15, 2007.

Next,,the State admitted photographs during punishment showing FG's mother/Gomez' wife performing oral sex for Petitioner. The State did not request for non-pornographic photographs to be taken. The pornography had no relevance because it was not 'helpful' to the jury in its normative function and was unduly prejudicial. Its use appeared to be punitive.

During the sentencing phase Parrish offered into evidence a photo of Gomez' wife performing fellation on him. Parrish tells the jury "and that's what the little girl had to look at for six years."(12th COA Op @ 2& 3).The State moved to enter Exhibits 84 & 85. At the bench on record the following pertinent testimony is had (13RR164).Defense counsel

clearly makes an objection:

> MR.DAVIDSON: Judge, I'm going to object. I don't know that they're relevant and I think they're more prejudicial than probative. THE COURT: Okay. Let me see. MR.PARRISH: They're his penis, and that's what that little girl had to look at for six years. THE COURT: Is that his wife? MR.PARRISH: Yes. And that's what that little girl had to look at-- THE COURT: What? MR.PARRISH: That's what that little girl had to look at for six years. THE COURT: Okay. What's your objection? You've got relevancy. Anything else? MR.DAVIDSON: Prejudice. That's all. Any you know, quite frankly, I mean, I'm going to call her as a witness. THE COURT: Going to call who as a witness? MR.DAVIDSON: The wife.

These pictures were admitted to inflame the minds of the jury, they were not helpful nor relevant. The photographs depicted lawful acts. The use of State's Exhibits 84 & 85 produced a "substantial and injurious effect or influence" on the jury in determining the verdict.

Gomez was also prejudiced by the prosecutor's misconduct during the State's opening statement and misrepresenting to the jury that Gomez had somehow 'encrypted' his security systems hard drive, to hide something and also failing to disclose material evidence favorable to one of his defenses. Here is what assistant district attorney Parrish ("Parrish") tells the jury:

> (12RR39,8-9): This is my opportunity to talk to you about what the evidence is going to show in this case.(12RR49,2-7) The DVR equipment was collected, and I'll tell you right now that the Tyler Police Department did everything they could to obtain any typeof recordable information that was on this equipment. Nobody can do it. It was encrypted and nobody could pull anything off of it. But it was there for some reason.

This opening statement was misleading and false, speculative and conclusory. There was no evidence of the hard drive being 'encrypted,' and without that, the argument was improper.

REASONS FOR GRANTING THE PETITION

Q: In adopting the 12th COA opinion, who used the State's 'harm analysis' standard, did the USDC apply the harmless-error review in an "objectively unreasonable" manner?

United States Magistrate Judge Honorable Judge John D. Love ("Hon. Love") states in his Report and Recommendation (Rep.Rec.)(Rep.Rec@9):

> "A liberal reading of his petition shows that Gomez alleges that the charge allowed the jury to convict him based on offenses committed outside the time frame permitted by the statute. Gomez raised this claim on direct appeal, and the appellate court issued the last reasoned opinion on this issue, which this Court reviews to determine whether the denial of this claim was contrary to federal law or an unreasonable application thereof. See Yist v. Nunnemaker,501 U.S.797, 803(1991)."

The 12th COA "last reasoned opinion" stated "This is an erroneous instruction..."(pg.7) the instruction:

> "You are instructed that the State is not bound by the specific date which the offense, if any, is alleged in the indictment to have been committed, but that a conviction may be had upon proof that the offense, if any, was committed at any time prior to the filing of the indictment which is within the period of limitations. There is no limitation period to the offense of continuous sexual abuse of a child."

The 12th COA went on to state (pg.7):

> "Because Appellant did not object to this instruction, we apple the "egregious harm" standard wherein reversal is required only if the charge error was "so egregious and created such harm that the defendant has not had a fair and impartial trial." Barrious v. State, 283 S.W.3d 348,350(Tex.Crim.App.2009);Almanza,686S.W.2d at 171."

Here Gomez argues that an objection was not required and the State's harm analysis was unreasonably applied. Gomez will briefly explain. When jury charge error involves failure to submit an instruction concerning the law applicable to the case, a defendant is not required to make an objection or request to have the instruction included in the jury charge. Tex.Code Crim.Proc.("TCCP")art.36.14; Taylor v. State,332 S.W.3d 483,493(Tex.Crim.App.2011).

Gomez persistently raised concerns, objected on relevancy and undue prejudice grounds before and during trial and obtained a running objection and oral and written instructions concerning the limitations on the use of testimony about the offense conduct outside of the time-frame alleged in the amended indictment.(CR85,11RR141-47,149,153-154, 157-58,160-161,164-67;12RR 17-18,79-82,90-97;13RR 95-96,104,115).

Gomez also referred to his Motion to Quash and Exceptions to Substance of the Indictment during hearings outside of the presence of the jury. (CRS2;2RR5-6). Gomez' motion asserted that,"under continuous sexual abuse of a child, you have to be under the age of 14-."(2RR 5;11RR 168-172;CRS2). Gomez referenced his motion to quash in connection with notice and the substantive issues about the use of irrelevant and prejudicial evidence about conduct that was outside of the timeframe corresponding to the offense conduct.(11RR 155-56,159-176).

Clearly Gomez objected specifically and covered all available remedies. Nevertheless, the 12th COA opined there was no "egregious harm" and there was no objection. Hon.Love adopted this finding and specifically stated "...,which this Court reviews to determine whether the denial of this claim was contrary to federal law or an unreasonable application thereof. See Yist v. Nunnemaker,501 U.S.797,803(1991)." Gomez will show this is contrary to federal law and that Hon.Love applied the incorrect standard in an objectively unreasonable manner.

When it comes to the order in which a federal court addresses the merits and the section 2254 (d) determination, this Supreme Court has made clear that "AEDPA does not require a federal habeas court to adopt anycone methodology." Lockyer v. Andrade,538 U.S.63,71(2003). The Court's opinion applying AEDPA's appropriate sequence of decision-making is to analyze the merits and thereafter address the question of whether relief is warranted under section 2254 (d). Themerits analysis apparently includes application of thesstandard developed in Brecht v. Abrahamson,507 UYS.619(1993) for gauging "harmless error" in federal habeas corpus proceedings.

Supreme Court law requires the USDC to use the Brecht standard not the state's 'harm analysis' cited in Barrious v State,283 S.W.3d 348, 350(Tex.Crim.App.2009). Clearly Hon.Love did not reasonably apply the correct standard let alone in an objectively reasonable manner. The idea that the harmlessness of constitutional error is a federal question was enlarged by the Court when it denominated harmlessness a "decision..of federal law." Rushen v. Spain,464 U.S.114,120(1983).

An error may be deemed harmless, if the reviewing court finds that "the error did not influence the jury, or had but very slight effect" (Kotteakos v. United State,328U.S.750(1946)) and that "the judgement was not substantially swayed by the error."Id.at 765. Or, to use the

phrase the Brecht Court most frequently extracted from Kotteakos, "the standard for determining whether habeas relief must be granted is whether... the error 'had substantial and injurious effect or influence in determining the jury's verdict." Brecht,507 U.S.@623. When "the matter is so evenly balanced that [the federal judge] feels himself in virtual equipose as to the harmessness of the error," the court should find that the error is not harmless and rule in favor of the petitioner. O'neal v. McAninch,513 U.S.432,435(1995).

To justify the newly drawn distinction between the harmless error rule that applies on direct appeal and the different one that applies in habeas corpus the Brecht majority pointed to "the State's interest in the finality of convictions that have survived direct review within the State court system" and concerns of "comity and federalism."Brecht,507 U.S.@635.Accord Calderon v. Coleman,525 U.S.141,145-47(1998)(per curiam).

Because the Brecht majority apparently premised these justifications on an assumption that a finding of harmlessness by the state courts under the more stringent Chapman rule always will preced habeas corpus review of the harmlessness question under the less stringent Brecht rule, the Brecht opinion appeared to leave open the possibility that Brecht would be restricted to cases in which the State courts in fact had previously applied the Chapman rule. Until the clarification of the rule in Fry v. Pliler,551 U.S.112(2007), the circuit courts were divided on the question of whether to apply Brecht or Chapman to assess harmless error in a federal habeas corpus proceeding in which the State courts had not applied Chapman in the first instance.[3]

U.S. Magistrate Judge Hon.Love adopted the Barrious standard agreeing with the 12th COA at Tyler Texas. Neither Courts used the federal standard in Chapman or Brecht. This was done clearly in an objectively unreasonable manner. Because the Fifth Circuit agreed with the USDC of the Eastern District of Texas who agreed with the State appellate 12th Court of Appeals, all in which failed to apply Chapman nor Brecht this Honorable Court must grant certiorari.

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[3] this is my emphasis throughout writ.ig.g., my emphasis

Q: Can Gomez' indictment be Constitutionally amended allowing the crime to be graded higher without the Grand Jury doing the broadening or amending?

Gomez' indictment alleged that a commencement date for continuous sexual abuse that was prior to the effective date of the continuous statute. The original indictment was filed on April 19,2012 alleged that the offense commenced on August 15,2007.(CR 1). On November 2,2012 the State filed its motion to interlineate the indictment to change the beginning date of the alleged offense to September 1,2007.(CR 42;10RR 1,10-11). During pretrial on February 1,2013, which was the Eriday before trial commenced on Monday February 4,2013, the trial court only verbally[3] granted the State's motion,supra. The trial court also signed an Order on Febrary 1,2013 stating that the State's motion was granted, but the Order did not specify the language that would be changed.(CR 46, 48). On Saturday,February 2,2013 the trial court interlineated the indictment to change the beginning date of the offense to September 1,2007 in fulfillment of it's February 1,2013 statement that it would do so. (CRS2;10RR11). The jury found on February 6,2013 that Gomez was "guilty of continuous sexual abuse of a child, as charged in the indictment.[3]" (CR 91). The verdict did not[3] refer to the amended indictment. (CR 91;C CRS2). In the February 6,2013 judgement, the trial court indicated that the offense began on August 15,2007[3], which was the date alleged in the original indictment.(CR 1,102).

In Gomez' case, the State motioned for an amendment to change the beginning date of offense from August 15,2007 to September 1,2007, which was designed to revise the charge from[3] aggravated sexual assault to coninuous sexual abuse. TPC§§ 21.02(b)(1),21.02(b)(2),22.021(a)(1)(B)(i)(iii);see Act of May 18,2007,80th Leg.,R.S.,ch.593,§§1.17,4.01(a), 2007 Tex.Gen.Laws 1120,1127,1148. The amendment was unconstitutional as a right to a fair trial and due process were violated by 1) there was no interlineation by the state of the original indictment,2) the order granting the motion did not include any language from the motion and 3) there was no other document containing the pertinent language that qualifies as incorporated into the record. The record does not indicate that the parties were present at the trial judge's Saturday interlineation, nor was the interlineated document re-filed with the District

Clerk before trial commenced. This is mandatory under TCCP arts. 28.10,28.11; Wright v. State,28S.W.3d 526,531 n.4(Tex.Crim.App.2000) and by not following the rules it affected Gomez' substantial rights making it a violation of Constitutional magnitude.

Hon.Love states in his Rep.Rec.@12 in pertinent part:

> "As the Respondnet explains, however,claims regarding the sufficiency of a state indictment are not matters for federal habeas review unless it can be shown that the defects within the indictment deprives the State court of jurisdiction. See McKay v. Collins, 12 F.3d 66,68(5th Cir.1994)("The sufficiency of a state indictment is not a matter of federal habeas relief unless it can be shown that the indictment is so defective that it deprives the state court of jurisdiction.")."

This is where the same circuit state in U.S. v. Arlen,947 F.2d 139(5th Cir.1991):

> "The Fifth Amendment guarantees that a criminal defendant will be tried only on charges alleged in a grand jury indictment";"The indictment cannot[3] be "broadened or altered" except by the grand jury."

The indictment was in fact 'broadened or altered,' the relevant information is reflected from the indictment, the failed amendment and the jury charge. The application paragraph and verdict applied the incorrect offense, continuous abuse, which carried a 25-year minimum sentence, with no eligibility for parole; in comparison, Gomez would be subject to a range of only five to 99 years or life, with parole after 30 years, assuming a life sentence, for the offense that was actually alleged in the indictment, aggravated sexual assault. TCP §§12.32,21.02(b)(1).

Hon.Love concludes (pg.13):

> "Here, Gomez has not shown that the state court's adjudications of his invalid-indictment claims were unreasonable and, importantly, his claim is not cognizable on federal habeas review."

Gomez has shown the indictment was 'broadened or altered' increasing the charge and sentence and this is a violation of his Fifth Amendment rights to due process and was in fact 'unreasonable.'

This Honorable Court and again the Fifth Circuit states in United States v. Young,730 F.2d 221(1984);

> "It is a long-established principle of our criminal justice system that, after an indictment has been returned its charges may not be broadened through amendment except by the grand jury[3] itse self." See Ex parte Bain,(1887)121 U.S.1, 7S.Ct.781,30 L.Ed.849. In Stirone v. U.S.,(1960),361 U.S.212,80 S.Ct.270,4 L.Ed.2d 252,

a leading case, "the Supreme Court recognized that a trial court's amendment of the indictment need not be explicit to constitute reversible error, but that it may be implicit or constructive."

Gomez claims his indictment was amended after the grand jury indicted him, based on a time frame outside the statute, making it void and reversible. For the above reasons, Gomez is entitled to certiorari.

Q.: If erroneously admitted evidence was not 'helpful' but in fact 'harmful' and prejudiced Gomez, was his Constitutional rights to due process and fair trial violated?

At the punishment phase of the trial the State introduced State's Exhibits 84 and 85. Gomez claims the trial court erred during the punishment phase by rejecting relevancy and prejudice objections concerning photographs where Gomez' penis was shown with his wife performing oral sex. Gomez was indicted and convicted as charged in the indictment in pertinent (CR 1):

"...,CESAR GOMEZ did then and there, during a period that was 30 or more days in duration, to-wit: from on or about August 15,2007 through November 21,2011, when the defendant was 17 years of age or older, commit two or more acts of sexual abuse against a child younger than 14 years of age, namely, intentionally or knowingly cause the contact and penetration of the female sexual organ..."

The State told the jury that Gomez used his "filthy penis" to torture the complainant from 2006 to 2012.(12RR 39,42,43,47,48,52; 13RR 116, 119,120,122,125,128,136,137,166,167,177,178,179,210,214,215). The State used the words "filth" or "filthy" 21 times before the end of the guilt/innocence.

In State's Exhibit 84, Gomez' erect penis is shown protruding from his pants, with some of his pubic hair shown, and the right side of the end of his penis brushing the face of his wife, Miriam Gomez, specifically the right side of her upper lip.((State's Ex.84;&13RR 175-79). The right side of Miriam's mouth is slightly open in State's Exhibit 84.

State's Exhibit 85 is a closer depiction of Miriam's head; her face takes up much of the picture, with Gomez' erect penis appearing less prominently then it does in State's Exhibit 84, because Miriam's hands are holding his penis.(13RR175-79). Miriam's mouth is open in State's Exhibit 85, with her tongue extended in a manner where she is touching or appears to be touching the underneath side of Gomez' penis with her tongue.

Gomez incorporates the Statement of the Case regarding the excerpts from trial to this point. The trial court stated "[y]our relevancy objection is overruled. Prejudicial objections overruled."(13RR165). The trial court further state that it considered all the testimony in the case, specifically the testimony that complainant was "forced to perform oral sex on the penis of the defendant, and that's what these photographs reflect the defendant's wife in that position."(12RR 113-114,152). The trial court also stated that it understood that "this is a picture of a penis that the little girl had to perform oral sex on."(13RR166).

Again, Gomez was not convicted of: causes the penetration of the mouth of a child by the sexual organ of the actor,(TCP§22.021(a)(B)(ii)), nor Invasive Visual Recording "voyeurism"(TCP§21.15). The trial court decided to conditionally admit the photographs through Detective Robert's testimony. (13RR167). Shelton renewed his objection when the State said they would use Anselma to identify Gomez' penis.(13RR177). The trial court at the bench responded that the photographs would be admitted if the State could "prove up" the photograph since "the little victim testified he was forcing her to perform oral sex on him."(13RR 177). In referencing Gomez' penis Anselma agreed she know "whose that is."(13RR178). When the state asked "[w]hose is that," she replied "[h]is," meaning Gesar Gomez.(13RR178). The trial court stated that State's Exhibits 84 and 85 were admitted for all purposes, overruling Shelton's objection.(13RR179).

The 12th COA states in their opinion (pg 3 & 4):

Relevance

At trial the state asserted that the photographs were relevant because the photographs were of Appellant's penis, "and that's what that little girl had to look at for six years.""And while the State's assertion concerning Appellant's abuse of F.G. is uncontested, WE DO NOT AGREE[3], that it was helpful to the jury to view pictures of Appellant's penis so that it could see precisely what F.G.saw."

Hon.Love states in pertinent (Rep.Rec.@14):

"The Fifth Circuit has repeatedly held that claims of trial court error may justify federal habeas relief if the error "is of such magnitude as to constitute a denial of fundamental fairness under the due process clause." See Krajcovic v. Director,2017WL3974251 at *6 (E.D.Tex.June 30,2017)(quoting Skillern v. Estelle,720 F.2d 839,852 (5th Cir.1983)); see also Brecht v. Abrahamson,507 U.S.619,637-38 (1993)(To be actionable in federal court, the trial court error must have "had substantial and injurious effect or influence in determining the jury's verdict."). In other words, Gomez must show that he was prejudiced by the purported trial court error."

Prejudice is easily shown by this very Court's statement in Glover v. United States,531 U.S.198,203(2001)"Any amount of additional time in prison constitutes prejudice." The 12th COA opined "we do not agree that it was helpful..."(pg.3). If the evidence wasn't helpful it was 'harmful' and this is the prejudice proven. The photo was highly irrelvant to the manner charged in the indictment.

This was easily error of Constitutional magnitude, since there are Constitutional implications. It was for the jury, in its role as part of the judicial branch, to assess punishment, and the error affected Gomez' right to a fair trial. Thus, being "of such magnitude as to constitute a denial of fundamental fairness under the due process clause." Krajcovic.

The error in admitting the color photograph in State's Exhibit 84 and 85 required no emphasis for it to remain the forefgont of the jurors' minds during deliberations. Under these circumstances, the jury probably placed substantial weight on both Exhibits 84 and 85 in assessing his sentence of life without parole, rather than a lower number. The Fifth Circuit in Bryson v. Alabama,634 F.2d 862 (1981) states, "Erroneous admission of prejudicial evidence can³ justify habeas relief." Gomez' Fifth and Sixth Constitutional rights were violated by the court's erroneous admission of these non-helpful photos that increased Gomez' sentence substantially. Gomez is entitled to certiorari.

Q.: Was Gomez' trial fundamentally unfair due to prosecutorial misconduct during opening statement?

"This claim is without merit."The purpose of an opening statement is to tell the jury what the case is about and to outline the proof." United States v. Breedlove,576 F.2d 57,60(5th Cir.1978). A prosecutor's articulation of what he or she believes the evidence will demonstrate or has demonstrated is not error. See Ortega v. McCotter,808 F.2d 406, 410(5th Cir.1987). Here,a review of the prosecutor's opening statement reveals that he - at the very beginning of his opening statement - specifically explained to the jury that was his "opportunity to talk to you about what the evidence is going to show³ in this case."(Rep.Rec@18).

Gomez was prejudiced by the prosecutor's misconduct during the state's opening statement and misrepresenting to the jury that Gomez had somehow 'encrypted' his security systems hard drive to hide something³.

What the evidence is going to show³ is a difinitive statement. It is not a 'probability,' it's an assuring fact told to layman of the law so easily swayed by legal jargon and terminology. Parrish tells the jury (12RR 49,2-7):

"The DVR equipment was collected, and I'll tell you right now that the Tyler Police Department did everything they could to obtain any type of recordable information that was on this equipment. Nobody can do it. It was encrypted and nobody could pull anything off of it. But it was there for some reason.

This is how Parrish opened up to the jury, with false and misleading statements that were purely speculative and conclusory. Parrish tell the jury the evidence will show[3] that the security system's hard drive was 'encrypted,' specifically not the fault of the civil sevants working for the State. This Court says in Berger v. United States,295 U.S.78,(1935) in pertinent:

"The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insuations and assertions calculated to mislead the jury."

Parrish wanted the jury to believe it was Gomez who 'encrypted' the hard drive, trying to hide something. Parrish wanted the jury to perceive Gomez as a computer guru who had above average computer skills that allowed him to watch the alleged recorded assaults and be able to 'encrypt,' at any instance.

Parrish never once produced an ounce of evidence to prove beyond a reasonable doubt that the system was 'encrypted.' Parrish opened this way to mislead the jury, taint their minds, inflame their emotions. Parrish had this calculated perfectly, to find Gomez guilty before trial even started.

This Court says the standard for relief for prosecutorial misconduct is "the narrow one of due process, and not the broad exercise of supervisory power." Darden v. Wainwright,477 U.S.168,181(1986). "To prevail on such claims the petitioner must show that the prosecutor's actions were so egregious as to tender the trial fundamentally unfair." See Donnelly v. DeChristoforo,416 U.S.637,643(1974).

Did the jury now believe Gomez could remotely 'encrypt' his own security system, that he uses for sexual gratification? "His or her actions must have so infested the trial with unfairness as to make the resulting conviction a denial of due process." Darden,477 @181. It is not enough that his or her actions "were undesierable or even universally condemed." Parrish's unproven, conclusory statements rendered Gomez' trial fundamentally unfair. Gomez is entitled to relief due to the prosecutorial misconduct committed during opening statements to the jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Cesar Gómez

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