United States Court of Appeals for the Fifth Circuit

No. 19-40916

CESAR GOMEZ,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:18-CV-89

ORDER:

Cesar Gomez, Texas prisoner # 1839985, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application challenging his conviction for continuous sexual abuse of a child. In his COA application, he raises the following claims: (i) the trial court's jury instructions were erroneous; (ii) the trial court erred when it granted the State's motion to amend his indictment; (iii) the trial court erred by admitting certain photographs into evidence during the trial on punishment; (iv) the prosecutor committed misconduct by making improper comments in his opening statement and failing to disclose various police

reports to the defense; and (v) the prosecutor committed misconduct by seeking to admit into evidence various firearms and firearm accessories.

In his COA application, Gomez does not raise many of the claims that he raised in the district court. Accordingly he has abandoned these claims. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *see also Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004). Furthermore, he raises for the first time in his COA application his claim that his indictment was defective because it employs the term "on or about" when referring to various pertinent dates. Because he failed to raise this claim in his § 2254 application, we do not have jurisdiction to consider it. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018).

As to Gomez's remaining claims, a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). An applicant satisfies this standard by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Gomez has not met this standard.

Accordingly, his motion for a COA is DENIED. His motion for leave to proceed in forma pauperis is also GRANTED.

/s/Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

CESAR GOMEZ, #1839985	§	
VS.	§	CIVIL ACTION NO. 6:18cv89
DIRECTOR, TDCJ-CID	§	

ORDER

Before the court is Petitioner's motion to alter or amend the judgment (Dkt. #44). On June 17, 2019, this court dismissed Petitioner's federal habeas petition with prejudice (Dkt. #43). The court also denied Petitioner a certificate of appealability *sua sponte*.

In this timely motion to alter or amend the final judgment, Petitioner argues that the court "failed to make a proper final determination after the entry of the Magistrate's Report, and objections to the same by the Petitioner." He insists that the court allowed the final disposition of his case to rest "wholly upon the Magistrate's Report and Recommendation," without making "any specific determination[s]." Petitioner then repeats his habeas claims.

A. Standard of Review

> The United States Supreme Court discussed the purpose of Rule 59(e) as follows:
>
> Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to "mak[e] clear that the district court possesses the power" to rectify its own mistakes in the period immediately following entry of judgment. . . . Consistent with this original understanding, the federal courts have invoked Rule 59(e) only to support reconsiderations of matters properly encompassed in a decision on the merits.

White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 450-51 (1982) (citations omitted). Furthermore, "Rule 59(e) permits a court to alter or amend a judgment, but it 'may not

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be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (citation omitted).

The Fifth Circuit has observed that a Rule 59(e) motion "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (citation and internal quotations omitted). A Rule 59(e) motion "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem, Inc.*, 367 F.3d 473, 479 (5th Cir.) (citation omitted), *cert. denied*, 543 U.S. 976 (2004). The Fifth Circuit has repeatedly held that the purpose of a Rule 59(e) motion is not to rehash arguments that have already been raised before a court. *See, e.g., Naquin v. Elevating Boats, L.L.C.*, 817 F.3d 235, 240 n.4 (5th Cir. 2016); *Winding v. Grimes*, 405 F. App'x 935, 937 (5th Cir. 2010).

Moreover, "[r]econsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet*, 367 F.3d at 479 (citations omitted). The decision to alter or amend a judgment is committed to the sound discretion of the district court and will not be overturned absent an abuse of discretion. *Southern Contractors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 & n.18 (5th Cir. 1993).

B. Discussion and Analysis

Petitioner's motion should be denied. His conclusory assertions that the court did not conduct a *de novo* review and simply adopted the Report and Recommendation wholesale is without merit. In the order of dismissal, the court stated that it conducted a careful *de novo* review after reviewing both the proposed Report and the record, (Dkt. #42). Petitioner identifies no

evidence to suggest otherwise. *See, e.g.*, *Okpala v. Thomas*, 697 F. App'x 838, 838 (5th Cir. 2017) (unpublished) ("First, Okpala asserts that the district court improperly adopted the magistrate judge's report and recommendation without conducting a *de novo* review of his objections to the report and recommendation. The district court stated that it had conducted an independent review of the record. We assume that the district court did its statutory commanded duty in the absence of evidence to the contrary.") (internal quotations and citation omitted).

Because the court conducted an independent, *de novo* review of Petitioner's case—including his objections—Petitioner's motion to alter or amend the judgment is denied. Accordingly, it is

ORDERED that Petitioner's motion to alter or amend the judgment (Dkt. #44) is **DENIED**.

SIGNED this the 29th day of September, 2019.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

CESAR GOMEZ, #1839985	§	
VS.	§	CIVIL ACTION NO. 6:18cv89
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner Cesar Gomez, an inmate confined at the Eastham Unit within the Texas Department of Criminal Justice (TDCJ) proceeding *pro se*, filed this petition for a writ of habeas corpus pursuant to § 2254 complaining of the legality of his Smith County criminal conviction. The case was referred to the United States Magistrate Judge, the Honorable Judge John D. Love, for findings of fact, conclusions of law, and recommendations for the disposition of the case.

On April 1, 2019, Judge Love issued a Report, (Dkt. #33), recommending that Petitioner's habeas petition be denied and further recommended that Petitioner be denied a certificate of appealability *sua sponte*. A copy of this Report was sent to Petitioner at his address. After receiving an extension of time in which to file his objections, Petitioner filed timely objections, (Dkt. #40).

The court has conducted a careful *de novo* review of record and the Magistrate Judge's proposed findings and recommendations. *See* 28 U.S.C. §636(b)(1) (District Judge shall "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). Upon such *de novo* review, the court has determined that Report of the United States Magistrate Judge is correct and Petitioner's objections are without merit. Accordingly, it is

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ORDERED that Petitioner's objections, (Dkt. #40), are overruled. The Report of the United States Magistrate Judge, (Dkt. #33), is **ADOPTED** as the opinion of the District Court. It is also

ORDERED that the above-styled habeas petition is **DENIED** and Petitioner's case is **DISMISSED** with prejudice. Further, it is

ORDERED that Petitioner is **DENIED** a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all motions which may be pending in this civil action are hereby **DENIED**.

SIGNED this the 17th day of June, 2019.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

CESAR GOMEZ, #1839985	§	
VS.	§	CIVIL ACTION NO. 6:18cv89
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Cesar Gomez, an inmate confined at the Eastham Unit within the Texas Department of Criminal Justice (TDCJ) proceeding *pro se*, filed this petition for a writ of habeas corpus pursuant to § 2254 complaining of the legality of his Smith County criminal conviction. The case was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case. For the foregoing reasons, the Court recommends that Gomez's petition be denied.

I. Procedural Background

On February 6, 2013, a jury found Gomez guilty of continuous sexual abuse of a child younger than fourteen of age, a first-degree felony. Gomez was sentenced to life imprisonment without the possibility of parole. He filed a direct appeal, and the Twelfth Court of Appeals affirmed his conviction in a published opinion. *See Gomez v. State*, 459 S.W.3d 651 (Tex. App.—Tyler 2015, pet. ref'd). The Texas Court of Criminal Appeals refused his petition for discretionary review on June 17, 2015. Subsequently, the United States Supreme Court denied Gomez's petition for a writ of certiorari. *See Gomez v. Texas*, 136 S.Ct. 1201 (2016) (Mem.).

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Gomez filed a state application for a writ of habeas corpus, which was denied by the Texas Court of Criminal Appeals, without a written order, on October 25, 2017. (Dkt. #26, pg. id. #1769). This timely federal habeas petition follows.

II. Factual Background

The Twelfth Court of Appeals articulate the facts of Gomez's case as follows:

> Appellant began sexually abusing his daughter, F.G., in 2006 when she was eight years old. According to F.G., the sexual abuse continued until March 1, 2012, when she was fourteen years old. On March 5, 2012, she made an outcry statement to a school counselor concerning Appellant's sexually abusing her. As a result, Appellant was arrested and confessed in a videotaped interview to having sexually assaulted F.G. multiple times within the preceding six month period as a result of being intoxicated. Officers searched Appellant's home and discovered, among other things, an expensive video surveillance system with multiple cameras, one of which was aimed at F.G.'s bed and the other of which was aimed at the bed in the master bedroom.
>
> Appellant was charged by indictment with aggravated sexual assault and pleaded "not guilty." The indictment was later amended to charge Appellant with continuous sexual abuse of a child under fourteen years of age. The matter proceeded to a jury trial, following which the jury found Appellant "guilty" as charged. After a trial on punishment, the jury assessed Appellant's punishment at imprisonment for life without the possibility of parole. The trial court sentenced Appellant accordingly, and this appeal followed.

Gomez, 459 S.W.3d at 656.

III. Gomez's Federal Habeas Claims

In his federal petition, Gomez first argues that the criminal statute under which he was convicted is unconstitutional and that the jury charge during the guilt/innocence phase included an improper comment on the evidence. He also raises several claims concerning alleged ineffective assistance of counsel and trial court error. Specifically, he maintains that counsel was ineffective for (1) incorrectly advising him that he was eligible for community supervision; (2) failing to object to several occurrences throughout his trial; (3) failing to investigate; and (4) failing to call witness. Gomez further insists that the prosecutor committed prosecutorial misconduct in a variety of ways. Finally, Gomez states that his indictment was improperly amended.

The Respondent has been ordered to answer and has done so, (Dkt. #23). Respondent maintains that all of Gomez's claims fail on the merits. Gomez has filed a reply to that response, (Dkt. #31), reurging many of his habeas claims.

IV. Standard of Review

1. Federal Habeas Review

The role of federal courts in reviewing habeas petitions filed by state prisoners is exceedingly narrow. A prisoner seeking federal habeas corpus review must assert a violation of a federal constitutional right; federal relief is unavailable to correct errors of state constitutional, statutory, or procedural law unless a federal issue is also present. *See Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993); *see also Estelle v. McGuire*, 503 F.3d 408, 413 (5th Cir. 2007) ("We first note that 'federal habeas corpus relief does not lie for errors of state law.'") (internal citation omitted). When reviewing state proceedings, a federal court will not act as a "super state supreme court" to review error under state law. *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007).

Furthermore, federal habeas review of state court proceedings is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. Under the AEDPA, which imposed several habeas corpus reforms, a petitioner who is in custody "pursuant to the judgment of a State court" is not entitled to federal habeas relief 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 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 proceedings.

28 U.S.C. § 2254(d). The AEDPA imposes a "highly deferential standard for evaluating state court rulings," which demands that federal courts give state court decisions "the benefit of the

doubt." *See Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal citations omitted); *see also Cardenas v. Stephens*, 820 F.3d 197, 201-02 (5th Cir. 2016) ("Federal review under the AEDPA is therefore highly deferential: The question is not whether we, in our independent judgment, believe that the state court reached the wrong result. Rather, we ask only whether the state court's judgment was so obviously incorrect as to be an objectively unreasonable resolution of the claim."). Given the high deferential standard, a state court's findings of fact are entitled to a presumption of correctness and a petitioner can only overcome that burden through clear and convincing evidence. *Reed v. Quarterman*, 504 F.3d 465, 490 (5th Cir. 2007).

2. Ineffective Assistance of Counsel

To show that trial counsel was ineffective, Gomez must demonstrate both deficient performance and ensuing prejudice. *See Strickland v. Washington*, 466 U.S. 668 (1984). In evaluating whether an attorney's conduct was deficient, the question becomes whether the attorney's conduct fell below an objective standard of reasonableness based on "prevailing norms of practice." *See Loden v. McCarty*, 778 F.3d 484, 494 (5th Cir. 2016).

Moreover, to establish prejudice, the petitioner must show that there is a reasonable probability that—absent counsel's deficient performance—the outcome or result of the proceedings would have been different. *Id.*; *see also Reed v. Stephens*, 739 F.3d 753, 773 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 687)). It is well-settled that a "reasonable probability" is one that is sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, 466 U.S. at 694. Importantly, the petitioner alleging ineffective assistance must show both deficient performance and prejudice. *See Charles v. Stephens*, 736 F.3d 380, 388 (5th Cir. 2013) ("A failure to establish either element is fatal to a petitioner's claim.") (internal citation omitted). Given the already highly deferential standard under the AEDPA, establishing a state court's application

whether counsel was ineffective "is all the more difficult." *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *see also Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013) ("Both the *Strickland* standard and the AEDPA standard are highly deferential, and when the two apply in tandem, review is doubly so.") (internal quotations and citation omitted).

V. Discussion and Analysis

For cohesion and judicial economy purposes, the Court will combine Gomez's related claims.

A. Trial Court Error and Prosecutorial Misconduct

1. Constitutionality of Texas' Continuous Sexual Abuse Statute

In his first claim, Gomez opines that he was "convicted under an unconstitutional statute designed to circumvent multiple protections of the United States Constitution." He insists that the statute allows the State to highlight extraneous offenses that were allegedly committed. Gomez also complains that the statute does not require a unanimous verdict as to the "specific acts of sexual abuse [that] were committed by the defendant or the exact date when those acts were committed." He further states that the statute does not even require the State to prove that a specific offense occurred. Gomez raised this claim in his state habeas application, which was denied without a written order.

Gomez's claims are without merit. First, the United States Supreme Court has repeatedly rejected his argument that due process requires jury unanimity. *See Johnson v. Louisiana*, 406 U.S. 356, 359 (1972) ("We note at the outset that this Court has never held jury unanimity to be a requisite of due process of law."); *see also McDonald v. City of Chicago, Ill.*, 561 U.S. 742 n.14 (2010) (explaining that the Court's holding in *Johnson* that "although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a

unanimous jury verdict in **state criminal trials**.") (emphasis supplied). This is important because our review under the AEDPA is to examine potential federal constitutional issues.

Moreover, Texas courts have routinely found that the continuous sexual abuse statute does not violate Texas' jury unanimity requirement and is constitutional because, as Respondent correctly explains, the individual acts of abuse are manner and means—and not an element of the offense. *See, e.g., Fulmer v. State*, 401 S.W.3d 305 (Tex.App.—San Antonio 2013, pet. ref'd) (holding that "the individual acts of sexual abuse are manner and means, not [elements] of the offense. Therefore, unanimity [is] required only as to a finding that [the defendant] committed two or more acts of sexual abuse—not as to which specific acts he committed."); *see also Martin v. State*, 335 S.W.3d 867, 872-73 (Tex.App.—Austin 2011, pet. ref'd), *cert. denied*, 568 U.S. 1026 (2012) ("We held that because the jury in that case (like the jury in this case) was required to unanimously find that the defendant committed two or more of the alleged acts of sexual abuse, the defendant's right to a unanimous jury verdict was not violated.") (citing *Jacobsen v. State*, 325 S.W.3d 733, 739 (Tex.App.—Austin 2010, no pet.)). Contrary to Gomez's claim, the statute does require that the jury find that he committed two or more acts of sexual abuse.

Here, the record reflects that the trial court instructed the jury that they were required to reach a unanimous verdict concerning whether Gomez committed two or more acts of sexual abuse during the time period that was defined—but not a unanimous verdict as to which specific acts of sexual abuse or the exact dates. (Dkt. #25, pg. id. #290). Such instruction tracks the applicable statute and cases mentioned above.

Furthermore, the record shows that the jury reached a unanimous verdict of guilty during the guilt and innocence phase. (Dkt. #25, pg. id. #1322). Moreover, the jury reached a unanimous

verdict on a sentence of life imprisonment. (Dkt. #25, pg. id. #1407). Therefore, Gomez's complaints concerning lack of unanimity do not apply to his own case.

Furthermore, because Gomez raised this exact issue in his state habeas application—which the Texas Court of Criminal Appeals denied without a written order—that denial is entitled to deference. As it stands, Gomez failed to demonstrate how the state court's adjudication of this claim was unreasonable or contrary to federal law.

To the extent that Gomez insists that this Court cannot rely on the state habeas court's denial because it did not enter express findings of fact or conclusions of law, the Court notes that the failure to enter express findings of fact does not preclude deference under the AEDPA because "[a]s a federal court, we are bound by the state habeas court's factual findings, both implicit and explicit." *See Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *see also Becerril v. Quarterman*, 2007 WL 1701869 *4 (S.D.Tex.—Houston Jun. 11, 2007) ("The Texas Court of Criminal Appeals adopted the trial court's findings when it denied relief. A federal court is bound by the state habeas court's factual findings, both implicit and explicit.") (citation omitted).

In Texas, when the Court of Criminal Appeals denies a state habeas petition—with or without an order or opinion—the "denial" means that the court addressed and rejected the merits of a particular claim. *See Ex parte Torres*, 943 S.W.2d 469, 472 (Tex.Crim.App. 1997) ("In our writ jurisprudence, a 'denial' signifies that we addressed and rejected the merits of a particular claim while a 'dismissal' means that we declined to consider the claim for reasons unrelated to the claims merits."); *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000) ("Under Texas law, a denial of relief by the Court of Criminal Appeals serves as a denial of relief on the merits of the claim."). Accordingly, these claims should be dismissed.

2. Jury Charge

Next, Gomez argues that the jury charge for the guilt/innocence phase "included an improper comment on the evidence, and gave incorrect instructions concerning the period of limitations periods as [sic] under law." Specifically, he takes issue with the following portion—as he outlines the charge:

> You are instructed that members of the jury are not required to agree unanimously on which specific acts of sexual abuse, **if any**, were committed by the defendant or the exact date which those acts were committed, **if any**."

(Dkt. #1, pg. 12) (emphasis supplied by Gomez). He insists that the inclusion of "if any" eliminates the need for the jury to conclude that any act of sexual abuse was committed, or even a date of offense.

Improper jury instructions in state criminal trials do not generally form the basis for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). Rather, the relevant inquiry on claims of improper jury instructions turns on whether there was prejudice of constitutional magnitude. *See Galvan v. Cockrell*, 293 F.3d 760, 764 (5th Cir. 2002).

In examining whether a jury instruction was prejudicial, the question becomes "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process . . . , not merely whether the instruction is undesirable, erroneous, or even universally condemned." *See Henderson v. Kibble*, 431 U.S. 145, 154 (1977).

Here, Gomez's assertion—that the inclusion of "if any" was improper—is misguided. To the contrary, the inclusion of "if any" in these instructions was, presumably, to protect Gomez's presumption of innocence. In other words, "if any" simply means "if any sexual acts were committed," which properly protects Gomez's presumption of innocence until the jury makes its

decision. Gomez does not explain how the inclusion of "if any" language actually harmed his trial. This claim should be dismissed, as it is wholly without merit.

Turning to Gomez's complaint regarding the period of limitations in his case, the Court notes that this claim is similarly meritless. 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 timeframe 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). Ultimately, the court determined that while there was an erroneous paragraph within the instruction regarding time, the charge included a proper charge immediately following the erroneous paragraph and a precise limiting instruction request by Gomez.

The appellate court analyzed this issue as follows:

> The offense of continuous sexual abuse of a young child became effective on September 1, 2007, and the statute does not apply to acts of sexual abuse committed before that date. *See Kuhn*, 393 S.W.3d at 254. Moreover, the statute does not apply to an offense committed against a child fourteen years of age or older. *See* Tex. Penal Code Ann. § 21.01(b)(2) (West Supp. 2014). Appellant contends that the jury charge was erroneous because it potentially allowed jurors to convict him based on acts he committed prior to September 1, 2007, or after November 21, 2011. Specifically, in the abstract portion of the charge, the jury was instructed as follows:
>
> > 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 continued sexual abuse of a child.
>
> This is an erroneous instruction. *See, e.g.*, *Kuhn*, 393 S.W.3d at 524; *Martin v. State*, 335 S.W.3d 867, 876 (Tex.App.—Austin 2011, pet. ref'd).
>
> **Egregious Harm Analysis**

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

. . .

The Court's Charge

Based on our review of the entirety of the court's charge, we first note that the application paragraph, which immediately precedes the erroneous abstract paragraph, correctly instructed the jury to convict Appellant, if must find beyond a reasonable doubt that he,

> during a period that was 30 days or more days in duration, to-wit: from about September 1, 2006, 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.

As a result, the application paragraph mitigates against finding that any error in the abstract portion of the charge was egregious. *See Kuhn*, 393 S.W.3d at 529-30; *see also Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999). Moreover, similar to the charge in *Kuhn*, the first paragraph of the charge in the instant case correctly instructed the jury that the offense was alleged to have been committed from on or about September 1, 2007, through November 21, 2011. Lastly, the trial court included in the charge as Paragraph 11 the following limiting instruction in the precise language requested by Appellant.

> You are instructed that if there is any testimony before you in this case regarding the defendant's having committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses, if any were committed[,] and even then[,] you may only consider the same in determining the motive, opportunity, intent, preparation, plan, knowledge, identity of the defendant or absence of mistake or accident, if any, in connection with the offense, if any, alleged against him in the indictment in this case, and for no other purpose.

See Kuhn, 393 S.W.3d at 530 (considering trial court's use of detailed limiting instruction in jury charge concerning evidence of uncharged offenses or bad acts). Our reading of the charge as a whole weighs against a conclusion Applicant was denied a fair and impartial trial.

Gomez, 459 S.W.3d at 660-61. The appellate court further highlighted how the prosecuting attorney, during closing, denoted the distinction between the charged acts and the acts occurring outside the time frame:

> When did it begin? 2006. And, see, you're entitled to know about everything. You're entitled to know about when it started and when it ended, because it shows his intent, it shows his common scheme and plan, it shows his motivation. And, you know, motivation is real simple. For a child molester, for a filthy child molester, real simple: It's a kid, fair game, period. And it goes to establish, you know, his state of mind.
>
> So that's why you're entitled to know about the start date and end date.

Id. at 662. The prosecuting attorney then directed the jury to the specific dates within the indictment, the effective date of the statute, and the correctly worded application paragraph in the instructions:

> We have to prove that the defendant, whom she identified, had sex with her, had continuous sex with her from September the 1st of 2007 through November 21st, 2011.
>
> And let me tell you what the evidence shows. 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. So what is important here—when you look at September 1st of 2007, okay, and ending November the 21st 2011, there are several elements that are met here. And why these dates are important is because of this: On September the 1st of 2007, that's when the statute was enacted. So all the acts that occurred—every time—twice a week, you do the math—he committed the offense of aggravated sexual assault of a child from 2006 to 2012 hundreds and hundreds and hundreds of times on her.
>
> . . .
>
> So he was sexually penetrating her with his penis, with his fingers, from 2006 through 2012.
>
> Now why stop November the 21st, 2011? Well, that's her—the next day is her birthday. See, she turns 14 on 2011. So right here she's under the age of 14, and he's obviously over the age of 17.

Id. The appellate court ultimately determined that, given counsel's argument, the entire jury charge, and the overwhelming evidence of guilt, it could not conclude that the jury was unable to

infer that at least two acts of abuse occurred between September 1, 2007, and November 21, 2011. Accordingly, Gomez did not suffer egregious harm from the one erroneous paragraph. *Id.* at 664.

Here, on federal habeas review, Gomez has not shown how this reasoned adjudication was contrary to federal law or an unreasonable application of federal law. While the appellate court determined that one paragraph in the charge was erroneous, the jury was instructed several times concerning the applicable time-period, why that period was significant, and Gomez received the limited instruction he requested. On federal review, he simply reargues his contentions found in his state habeas application. This claim should also be dismissed.

Gomez also argues that his indictment was "unconstitutionally amended" in an effort to "alter" the operative facts of the charge. He complains that the State amended the indictment three days prior to trial and he "therefore had zero knowledge prior to trial of the exact nature of his charge." (Dkt. #1, pg. 41).

Gomez raised this issue on direct appeal, within his petition for discretionary review that was denied, and his state habeas application. As the Respondent 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 for federal habeas relief unless it can be shown that the indictment is so defective that it deprives the state court of jurisdiction.").

Because the state courts rejected claims concerning the invalidity of Gomez's indictment, the courts implicitly found that the trial court possessed jurisdiction. *See McCotter*, 775 F.2d at 598 ("We adhered to the rule that a federal habeas court will not consider such claims '[w]hen it appears ... that the sufficiency of the indictment was squarely presented to the highest court of the

state on appeal, and that court held that the trial court had jurisdiction over the case....") (internal citations omitted); *see also Davis v. Craig*, 66 F.3d 319, 1995 WL 534730 *3 (5th Cir. 1995) (unpublished) ("By denying Davis relief on habeas corpus, the Texas Court of Criminal Appeals has necessarily, though not expressly, held that Davis' indictment is sufficient to vest the Texas trial court with jurisdiction."). 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. Accordingly, this claim must be dismissed.

3. Cell Phone Photographs

Next, Gomez maintains that the trial court abused its discretion by admitting photographs from his cell phone wherein Gomez receives oral sex from his wife. He argues that these photographs were offered only to inflame the jury. Gomez recognizes that this issue was thoroughly analyzed on direct appeal, but argues that the appellate court's conclusion—that the photographs were relevant to his engaging in "voyeurism" and that their high probative value was not substantially outweighed by the danger of unfair prejudice—was unreasonable. Gomez insists that there was no probative value attached to the photographs whatsoever.

However, both the intermediate appellate and state habeas courts disagreed. Specifically, the appellate court reasoned as follows:

> 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 that it was helpful to the jury to view pictures of Appellant's penis so that it could see precisely what F.G. saw.
>
> However, we are not bound by this underlying rationale for admissibility. *See De La Paz*, 279 S.W.3d at 344. An underlying theory of Appellant's defense was based on his assertion that his sexual abuse of F.G. took place during the six month period preceding her outcry and resulted from his being intoxicated. Contrary to the limited timeline of abuse asserted by Appellant, F.G. testified that Appellant regularly sexually assaulted her in her bedroom from 2006 through 2012. When officers searched Appellant's house they discovered,

> among other things, a $1,200.00 video surveillance system with multiple cameras, one of which was aimed at F.G.'s bed and the other of which was aimed at the bed in the master bedroom. The system was connected through the walls to a recording device located in the master bedroom with a monitor that displayed the various camera feeds. The record reflects that officers were unsuccessful in recovering past videos recorded by the surveillance system. Nonetheless, the record also supports that Appellant admitted to having used the surveillance system on one occasion to record his sexual abuse of F.G.
>
> Consequently, the pictures recovered from Appellant's cellular phone depicting his wife performing fellatio on him tend to support the State's theory that Appellant regularly engaged in voyeurism. Therefore, the State's establishing that Appellant engaged in voyeurism and used his expensive surveillance system to further that end was helpful to the jury in assessing Appellant's punishment because it contradicted his assertion that his sexual abuse of F.G. was limited to a handful of regrettable encounters as a result of being intoxicated. Rather, it tends to show that Appellant invested a substantial sum of money and time installing a video system to record himself sexually abusing F.G. Accordingly, we conclude that the trial court did not err in overruling Appellant's relevance objection to these exhibits.

Gomez, 459 S.W.3d at 658-59.

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*, 2017 WL 3974251 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.

Because federal habeas review is limited to whether a defendant's conviction violated the Constitution, law, or treaties of the United States, errors of state law—including evidentiary errors—are not cognizable under federal habeas review. *See Hill v. Johnson*, 210 F.3d 481, 491 (5th Cir. 2000) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law

questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, law, or treaties of the United States.")).

Here, contrary to Gomez's assertions, the appellate court found that the photographs had probative value—value tending to show that he engaged in video voyeurism, especially given the expensive security camera pointed directly at the victim's bed where evidence showed that Gomez repeatedly sexually abused her. The state habeas court rejected the claim as well. Gomez has not shown how this prejudiced his case—given all the other inculpatory evidence. This claim should be dismissed.

4. Prosecutorial Misconduct Claims

Gomez raises several claims of prosecutorial misconduct. The standard for granting federal habeas relief because of alleged 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). His or her actions must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181. It is not enough that his or her actions "were undesirable or even universally condemned." *Id.*

a. Referring to the Complainant as the "Victim"

Gomez first states that the prosecutor committed misconduct by referring to the victim as the "victim." Specifically, he complains that the prosecutor referred to her as the victim before he was convicted. He also states that the prosecutor "[elicited] and/or coached witnesses they called to the stand to refer to the complainant as a 'victim' during their testimony." (Dkt. #1, pg. 29).

He raised this claim in his state habeas application, which was denied. In his memorandum of law attached to his state habeas application, Gomez relies on *Casey v. State*, 160 S.W.3d 218, 225 (Tex.App.—Austin 2005, pet. granted), in support of his contention. In that case, the appellate court overturned the defendant's conviction because the jury charge included the word "victim," which the court considered an improper comment on the evidence. *Casey*, 160 S.W.3d at 230.

However, that opinion was subsequently reversed by the Texas Court of Criminal Appeals. *See Casey v. State*, 215 S.W.3d 870 (Tex. Crim. App. 2007). The Texas Court of Criminal Appeals found that "[b]ecause the jury charged tracked the language of the statute, the trial court did not abuse its discretion by including the word 'victim' in the charge." *Id.* at 887. Accordingly, Gomez's reliance on a case that was subsequently overturned is misplaced. Moreover, both cases did not concern the prosecutor articulating the word "victim" in the trial; rather, the cases concerned the language in the jury charge. Accordingly, Gomez's insistance on a case regarding the use of "victim" within the jury charge does not apply to his particular claims. His claim that the prosecutor coached witnesses to use the word "victim" is purely conclusory. Conclusory allegations are insufficient for federal habeas relief. *See Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983) (conclusory allegations do not raise constitutional issues).

Gomez has not shown how the use of the word "victim" rendered his trial fundamentally unfair as to demonstrate a reasonable probability that the verdict might have been different had the word "victim" not been used. *See Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000). Furthermore, he has failed to show how the state habeas court's adjudication of this claim was unreasonable or contrary to federal law. This claim should therefore be dismissed.

b. "Torture"

Like the previous claim, Gomez opines that his rights were violated when the prosecutor repeatedly—during his closing argument—used the term "torture" or the phrase "life of sexual torture."

"A prosecutor is confined in closing argument to discussing properly admitted evidence and any reasonable inferences or conclusions that can be drawn from that evidence." *United States v. Vargas*, 580 F.3d 274, 278 (5th Cir. 2009). The sole purpose of closing arguments is to assist the jury in analyzing, evaluating, and applying the evidence. *See United States v. Dorr*, 636 F.2d 117, 120 (5th Cir. Unit Feb. 1981).

Here, a review of the prosecutor's closing argument shows that he argued that the victim lived a life of "torture" and a "life of sexual torture." (Dkt. #25, pg. id #1296) (sealed). These are comments derived from the evidence—evidence that Gomez sexually abused the child victim, multiple times per week for years, beginning when she was only in the second grade. During his closing argument, the prosecutor highlighted the evidence presented to the jury: the DNA, testimony from the SANE nurse, harrowing testimony from the victim herself, Gomez's own confession, and the extremely expensive video equipment pointed directly at the victim's very own bunkbed. Accordingly, his comment that Gomez sexually "tortured" her is a comment stemming from the evidence presented at trial and assisted the jury in evaluating and applying the evidence.

As it stands, Gomez has neither shown how the state habeas court's adjudication of this claim was unreasonable or contrary to federal law nor how these comments affected the fairness of his trial. This claim should also be dismissed.

c. Security System

Gomez further opines that the prosecutor committed misconduct during his opening statement by stating that he had "encrypted" security equipment, which resulted in investigator's inability to present actual images of the alleged crime. Rather, he states, testimony disclosed that the security equipment was actually damaged—possibly by investigators. Gomez further notes that the images on the hard drive would have been favorable to him "as the system recorded events on the day in question."

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 this was his "opportunity to talk to you about what the evidence is going to show in this case." (Dkt. #25, pg. id. #1000) (sealed). Importantly, Gomez has not connected the word "encrypted" to any unfair prejudice or articulated how that word prejudiced his trial. In this way, his claim is conclusory and should be dismissed.

Embedded in this claim, Gomez maintains that the prosecutor "failed to produce exculpatory evidence through the Tyler police Department reports concerning burglaries of the Petitioner's home." (Dkt. #1, pg. 37). It seems that Gomez is arguing that he installed his expensive security system in his home not to further his sex crimes—but, rather, because there was evidence of burglaries.

However, Gomez's *Brady* claim is meritless. To demonstrate a *Brady* violation, a defendant must satisfy three components:

> First, the evidence must be favorable to the accused, a standard that includes impeachment evidence. Second, the State [or, in this case, the Government] must have suppressed the evidence. Third, the defendant must have been prejudiced. *United States v. Hughes*, 230 F.3d 815, 819 (5th Cir. 2000). To establish the third element, a defendant must show that the evidence "could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." *Id.* (internal quotation marks omitted).

See U.S. v. Fields, 761 F.3d 443, 475 (5th Cir. 2014); *see also Brady v. Maryland*, 373 U.S. 83 (1963). Here, Gomez has not provided any evidence of Tyler police reports concerning burglaries. In this way, his *Brady* claim is conclusory. Moreover, he has not shown that the purported police report would have been favorable to him—especially considering the evidence that Gomez's security cameras were pointed to the victim's bed, which would not detect burglars. This claim should be dismissed.

d. Evidence of Items that were not Illegal

Furthermore, Gomez asserts that the "prosecution put on evidence, allegedly due to threats of death, of various weapons and accessories kept in the Petitioner's vehicle." (Dkt. #1, pg. 32). He insists that there was no evidence placed in the record "of any weapon being drawn, used, or implemented in the alleged commission of the offense." Gomez further notes that the State put evidence into the record concerning his owning pornography and erotic "culpability," which is allowed for an adult male—but "in some way equated culpability in the instant case." *Id.* Gomez maintains that such evidence was presented only to bolster the State's case and prejudice any defense Gomez may have had.

In Texas, all relevant evidence is admissible. *See Lopez v. State*, 2008 WL 1904022 *9 (Tex. App.—Houston, May 1, 2008) ("At trial, all relevant is admissible unless otherwise excepted by the Constitution, statute, or other rules."); *see also* TEX. R. EVID. 402. Here, the record reflects that exhibits of Gomez's possession of handguns and bullets, found when officers searched his vehicle, were admitted into evidence during the guilt/innocence phase. Defense counsel objected

based on relevance and extraneous offenses. The State explained that the firearms and accessories were relevant because Gomez threatened the child victim by stating that he would kill her or her mother if she told. (Dkt. #25, pg. id. #1164). The trial court found that the State was not attempting to introduce an extraneous offense because the victim testified previously that Gomez threatened to kill her and her mother if she told about his offenses.

While Gomez complains that the evidence of his guns was used to bolster the State's argument, the record supports the trial court's finding that the evidence was relevant. Even though he may not have used his weapons during the commission of the crime, the victim testified that he threatened to kill her and her mother if she spoke out—thereby rendering evidence of his weapons relevant.

Furthermore, Gomez's habeas claims are purely conclusory. As mentioned, mere conclusory allegations do not raise constitutional issues in federal habeas proceedings. *See Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982). Gomez does not articulate how these items were not relevant, admissible evidence—and, while he insists that such evidence prejudiced his defense, he does not elaborate, demonstrate how it prejudiced his defense, or even articulate what the defense was that was prejudiced.

Lastly, the issue surrounding the admission of Gomez's pornography was thoroughly addressed by the intermediate appellate court, which found that the evidence was relevant and that the probative value of the evidence—which was high—was not substantially outweighed by unfair prejudice. Here, Gomez has failed to show that the appellate court and the state habeas court's adjudication and rejection of these claims were unreasonable or contrary to federal law. These claims should be dismissed.

e. Interjection of Personal Opinions and Derogatory Comments

Gomez further maintains that the prosecutor made improper personal opinions and derogatory/inflammatory comments during his closing statement at the end of the guilt/innocence phase. Specifically, he points to the prosecutor calling him a "piece of trash that he is," stating that he had a "filthy penis," was a "filthy child molester," and a "demon." Gomez articulates that these comments were "in no way a summation of the evidence or any logical conclusion thereof." (Dkt. #1, pg. 33). He raised these exact claims in his state habeas application, which was denied.

A prosecutor's use of pejorative language and unflattering characterizations is not improper when those comments are supported by the evidence. *See, e.g.*, *U.S. v. Fields*, 483 F.3d 313, 360 (5th Cir. 2007) (finding that the prosecutor's use of the word "con" to describe the defendant's actions was not improper and rejecting Field's argument that "prosecutors may not engage in name-calling); *U.S. v. Malatesta*, 583 F.2d 748, 759 (5th Cir. 1978) ("Unflattering characterizations of a defendant do not require a new trial when such descriptions are supported by the evidence."); *see also U.S. v. Cook*, 432 F.2d 1093, 1106 (7th Cir. 1970) (finding that the prosecutor's remarks about the defendant during closing—that he was a "sub human" with a "rancid, rotten mind," and a "true monster"—was not reversible error because "[t]he district attorney is quite free to comment legitimately and speak fully, although harshly, upon the action and conduct of the accused, if the evidence supports his comments …").

Here, the prosecutor's remarks and harsh language were reasonable deductions of the evidence. The evidence in this case was overwhelming: Evidence showed that Gomez sexually abused his own daughter—using his mouth, penis, and fingers—multiple times a week for about six years, beginning when she was only in second grade. Accordingly, the prosecutor's comment

that Gomez was a "filthy child molester" and had a "filthy penis and fingers" was supported by the evidence and a reasonable deduction from that evidence. Texas courts have repeatedly upheld such language. *See e.g.*, *Navarro v. State*, 2000 WL 1476638 *8-9 (Tex.App.—El Paso 2000) (unpublished) ("Appellant broke into the home of a woman who was seven months' pregnant, beat her about the face, torso, and stomach, and then proceeded to rape her in front of her two children. We conclude that reference to Appellant as a monster was a reasonable deduction from the evidence."); *Belton v. State*, 900 S.W.2d 886, 898 (Tex.App.—El Paso 1995, pet. ref'd) (explaining that the characterization of defendant as "an animal" was supported by the evidence).

Further, a review of the trial transcript shows that the prosecutor called Gomez a "demon" during its second closing argument—after defense counsel argued to the jury that the State was attempting to "demonize" him. (Dkt. #25, pg. id #1312; 1316). Directly responding to opposing counsel's argument is proper. *See Borjan v. State*, 787 S.W.2d 53, 55 (Tex. Crim. App. 1990). Because the prosecutor's comments were supported by the evidence or invited by defense counsel, these claims should be dismissed. Gomez has not demonstrated that the state habeas court's adjudication of this claim was unreasonable or contrary to federal law.

f. Right to Remain Silent

Next, Gomez maintains that the prosecutor made comments during both the guilt/innocence and punishment phases that infringed on his right to remain silent. Specifically, he highlights that—on closing during the guilt/innocence phase—the prosecutor stated that the victim was "forced to look at him," which he says is a reference "directly relating to the fact that the Petitioner requested a jury trial and asserted his right to confront his accusers." During punishment, Gomez argues that the prosecutor called him a "coward" and a "child molesting coward." Gomez also takes issue with the prosecutor stating that he does not "even care." He

insists that these comments about him being a coward were "due to the fact that the Petitioner chose not to take the stand in his own defense." (Dkt. #1, pg. 35-36). Gomez raised these claims in his state habeas application, which was denied.

Gomez's claims are misguided and evince a misunderstanding of the prosecutor's arguments. A review of the prosecutor's closing statement during the guilt/innocence phase illustrates that the prosecutor commented on how Gomez did not look at the victim as she testified during trial—but that she had to look at him as he sat at the defense table during her own testimony. Gomez fails to show that his right to remain silent—as he exercised his right to remain silent and did not testify—was violated. Furthermore, he wholly failed to show how his right to confront his accuser was violated as the victim testified and was cross-examined by defense counsel. Because these claims are meritless and Gomez failed to show how the state habeas court's rejection of this claim was unreasonable or contrary to federal law, they must be dismissed.

g. Petitioner's Security System

Next, Gomez contends that the prosecution "misrepresented evidence concerning the security system placed in the Petitioner's home as a means to commit further crimes and failed to produce exculpatory evidence through the Tyler Police Department reports concerning burglaries of the Petitioner's home." (Dkt. #1, pg. 37). As with his other claims, Gomez raised this claim in his state habeas application, which was denied.

This claim is without merit. A review of the entire trial transcript illustrates that Gomez installed an expensive security system—equipped with video equipment and monitors pointed at the victim's bed. While perhaps there was an additional reason for the security equipment stemming from burglaries in the area, as the Respondent argues, that additional reason does not make the prosecutor's argument improper. Because the evidence showed that Gomez installed

video equipment that pointed to the victim's bed—when other evidence illustrated that he had sex with her in that bed—the prosecutor's argument that such equipment was used in commission of his crimes, again, derived from the evidence. *See Modden v. State*, 721 S.W.2d 859, 862 (Tex. Crim. App. 1986) (en banc) ("Proper jury argument must fall within at least one of the following four areas: (1) summation of the evidence, (2) **reasonable deduction from the evidence**, (3) answer to argument of opposing counsel or (4) plea for law enforcement.") (emphasis added). This claim should be dismissed.

h. Agreement Between Prosecution and Victim's Mother

Gomez maintains that the prosecution—to secure testimony against him—entered into an agreement between the victim's mother "wherein the witnesses for the State were [guaranteed] the right to stay in the United States." He further explains: "what better incentive to stick to your story than to be allowed to stay in the United States instead of being deported to Mexico."

As the Respondent states, this claim is purely conclusory and speculative. While he states that he attached, as exhibit H, a "motion" to reveal this agreement filed by his attorney, there is no "exhibit H" attached to his petition. Accordingly, Gomez points to nothing in the record supporting this contention and it must be dismissed.

B. Ineffective Assistance of Counsel Claims

Gomez raises many claims of ineffective assistance of counsel. As mentioned, he must demonstrate both deficient performance and ensuing prejudice. *Strickland*, 466 U.S. 668.

1. Community Supervision

In his first claim of ineffective assistance of counsel, Gomez insists that trial counsel was ineffective for advising him that he was eligible for community supervision when community supervision was not applicable. According to Gomez, "this led to the erroneous belief by the

Petitioner that his only option available was a jury trial if he desired to be released from jail." (Dkt. #1, pg.15).

Gomez raised this claim in his state habeas application, which was denied. Importantly, trial counsel provided an affidavit directly responding to this claim, which reads as follows:

> **Ground Three: Ineffective Assistance of Counsel Due to Alleged Advice Regarding Community Supervision**
>
> I did not advise Mr. Gomez that he was probation eligible for the indicted offense. Just the opposite, I consistently advised him, with the assistance of an interpreter, that if he were convicted of the indicted offense that any time imposed would be served on a day-for-day basis and he would not be eligible for parole of probation or any other kind of release before the sentence had been serve[d] on a day-for-day basis without credit of good conduct or other similar consideration.
>
> Mr. Gomez claims that because his native language is Spanish he did not understand the applicability of probation or parole. This is not true. Whether it was in court or at the jail, there was always a certified interpreter who translated for Gomez. Mr. Gomez never indicated any problems with understanding what was happening before, during or after trial. He consistently indicated he understood and agreed with what he was being told.
>
> Mr. Gomez claims that I advised him that he would be probation eligible from a jury if he went to trial. I never advised Mr. Gomez that he would be eligible for probation or parole if he was convicted of the indicted offense. I did advise him that there was an overwhelming amount of inculpatory evidence but that I would go forward if that was what he wanted to do. I explained to him, with the assistance of an interpreter, that it was possible but highly unlikely that a jury might convict him of a lesser included offense. And if they convicted him of any lesser included offense I was filing an application for community supervision in that unlikely event. I went over with him the legal grounds for submitting a possible charge with one or more lesser included offenses. But I always stressed that this was probably not going to happen based on the evidence I reviewed with him.
>
> Prior to appearing in court for the ex parte hearing[,] I met with Mr. Gomez on multiple occasions with the assistance of an interpreter. I took over the responsibility as Mr. Gomez from another court-appointed attorney, Mr. Clifton Roberson. Mr. Roberson informed me that Mr. Gomez had conditionally agreed to the 40 year offer from the State. I met with Mr. Gomez and he told me that if I met with his daughter (the complainant in the indictment) and if she said she would testify at trial consistently with her outcry statements that he would accept the 40-year sentence offered by the State. I arranged with his daughter's attorney ad litem to meet with them at her school. She told me unequivocally that her testimony would be the same as her outcry statements. Additionally[,] she told of

> evidence regarding the timing of her outcry that was not introduced at trial. I shared that evidence with Mr. Gomez and informed her that her testimony was consistent and credible.
>
> After I informed Mr. Gomez of this meeting[,] he told me that he changed his mind and wanted a jury trial. I told him that he had no factual or legal defenses but that I would do my best to find reasonable doubt in the State's evidence and preserve any errors for appeal. I told him that he was likely to get more than the 40 years offered by the State and he indicated he understood, but wanted to proceed with a jury in spite of my advice and the evidence.

(Dkt. #26, pg. id. #1896-98) (sealed).

The state habeas court rejected this claim, revealing implicit credibility choices in favor of trial counsel's affidavit, which are presumed correct in this forum. This adjudication is entitled to deference and Gomez has wholly failed to explain—or demonstrate—that the state court's adjudication of this claim was unreasonable or contrary to federal law. *See Marshall v. Lonberger*, 459 U.S. 422, 433 (1983) (applying presumption of correctness to an implicit finding against the defendant's credibility where that finding was necessarily part of the court's rejection of the defendant's claim); *see also Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004) (explaining that, "[a]s a federal court, we are bound by the state habeas court's factual findings, both implicit and explicit."); *Becerril v. Quarterman*, 2007 WL 1701869 *4 (S.D. Tex.—Houston Jun. 11, 2007) ("The Texas Court of Criminal Appeals adopted the trial court's findings when it denied relief. A federal court is bound by the state habeas court's factual findings, both implicit and explicit.") (citation omitted).

As Respondent explains, Gomez bases his claim on trial counsel's filing of an "application for community supervision from the jury." (Dkt. #25, pg. id. #271). However, as trial counsel explained in his affidavit, he advised Gomez that in the unlikely event the jury convicted him of a lesser-included offense, trial counsel anticipated filing an application for community supervision. The record demonstrates that he filed the application in the event that Gomez was convicted. *Id.*

Crucially, the filing of this application for community supervision in no way detracts from trial counsel's statement that he did not advise Gomez that he would actually receive community supervision if convicted. Counsel's affidavit shows that he was properly advising Gomez of *all* possibilities—further explaining to him that the evidence against him was overwhelming, but that he would do his best at trial. Gomez has neither shown that counsel was ineffective nor that the state habeas court's adjudication of this claim was unreasonable or contrary to federal law. Therefore, this claim should be dismissed.

2. Failure to Object

Gomez further maintains that counsel was ineffective for failing to object on several occasions. Specifically, he argues that counsel was ineffective for failing to object to (1) the prosecutor referring to the "complainant" as the "victim," (2) the prosecutor's usage of the word "torture," (3) the "entry of items legal for the petitioner to own and/or possess and with no direct nexus to the alleged offense or alleged indictment," (4) the numerous "derogatory, inflammatory, and improper comments" by the prosecutor during the guilt/innocence phase, and (5) improper comments during closing arguments.

As with his other habeas claims, Gomez raised these in his state habeas application, which were denied. Trial counsel directly responded to these claims in his affidavit, as follows:

> Mr. Gomez claims that I did not object to the complainant being referred to as a victim. The record reflects that I vigorously and zealously defended Mr. Gomez to the best of my ability. I do not believe that objecting to the term victim would have changed the outcome of the trial and it would have given the State opportunities to rephrase and reargue their points to the jury.
>
> Mr. Gomez claims that I should have objected to the State's use of the word torture and other derogatory terms made in the State's opening and closing statements. The record reflects that I tried to use the State's statements as a way to illustrate to the jury how the State was trying to demonize Mr. Gomez. (13 R.R. at 131-32). Furthermore, the charge of the court clearly pointed out that the opening and closing statements were not to be considered as evidence by the jury. I do not believe that objecting to the State's statements

> in opening and closing arguments would have changed the outcome and would have possibly undermined the strategy of attacking the State for overstating their case.
>
> . . .
>
> Objecting to the State's statement during closing argument would have merely allowed the State to repeat and emphasize their characterizations of Mr. Gomez. I did my best to counter their statements but I do not believe any objections would have changed the outcome.
>
> . . .
>
> I objected when I believed it would help Mr. Gomez and the case we were presenting. Objecting during the State's closing argument would likely have given the State additional emphasis to their point by allowing them to rephrase and argue basically the same point. The State's argument was not evidence and I do not believe it contributed to the sentence the jury imposed because I believe they followed the Court's instructions and deliberated on the evidence and the law. The outcome was not what Mr. Gomez or I wanted but it was based on the law and facts.

(Dkt. #26, pg. id. #1898-1900) (sealed). The state habeas court rendered an implicit credibility choice in favor of counsel and rejected Gomez's claims—an adjudication entitled to deference.

A review of the entire record illustrates that the state habeas court's adjudications of these claims were not unreasonable. 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." *Crane v. Johnson*, 178 F.3d 309, 314 (5th Cir. 1999) (quoting *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)); *Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable.").

The Fifth Circuit has stated that it "will not find ineffective assistance of counsel merely because we disagree with counsel's trial strategy." *Id.* at 312. Moreover, an informed decision to forgo presenting "double-edged" evidence—one that could either help or harm a defendant—is reasonable trial strategy. *See Hopkins v. Cockrell*, 325 F.3d 579, 586 (5th Cir. 2003) ("This Court

has repeatedly denied claims of ineffective assistance of counsel for failure to present 'double edged' evidence where counsel has made an informed decision not to present it.").

Importantly, when reviewing counsel's decisions, it is crucial that federal courts do not engage in second-guessing, or "Monday morning quarterbacking"—as it is far too easy or tempting to criticize conduct in hindsight:

> Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 669; *see also U.S. v. Faubion*, 19 F.3d 226, 232 (5th Cir. 1994) ("We recognize the tendency, when all else fails, to blame the lawyer. With that in mind, it bears repeating: Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. As we have indicated in the past, the acuity of hindsight is not our proper lens.") (internal quotations and citations omitted).

The Court would be remiss not to further highlight how counsel cannot be ineffective for failing to make a meritless objection or argument. *See Wood. v. Quarterman*, 503 F.3d 408, 413 (5th Cir. 2007) (explaining that counsel cannot be constitutionally ineffective for failing to raise a meritless argument).

Here, counsel's affidavit demonstrates that he reasonably believed that objecting to all of the prosecutor's chosen words would have harmed Gomez's case more than it could have helped him. As counsel explained, if he had objected to the use of "victim" or "torture," the State would likely have been given an opportunity to rephrase—which, undoubtedly, would have called further attention to the words Gomez complains about and would have allowed the State to further emphasize their characterizations of him by reiterating the same argument with, perhaps, a

different term.

Furthermore, as mentioned above, a prosecutor's use of pejorative language and unflattering characterizations is **not** improper when those comments are supported by the evidence. *Fields*, 483 F.3d at 360 (emphasis added). The prosecutor's usage of the words "victim," "torture" and other derogatory terms stemmed directly from the overwhelming inculpatory evidence presented at trial. Because those comments and words were supported by the evidence, counsel cannot be ineffective for failing to raise a meritless objection. *See Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998) ("Because failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness, *see Sones v. Hargett*, 61 F.3d 410, 415 n. 5 (5th Cir. 1995), Green has not established deficient performance."). Additionally, Gomez has not shown—or articulated—how he was prejudiced by counsel's failure to object on these points.

Turning to Gomez's claim concerning counsel's failure to object to the "entry of items legal for the petitioner to own and/or possess and with no direct nexus to the alleged offense or alleged indictment," the court notes that this claim is likewise meritless. Specifically, Gomez maintains that his possessing various handguns, bullets, and gun accessories was not illegal and such items were not used in the commission of the alleged offense. The state habeas court rejected this claim after trial counsel directly responded to it, which reads as follows:

> It is beyond ironic that Mr. Gomez is now claiming that I should have objected to this evidence being admitted, because he was responsible for giving the State the evidence. During the trial[,] Mr. Gomez instructed me to retrieve a cell phone that was in his vehicle that was in police custody. I told him that I didn't think it was a good idea but if he wanted me to retrieve it I would do so. I went to the Tyler Police Department impound yard and they located and took into evidence the cell phone that was previously not in evidence and apparently was unknown to police. The State then used this evidence against Mr. Gomez in spite of my efforts to dissuade him from retrieving it. He knew what was on it and did not seem surprised when the evidence was introduced. I can only speculate as to why he did this.

(Dkt. #26, pg. id. #1899-1900) (sealed).

In Texas, the State may introduce evidence of extraneous offenses or bad acts during the punishment phase, after a defendant is found guilty. *See* Tex. Crim. Pro. Art. 37.07, Sec. 3(a)(1). The article specifically denotes, in pertinent part:

> Regardless of the plea and whether punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally liable, regardless of whether he has previously been charged with or finally convicted of the crime or act.

Id.; *see also Harris v. State*, 2019 WL 1141866 (Tex. Crim. App. Mar. 13, 2019) (unpublished) ("Article 37.07 of the Texas Code of Criminal Procedure authorizes consideration of several factors during punishment, including a defendant's prior criminal record, the circumstances of the offense for which he is being tried, his general reputation, and his character."); *Beham v. State*, 559 S.W.3d 474, 479 (Tex. Crim. App. 2018) ("Generalizing, we have said that evidence 'is relevant to sentencing,' within the meaning of the statute, if it is 'helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case.'"); *Sims v. State*, 273 S.W.3d 291, 295 (Tex. Crim. App. 2008) ("explaining that "[t]he Legislature has expressly provided that 'relevant' punishment evidence includes, but is not limited to, both character evidence in the form of an opinion testimony as well as extraneous-offense evidence.").

Here, a review of the trial transcript demonstrates that the State presented evidence—in the form of photographs from Gomez's cell phone—of his possession of a firearm, magazines, and invalid identification cards from Utah, Texas, and Mexico. As it stands, however, Gomez fails to show that an objection on these points would have been meritorious—because as explained above,

such evidence is permitted during the punishment phase. He also failed to show how objecting to admissible evidence would have changed the outcome of the trial or sentence given the overwhelming evidence of guilt. This claim should be dismissed.

3. Failure to "Put on" Evidence/Failure to Call Witnesses

Next, Gomez further asserts that counsel was ineffective for failing to put on evidence during the guilt/innocence phase. Specifically, he states that "defense counsel failed to call ANY witnesses on guilt/innocence." He further notes that this was relevant because his wife initially denied having sex with Gomez on the victim's bed, but later admitted to doing so. Gomez believes that trial counsel should have called his wife and his girlfriend to the stand during the guilt/innocence phase, which would have shown that he was at a different location during the commission of the offense.

Defense counsel directly responded to this claim before the state habeas court denied relief. Defense counsel explained, as follows:

> The decision not to call any witnesses on guilt/innocence was made by Mr. Gomez after we consulted at the end of the State's case. Between the credible testimony of his daughter and the playing of the video where Mr. Gomez told detectives that if his daughter said he did it then it must be true, there wasn't any evidence that could have been presented to effectively counter the State's case at guilt/innocence. Instead, the decision was made to focus on reasonable doubt arguments.
>
> Mr. Gomez and I discussed the potential testimony of his wife regarding putting on evidence that they had sex on their daughter's bed. He agreed that this would likely make the jury more upset because DNA was not the determining factor. Rather it was the credibility of his daughter's testimony. Mr. Gomez agreed with the strategy to not call witnesses at the punishment phase. Nothing they testified to at punishment would have changed the outcome at guilt/innocence.

(Dkt. #26, pg. id. #1900-01) (sealed). Once again, the state habeas court made an implicit credibility finding in favor of counsel—which must be given deference.

To demonstrate that counsel was ineffective for failing to call a witness, the petitioner must show "not only that this 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 *Gomez v. McKaskie*, 734 F.2d 1107, 1109-10 (5th Cir.), *cert. denied*, 469 U.S. 1041 (1984) (petitioner failed to meet his burden showing that uncalled witnesses would have testified favorably to petitioner's case)). Moreover, the petitioner must name the witness, demonstrate that the witness was available to testify at trial, and as mentioned, show that that such testimony would have been favorable to a particular defense. *See Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). The Fifth Circuit has repeatedly noted that:

> Complaints of uncalled witnesses are not favored in federal habeas corpus review because allegations of what a witness would have testified are largely speculative. Where only the evidence of a missing witnesses' testimony is from the defendant, this Court views claims of ineffective assistance with great caution.

Sayre v. Anderson, 238 F.3d 631, 635-36 (5th Cir. 2001) (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986)); *U.S. v. Fields*, 761 F.3d 443, 461 (5th Cir. 2014); *Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir. 2002). In the same vein, the Fifth Circuit has also held that "hypothetical or theoretical testimony will not justify the issuance of a writ: Rather, the petitioner must demonstrate that the 'might have beens' would have been important enough to affect the proceedings' reliability." *Martin v. McCotter*, 796 F.2d 813, 819 (5th Cir. 1986) (internal citation and quotations omitted).

Here, Gomez cannot demonstrate that these purported witness testimonies would have been favorable to him. As trial counsel explained, calling his wife to the stand to testify about them having sex on the victim's bed could have further inflamed the jury. This Court will not second-guess reasonable trial strategy. Gomez further fails to show that the state court's adjudication of this claim was unreasonable.

Moreover, Gomez insists that these uncalled witnesses would have shown that he "was at a different location" during the commission of the offense. This argument is extremely problematic in light of the evidence adduced at trial—which demonstrated that Gomez sexually abused his daughter multiple times per week over the course of about six years. Gomez allegedly being at a "different location at the time of the offense" overlooks the fact that the evidence showed that he repeatedly and routinely sexually abused the child victim. His allegedly being at another location on one occasion does not refute the overwhelming evidence that he abused the victim multiple times per week for years. This claim must be dismissed.

4. Failure to Investigate

Gomez insists that counsel was ineffective for failing to "investigate electronic devices alleged to have been 'encrypted' by the prosecution and object to improper opening statements alleging such conduct to have been committed by the petitioner to HIDE evidence." (Dkt. #1, pg. 20). He states that his "electronic storage devices" were damaged, rather than encrypted, possibly by prosecutors. The state habeas court rejected this claim after trial counsel explained the following:

> This allegation refers to security equipment that Mr. Gomez installed at his home. Even in hindsight, this matter is at most insignificant and was not harmful to the defense I presented on behalf of Mr. Gomez. The opening statement was not evidence and the fact that the State overstated their case was not going to hurt our case.

(Dkt. #26, pg. id. #1899). Gomez wholly fails to show how the rejection of this claim was unreasonable or contrary to federal law. Whether the devices were encrypted or damaged is inconsequential in light of all the other inculpatory evidence presented at trial. Furthermore, Gomez fails to show that he was prejudiced by the prosecutor's comments during opening statements—which were not evidence. This claim must be dismissed.

5. Overwhelming Evidence of Guilt

Because the facts in this case overwhelmingly demonstrate Gomez's guilt, he simply cannot demonstrate ineffective assistance of counsel. A claim of ineffective assistance of counsel will fail "if the facts against adduced at trial point so overwhelmingly to the defendant's guilt that even the most competent attorney would be unlikely to have obtained an acquittal." *See Green v. Lynaugh*, 868 F.2d 176, 177 (5th Cir. 1989); *see also Salazar v. Quarterman*, 260 F. App'x 643, 650 (5th Cir. 2007) (citing *Green*, 868 F.2d at 177) (unpublished) *Jones v. Jones*, 163 F.3d 285, 304 (5th Cir. 1998) (same).

Here, the record supports the state court's finding that Gomez is guilty of continuous sexual assault of a child. The evidence presented at trial shows that Gomez admitted to sexually abusing the victim—though he stated that he did so due to intoxication. Gomez even stated that if the victim said he "did it," then it must be true. Moreover, the evidence illustrated that Gomez purchased an expensive surveillance system and installed cameras that directly pointed at the victim's bed. The victim testified at length and her testimony was damaging to Gomez's defense. Gomez's trial attorney even explained to him that the evidence against him was overwhelming and presented the best defense he could. Simply because Gomez is unhappy with the outcome does not render counsel constitutionally ineffective. Ultimately, the weight of the evidence was so challenging that even the most competent attorney would have been unlikely to obtain an acquittal. Accordingly, all of Gomez's claims blaming counsel fail. *See Strickland*, 466 U.S. at 696 (explaining that a court analyzing a claim of ineffective assistance "must consider the totality of the evidence before the judge or jury.").

VI. Conclusion

Gomez has failed to show that the state habeas court's adjudication of her claims resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. His federal petition for a writ of habeas corpus should be denied.

VII. Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, under 28 U.S.C. § 2253(c)(1), he must first obtain a certificate of appealability ("COA") from a circuit justice or judge. *Id.* Although Gomez has not yet filed a notice of appeal, the court may address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner need only show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Supreme Court recently emphasized that the COA inquiry "is not coextensive with merits analysis"

and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. 773 (quoting *Miller-El*, 537 U.S. at 336). Moreover, "[w]hen the district court denied relief on procedural grounds, the petitioner seeking a COA must further show that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012)).

Here, Gomez failed to present a substantial showing of a denial of a constitutional right or that the issues he has presented are debatable among jurists of reason. He also failed to demonstrate that a court could resolve the issues in a different manner or that questions exist warranting further proceedings. Accordingly, he is not entitled to a certificate of appealability.

RECOMMENDATION

For the foregoing reasons, it is recommended that the above-styled application for the writ of habeas corpus be denied. It is further recommended that Petitioner Gomez be denied a certificate of appeal *sua sponte*.

Within fourteen (14) days after receipt of the Magistrate Judge's Report, any party may serve and file written objections to the findings and recommendations contained in the Report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto Ass'n.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).