United States Court of Appeals for the Fifth Circuit

No. 19-20855

EFRAIN LOPEZ,

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 Southern District of Texas
USDC No. 4:19-CV-876

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

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

PER CURIAM:

(X) The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

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ORDER:

Efrain Lopez, Texas prisoner # 1953021, is serving a maximum sentence of life imprisonment for murder. Currently, his parole eligibility date is December 16, 2045.[1] Lopez moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition on the merits and requests appointment of counsel on appeal.

[1] *See* Texas Department of Criminal Justice (TDCJ) Offender Search website, at https://offender.tdcj.texas.gov/OffenderSearch/offenderDetail.action?sid=07516299.

It is not necessary to recount the facts and procedural history of this case to resolve this motion. In his motion, Lopez seeks to challenge the district court's adjudication of his claims that (1) he is actually innocent; (2) he did not receive a "live" evidentiary hearing before the state habeas court; (3) his speedy trial rights were violated, inconsistent with *Barker v. Wingo*, 407 U.S. 514 (1972); (4) he received ineffective assistance of counsel at trial in violation of *Strickland v. Washington*, 466 U.S. 668 (1984); (5) the State withheld material exculpatory evidence concerning a co-defendant's plea bargain in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (6) his due process rights were violated when a witness for the State testified falsely. Before this court, Lopez also adds a new claim that the state trial court abused its discretion in admitting certain evidence in violation of Texas Rule of Evidence 403.

To obtain a COA, Lopez must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To meet that standard, a movant must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal quotation marks and citation omitted). Lopez has not made the requisite showing.

Accordingly, IT IS ORDERED that the motion for a certificate of appealability and motion for appointment of counsel are DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EFRAIN LOPEZ, TDCJ #01953021, Petitioner,	§	
VS.	§	CIVIL ACTION NO. H-19-876
LORIE DAVIS, Respondent.	§	

MEMORANDUM AND ORDER

Petitioner, Efrain Lopez (TDCJ #01953021), is a state inmate incarcerated in the Texas Department of Criminal Justice - Correctional Institutions Division ("TDCJ"). Lopez filed this petition for a writ of habeas corpus under 28 U.S.C. § 2254 to challenge his conviction and life sentence for capital murder. Respondent has filed a motion for summary judgment (Doc. No. 26), and Lopez has filed a response in opposition (Doc. No. 32). After carefully considering the petition, motion for summary judgment, response, record, and applicable law, the Court concludes that this petition must be dismissed for the reasons that follow.

I. BACKGROUND AND PROCEDURAL HISTORY

On September 8, 2014, Lopez was convicted of capital murder after a jury trial in the 179th Judicial District Court of Harris County, Texas, in cause number 1428270.[1] He is serving a life sentence in the Texas Department of Criminal Justice ("TDCJ") as a result of that

[1] *See* Petition, Doc. No. 1, at 1; *see also* TDCJ Offender Search website, available at https://offender.tdcj.texas.gov/OffenderSearch/offenderDetail.action?sid=07516299 (last visited Oct. 8, 2019). Citations following "Doc. No. ---" reflect the Clerk's pagination as stamped by the CM/ECF system; citations to state court records otherwise reflect the pagination according to the Bates stamp on the bottom of the page of those records.

conviction.[2] Lopez appealed his conviction, arguing that his speedy trial rights were violated and that the trial court erred by admitting certain photographic evidence. *See Lopez v. State*, No. 014-14-00758-CR, 478 S.W.3d 936 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd Feb. 3, 2016). The state intermediate appellate court affirmed his conviction on October 22, 2015, summarizing the facts on appeal as follows:

> [Lopez] and three other men entered the home of Guadalupe Sepulveda on September 12, 2005, and stole jewelry, guns, marijuana, and cocaine. Sepulveda was wounded by gunfire during the incident and his brother, Daniel Zamora, was killed. [Lopez] and the three other men wore black clothes and gloves, and covered their faces. This incident, which forms the basis of [Lopez]'s conviction below, is referred to as the "Loma Vista" case because it occurred at 6401 Loma Vista Street.[FN1]
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> On December 16, 2005, [Lopez] was arrested for an unrelated aggravated assault. A day after his arrest, [Lopez] was indicted for a capital murder committed on Bunker Hill Road (the "Bunker Hill" case).[FN2] [Lopez] was represented by attorney Gerald Fry in the Bunker Hill case. Both the Bunker Hill case and the Loma Vista case were linked to the La Tercera Crips gang.
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> [Lopez] remained incarcerated from 2005 to 2011 pending trials in the aggravated assault and Bunker Hill cases. [Lopez] was indicted in the Loma Vista case on May 11, 2011. Joseph Salhab was appointed to represent [Lopez] in the Loma Vista case on June 14, 2011.
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> [Lopez] filed a *pro se* motion for speedy trial on October 31, 2013, in which he contended that he was ready for trial in both the Bunker Hill and Loma Vista cases at all times. In an apparent reference to the Bunker Hill case, [Lopez] argued that his right to a speedy trial "began upon his arrest approximately three months prior to return of indictment." Before this motion was filed, however, [Lopez] and Salhab signed eleven agreed resets in the Loma Vista case between June 14, 2011, and September 6, 2013,[FN3] with the final one setting the case for disposition on February 5, 2014.
>
> [Lopez] filed a *pro se* motion to dismiss the indictment in the Loma Vista case for denial of a speedy trial on December 19, 2013. [Lopez] alleged that he was arrested for the Loma Vista case twice: first on October 10, 2005, after which he was released following a 24–hour hold, and again on December 16, 2005. [Lopez] argued that the delay could not be attributed to him or his counsel. [Lopez] further argued that the delay caused him to suffer oppressive pre-trial incarceration and

[2] Petition at 2.

anxiety, and compromised his ability to present his case due to lost evidence and unavailable witnesses.

Six agreed resets occurred in the Loma Vista case between February 5, 2014, and June 30, 2014, with the final one setting a trial date of August 29, 2014. Salhab filed a motion on August 29, 2014, to dismiss the Loma Vista indictment for failure to provide a speedy trial in which he adopted [Lopez]'s October and December 2013 *pro se* motions. A hearing on the motion to dismiss was held the same day.

At the hearing, defense co-counsel Deborah Summers argued that the passage of time since [Lopez]'s May 11, 2011 indictment in the Loma Vista case established a sufficiently prejudicial delay to trigger an analysis addressing whether [Lopez] was denied his right to a speedy trial. *See generally Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (court must consider length of delay, reason for the delay, defendant's assertion of the right, and prejudice to the defendant).

The State called Spence Graham to testify at the hearing. Graham became felony chief prosecutor of the 179th District Court in May 2009 and was in charge of handling approximately 30 capital murder cases pending in that court, including [Lopez]'s Bunker Hill case.

After reviewing the evidence in the Bunker Hill case—which included evidence of other homicides and aggravated robberies linked to the La Tercera Crips gang—Graham concluded [Lopez] was "worthy of being charged in the Loma Vista capital murder." Graham further testified that a search warrant was issued regarding the Loma Vista investigation, but that Graham held off filing charges against [Lopez] in the Loma Vista case at Fry's request while plea negotiations were ongoing in the Bunker Hill case.[FN4] Graham testified that he and Fry did not want to jeopardize the potential Bunker Hill plea deal—which involved [Lopez] agreeing to testify for the State in another capital murder case—by indicting [Lopez] in the Loma Vista case.[FN5] [Lopez] was indicted in the Loma Vista case after the Bunker Hill plea negotiations broke down. Once the Loma Vista charges were filed and Salhab was appointed to represent [Lopez] in that case, Graham had a lengthy discussion with Salhab "to get him up to speed." Graham further testified that the defense was not yet ready for trial when he left the 179th District Court in December 2011.

At the conclusion of the hearing, the State argued that it had been ready for trial at least since early March 2014. When the trial was set for July 2014, [Lopez] was in quarantine for medical reasons and unable to appear. The State also claimed that Salhab did not want to try the case in July 2014 and had urged the trial court to reset the case. Salhab confirmed that [Lopez] had been in quarantine and was unable to communicate with Salhab during the three weeks preceding the July

2014 trial setting. The trial court denied [Lopez]'s motion and trial was set for September 2, 2014.

A four-day trial was held beginning on September 3, 2014. The jury found [Lopez] guilty of capital murder and assessed his punishment at life imprisonment.

> [FN1] The Loma Vista case originally was filed as Cause No. 1305940, and, upon reindictment, as Cause No. 1428270. [Lopez] was reindicted for the Loma Vista murder on May 9, 2014, to correct a mistake made in the original indictment. Originally, the indictment alleged that [Lopez] caused the death of Zamora while in the course of committing and attempting to commit the robbery of Zamora. The new indictment alleged that [Lopez] caused the death of Zamora in the course of committing and attempting to commit the robbery of Sepulveda.
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> [FN2] The Bunker Hill case was filed under Cause No. 1050629 and was still pending at the time [Lopez] was convicted of the Loma Vista capital murder. [FN3] A twelfth agreed reset entered on January 24, 2013, and resetting the case for disposition on September 6, 2013, is not evidenced by a reset form in the record on appeal. However, the record includes the trial court's docket sheet, which reflects a January 24, 2013 entry stating "Reset By Agreement Of Both Parties, 9/06/2013 09:00 AM Disposition." The State asserts that "from December 13, 2011 until the day of trial, defense counsel had signed agreed resets," and [Lopez] does not dispute this contention. We conclude that the record supports the existence of the January 24, 2013 agreed reset. *See Zamorano v. State*, 84 S.W.3d 543, 650 (Tex. Crim. App. 2002) (noting that the docket sheet reflected 22 resets); *McIntosh v. State*, 307 S.W.3d 360, 368 (Tex. App.—San Antonio 2009, pet. ref'd) (reviewing docket sheet entries as evidence that trial was reset); *see also Page v. State*, 690 S.W.2d 102, 103 (Tex. App.—Houston [14th Dist.] 1985, pet. ref'd) ("The trial docket sheet reflects a long and confusing list of resets. However, appellant and the state are basically in agreement as to the sequence of events prior to August 1, 1983.").
>
> [FN4] The record does not reflect when the search warrant was issued.
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> [FN5] Fry contradicted Graham's testimony at the hearing and denied asking Graham to refrain from filing the Loma Vista charges.

Lopez, 478 S.W.3d at 939–41. The state intermediate appellate court found that Lopez's right to a speedy trial was not violated because he was not an "accused" regarding the Loma Vista murder until May 2011, and the numerous agreed resets excluded most of the intervening time from the speedy trial timetable. *Id.* at 944. The Texas Court of Criminal Appeals refused Lopez's petition for discretionary review on February 3, 2016. *Lopez v. State*, P.D.R. No. 1509-15 (Tex. Crim. App. 2016). The United States Supreme Court denied certiorari on May 23, 2016. *Lopez v. Texas*, 136 S. Ct. 2383 (2016).

Lopez filed a state application for habeas corpus on December 8, 2016. The Texas Court of Criminal Appeals denied the application without written order on September 12, 2018.[3]

In his federal petition dated February 24, 2019, Lopez asserts the following claims:

1. Actual innocence.
2. Denial of a hearing on state habeas review.
3. Denial of a speedy trial and due process from December 16, 2005 to August 2014.
4. Ineffective assistance of trial counsel for overriding Lopez's decision to testify in his own defense.
5. Ineffective assistance of trial counsel for (a) failing to utilize and introduce into evidence a transcript or audio recording of the August 21, 2008 interview of Yeni Rivas in order to impeach her trial testimony and (b) failing to move for a continuance until Alejandro Garcia was sentenced in exchange for his testimony at Lopez's trial.
6. Ineffective assistance of counsel for failing to move for a new trial to challenge the imposition of a mandatory life sentence because Lopez was 17 years old at the time the offense was committed.

[3] State Habeas Corpus Record ("SHCR") at Action Taken Sheet, Doc. No. 27-33 at 1.

7. Suppression of evidence that Alejandro Garcia made a deal to testify against Lopez in exchange for deferred adjudication.

8. Violation of due process because one of the State's witnesses testified falsely, had a motive for doing so, and newly presented evidence shows no juror would have considered her credible considering it.

9. Violation of Lopez's Eighth and Fourteenth Amendment rights regarding a mandatory life sentence.

10. Violation of speedy trial rights because the State deducted time when the parties signed agreed reset forms.

11. Violation of speedy trial rights because Lopez was an accused for speedy trial purposes when he was incarcerated and the case was used as leverage in plea negotiations.

II. STANDARD OF REVIEW

To be entitled to summary judgment, the pleadings and summary judgment evidence must show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). The moving party bears the burden of initially raising the basis of the motion and identifying the portions of the record demonstrating the absence of a genuine issue for trial. *Duckett v. City of Cedar Park, Tex.*, 950 F.2d 272, 276 (5th Cir. 1992). Thereafter, "the burden shifts to the nonmoving party to show with 'significant probative evidence' that there exists a genuine issue of material fact." *Hamilton v. Seque Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (quoting *Conkling v. Turner*, 18 F.3d 1285, 1295 (5th Cir. 1994)). The Court may grant summary judgment on any ground supported by the record, even if the ground is not raised by the movant. *United States v. Houston Pipeline Co.*, 37 F.3d 22 4, 227 (5th Cir. 1994).

While Rule 56 of the Federal Rules regarding summary judgment applies generally "with equal force in the context of habeas corpus cases," *Clark v. Johnson,* 202 F.3d 760, 764 (5th Cir. 2000), it applies only to the extent that it does not conflict with the habeas rules. *Smith v. Cockrell,* 311 F.3d 661, 668 (5th Cir. 2002), *abrogated on other grounds by Tennard v. Dretke,* 542 U.S. 274 (2004).

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

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

To the extent that the petitioner exhausted his claims, they were adjudicated on the merits by state courts. This Court, therefore, can only grant relief if "the state court's adjudication of the merits was 'contrary to, or involved an unreasonable application of, clearly established

Federal law.'" *Berghuis v. Thompkins,* 560 U.S. 370, 378 (2010) (quoting 28 U.S.C. § 2254(d)(1)). The focus of this well-developed standard "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007). Where a claim has been adjudicated on the merits by the state courts, relief is available under § 2254(d) *only* in those situations "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" Supreme Court precedent. *Richter*, 562 U.S. at 102.

Whether a federal habeas court would have, or could have, reached a conclusion contrary to that reached by the state court on an issue is not determinative under § 2254(d). *Id.* ("even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable."). Thus, AEDPA serves as a "guard against extreme malfunctions in the state criminal justice systems," not as a vehicle for error correction. *Id.* (citation omitted); *see also Wilson v. Cain,* 641 F.3d 96, 100 (5th Cir. 2011). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

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

Courts construe pleadings filed by *pro se* litigants under a less stringent standard than those drafted by attorneys. *Haines v. Kerner,* 404 U.S. 519 (1972); *Bledsue v. Johnson,* 188 F.3d

250, 255 (5th Cir.1999). Thus, *pro se* pleadings are entitled to a liberal construction that includes all reasonable inferences that can be drawn from them. *Haines,* 404 U.S. at 521. Nevertheless, "the notice afforded by the Rules of Civil Procedure and the local rules" is considered "sufficient" to advise a *pro se* party of his burden in opposing a summary judgment motion. *Martin v. Harrison County Jail,* 975 F.2d 192, 193 (5th Cir. 1992).

III. DISCUSSION

Respondent moves for summary judgment, arguing that claims 1, 2, and 10 are not cognizable on federal habeas review and that the other claims lack merit. Lopez has filed a response in opposition.

A. Actual Innocence (Claim 1)

A claim of actual innocence, standing alone, is not a cognizable ground for relief on federal habeas corpus review. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993). Instead, a claim of actual innocence is "a gateway through which a habeas petitioner must pass to have his otherwise [procedurally] barred constitutional claim considered on the merits." *Id.* at 404. A petitioner seeking to surmount a procedural default through a showing of "actual innocence" must support his allegations with new, reliable evidence that was not presented at trial and must show that it was more likely than not that, in light of the new evidence, no juror acting reasonably would have voted to find the petitioner guilty beyond a reasonable doubt. *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995).

Lopez does not assert that his actual innocence claim surmounts a procedural bar to any constitutional claim regarding his conviction; thus, his actual innocence claim is not a viable ground for federal habeas relief. In addition, actual-innocence claims "come[ ] before the habeas court with a strong, and in the vast majority of the cases conclusive, presumption of guilt."

Bosley v. Cain, 409 F.3d 657, 664 (5th Cir. 2005) (quotation omitted). The issue before the Court is not whether reasonable doubt may have been raised if new information had come before the jury, or whether sufficient evidence sustains the judgment, but rather whether the inmate has adduced new evidence of such a character that "no reasonable juror would have found the defendant guilty." *Schlup,* 513 U.S. at 329.

Even if a stand-alone actual innocence claim were cognizable on federal habeas review, Lopez does not present new evidence that would overcome the presumption of correctness that pertains to the state habeas court's findings on this issue. In support of his actual innocence claim, Lopez produces affidavits from Yeni Rivas's sister, Jessica Rivas, and Cecilia Calderon, Lopez's mother, who allege that Yeni testified falsely and that she is not a credible person. The state habeas court rejected Lopez's actual innocence claim, finding that he failed to present evidence that, despite the evidence of guilt that supports his conviction, "no reasonable juror could have found [him] guilty in light of the alleged new evidence."[4] In that regard, the state habeas court found that both the Jessica Rivas affidavit and the Cecilia Calderon affidavit contained unsupported hearsay, speculation, and personal opinion and were not persuasive.[5] The state habeas court found that Lopez failed to show that Yeni testified falsely or that the alleged false testimony was material to his conviction.[6] Lopez does not demonstrate that the state court's decision was based on an unreasonable determination of the facts or show that he is otherwise entitled to relief. Respondent is entitled to summary judgment Lopez's stand-alone actual innocence claim (Claim 1).

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[4] SHCR at 00052, Doc. No. 27-35 at 54.
[5] *Id.* at 00051-52.
[6] *Id.* at 00052.

B. Denial of Evidentiary Hearing during State Habeas Proceedings (Claim 2)

Lopez claims that the state habeas court erred by failing to conduct an evidentiary hearing on state habeas review. It is well established that defects in state habeas proceedings are not cognizable on federal habeas review. *See Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995) ("An attack on a state habeas proceeding does not entitle the petitioner to habeas relief in respect to his conviction, as it is an attack on a proceeding collateral to the detention and not the detention itself."), *cert. denied*, 518 U.S. 1022 (1996); *Duff-Smith v. Collins*, 973 F.2d 1175, 1182 (5th Cir. 1992), *cert. denied*, 507 U.S. 1056 (1993). Therefore, Lopez's claim regarding the defects in his state habeas proceeding (Claim 2) is denied.

C. Speedy Trial Claims (Claims 3, 10 & 11)

Regarding his Sixth Amendment right to a speedy trial, Lopez contends that his lengthy incarceration, from December 16, 2005 to his trial in early September 2014, violated his speedy trial rights (Claim 3). He also challenges the state court's determination, based on state law, that the time during an agreed reset is excluded from the length of delay for speedy trial purposes (Claim 10). Finally, he challenges the state court's determination, based on the trial court record, that he was not an "accused" for speedy trial purposes until he was indicted on May 11, 2011 for the Loma Vista murder and contends that he was an accused in December 2005, when he was arrested on an unrelated aggravated assault and indicted in the Bunker Hill case (Claim 11).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy trial." U.S. CONST. amend. VI. Courts evaluate speedy-trial claims by considering four factors—"the length of delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to him—in a two-step process." *United States v. Jackson*, 549 F.3d 963, 971 (5th Cir. 2008). The court first considers the length of the delay,

which is "to some extent a triggering mechanism" because "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker v. Wingo,* 407 U.S. 514, 530 (1972); *accord Goodrum v. Quarterman*, 547 F.3d 249, 257 (5th Cir. 2008) (holding that the speedy trial analysis under AEDPA requires federal courts to apply the state court findings of fact and ask whether the delay is extensive enough to trigger examination of the remaining factors).

The Fifth Circuit has held that "'[a] delay of less than one year will rarely qualify as 'presumptively prejudicial' for purposes of triggering the *Barker* inquiry.'" *Jackson*, 549 F.3d at 971 (quoting *Cowart v. Hargett*, 16 F.3d 642, 646 (5th Cir. 1994)). The Supreme Court has noted that "[t]he speedy-trial right is 'amorphous,' 'slippery,' and 'necessarily relative'" and is "'consistent with delays and depend[ent] upon circumstances.'" *Vermont v. Brillon*, 556 U.S. 81, 89 (2009) (quoting *Barker,* 407 U.S. at 530). Federal habeas review of a state court's speedy trial determination "requires [federal courts] to give the widest latitude to a state court's conduct of its speedy-trial analysis." *Amos v. Thornton,* 646 F.3d 199, 205 (5th Cir. 2011). Thus, federal courts on habeas review of a state court judgment accord deference under § 2254(d)(1), and so long as "there is an objectively reasonable basis on which the state court could have denied relief, AEDPA demands that [federal courts] respect its decision to do so." *Id.*

Lopez raised his Sixth Amendment speedy trial claims on direct appeal,[7] and the Texas Court of Criminal Appeals refused to hear his petition for discretionary review. *See Lopez*, P.D.R. No. 1509-15. Therefore, the intermediate court of appeals is the "last reasoned opinion"

[7] On direct appeal, Lopez asserted the following issue regarding his speedy trial rights: "Whether the Appellant's Sixth Amendment right to a speedy trial was violated during his eight year and nine month incarceration prior to trial." Lopez App. Brief, Doc. No. 27-13 at 12; *accord* Lopez Memorandum, Doc. No. 2 at 26.

on his speedy trial claims for purposes of federal review under AEDPA. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

The state intermediate appellate court carefully considered Lopez's speedy trial claims in light of the record and Texas law and concluded that his speedy trial rights were not violated because: (1) the record did not support that he was an "accused" for the purposes of the Loma Vista case before he was indicted on May 11, 2011 for that crime, where he was being held pursuant to charges in an unrelated aggravated assault case and the Bunker Hill capital murder case from 2005 through 2011; (2) Lopez had agreed to numerous resets between May 11, 2011 and his trial on September 2, 2014, such that the delay for speedy trial purposes was approximately two months; and (3) the length of the delay was not "presumptively prejudicial" to trigger an analysis of the other three *Barker* factors. *See Lopez*, 478 S.W.3d at 942-44. The intermediate appellate court thus concluded that Lopez's speedy trial rights were not violated in the Loma Vista case. *Id.* at 944.

As noted above, federal courts on habeas review of state court judgments accord deference to the state court's speedy trial determination. Here, the state court reviewed the record and concluded that Lopez acknowledged that the December 16, 2005 arrest occurred in connection with charges unrelated to the Loma Vista case. *Id.* at 942. It also found that the record did not establish that Lopez became an accused in the Loma Vista case on that date. *Id.* The intermediate court concluded, based on the record, that Lopez became an accused in the Loma Vista case when he was indicted in that case on May 11, 2011. *Id.*

Under federal law, a person becomes an "accused" for speedy trial purposes when "either a formal indictment or information or else the actual restraints imposed by arrest and holding to

answer a criminal charge" occurs. *United States v. Marion*, 404 U.S. 307, 320 (1971). In *Marion*, the Supreme Court explained:

> On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of *that* prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him.

Id. at 313 (emphasis added). The state intermediate appellate court determined that the record presented at the speedy trial hearing did not reflect that Lopez was confined pursuant to charges in the Loma Vista case until May 11, 2011. In light of the record presented at Lopez's hearing on his speedy trial motion and federal law regarding the speedy trial analysis, Lopez does not show that the state court's factual determination that he was an "accused" for purposes of the Loma Vista murder until May 11, 2011 was unreasonable based on the record as a whole, nor does he show that the state court's legal conclusion that he became an accused on May 11, 2011 is contrary to, or an unreasonable application of, clearly established Supreme Court law.

Lopez also challenges the state intermediate appellate court's determination that the time attributable to the numerous agreed resets should be excluded for purposes of determining the length of delay. The state intermediate appellate court found that both Lopez and his assigned counsel agreed to the resets, and, therefore, that time was excludable from the length of delay calculation. *Lopez*, 478 S.W.3d at 940 & n.3.

Respondent argues that the state intermediate appellate court calculated the length of delay based on state law, and a challenge to state law is not cognizable on federal habeas review. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (holding that a federal court reviewing a state court judgment is bound by the state court's interpretation of its own law). Respondent

additionally argues that Lopez points to no binding federal court decisions that would have forced the state intermediate appellate court to deviate from its precedent. In that regard, the Supreme Court has noted that "if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine." *Brillon*, 556 U.S. at 90 (quoting *Barker,* 407 U.S. at 529). The State may not be charged with delays caused by a criminal defendant's assigned counsel because those delays are attributable to the defendant for purposes of a speedy-trial analysis. *Id.* at 85, 90–93.

The state intermediate court found, as a matter of fact and under state law, that both trial counsel and Lopez agreed to reset his case during the majority of the time between May 11, 2011 and his September 2014 trial. Lopez has not established that the state court's determination regarding the length of delay was contrary to, or an unreasonable application of, Supreme Court precedent or was an unreasonable determination of the facts based on the record as a whole.

The Fifth Circuit has held that because the first factor, length of delay, "'serves a dual function' as both a substantive *Barker* factor and 'a threshold requirement,'" a court need not analyze the remaining factors unless the case involves a delay of over twelve months. *Laws v. Stephens*, 536 F. App'x 409, 412–14 (5th Cir. 2013) (citing *United States v. Schreane,* 331 F.3d 548, 553 (6th Cir. 2003)). Based on the excludable delays from the agreed resets discussed above, the state intermediate appellate court determined that the length of delay was less than one year.[8] *Lopez*, 478 S.W.3d at 943. The state court's determination that a review of the other *Barker* factors was unnecessary and that Lopez's speedy trial rights were not violated for the Loma Vista murder was not contrary to, or an unreasonable application of, clearly established

[8] The intermediate appellate court found that Lopez had agreed to twelve resets between June 14, 2011, and September 6, 2013 (with the final reset setting the case for disposition on February 5, 2014), and six more resets between February 5, 2014, and June 30, 2014 (with the final one setting a trial date of August 29, 2014), leaving a delay of only approximately two months. *Lopez*, 478 S.W.3d at 940 & n.3, 943.

Supreme Court precedent or an unreasonable determination of the facts based on the record. Accordingly, Lopez's speedy trial claims (Claims 3, 10 & 11) are denied.

D. Ineffective Assistance of Counsel (Claims 4, 5, & 6)

Lopez contends that his trial counsel[9] rendered ineffective assistance because they: (a) overrode his decision to testify in his own defense (Claim 4); (b) failed to utilize and introduce into evidence a transcript or audio recording of the August 21, 2008 interview of Yeni Rivas in order to impeach her trial testimony (Claim 5(a)); (c) failed to move for a continuance until Alejandro Garcia was sentenced in exchange for his testimony at Lopez's trial (Claim 5(b)); (d) failed to move for a new trial to challenge the imposition of a mandatory life sentence because he was 17 years old at the time the offense was committed (Claim 6).

The Constitution guarantees a fair trial for criminal defendants through the Due Process Clause, but the Sixth Amendment, which conveys the right to have the effective assistance of counsel, largely defines the basic elements of a fair trial. *See* U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *see also McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (observing that "the right to counsel is the right to the effective assistance of counsel"). Claims for ineffective assistance of counsel are analyzed under the following two-prong standard:

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

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[9] Mr. Joseph Salhab was lead counsel and Ms. Deborah Summers joined the defense team in August 2014 to assist with the speedy trial motion and hearing and for trial. *See* SHCR at 00028 ("Summers Aff."), Doc. No. 27-35 at 30. The record reflects that Salhab was incapacitated during the time of the state habeas proceedings, and, therefore, no affidavit was obtained from him. SHCR at 00044 ¶ 6, Doc. No. 27-35 at 46. However, Summers submitted an affidavit responding to issues regarding the representation that were within her personal knowledge. Summers Aff. at 00028-29.

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

The first prong of the governing standard is only satisfied where the defendant shows that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687. Scrutiny of counsel's performance must be "highly deferential," and a reviewing court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *See United States v. Molina-Uribe*, 429 F.3d 514, 518 (5th Cir. 2005) (citing *Strickland*, 466 U.S. at 687-88), *cert. denied*, 547 U.S. 1041 (2006).

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

1. Decision Whether to Testify

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Rock v. Arkansas*, 483 U.S. 44, 53 (1987) (quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)). This right is personal to the defendant; only he, not counsel, may make the choice, and he must do so knowingly and voluntarily. *See United States v. Mullins*, 315 F.3d 449, 452 (5th Cir. 2002).

Lopez alleges that his trial counsel overrode his decision to testify. He alleges that if he had testified, he would have been able to clear up the inconsistencies in witness testimony and look directly at the jury and tell them that he did not murder Daniel Zamora. He claims that trial counsel advised him not to testify because the prosecution had threatened to ask him about the Bunker Hill case during trial. Lopez states that he went along with trial counsel's recommendation, but later learned that if trial counsel had filed a motion,[10] they could have kept the prosecutor from mentioning the Bunker Hill case. He contends that if he had known he could testify without the risk of the prosecution asking about the Bunker Hill case, he would have chosen to testify.

The record reflects that on May 21, 2014, the State filed a "Notice of the State's Intent to Use Extraneous Offenses and Prior Convictions for Impeachment and/or Punishment," which listed numerous extraneous offenses, including the December 2005 murders in the Bunker Hill case.[11] Trial counsel filed, and the court granted, a *Theus* motion seeking notice of any intent to use extraneous offenses and for a hearing prior to their introduction into evidence.[12] As Summers notes in her affidavit, Lopez had two other capital murder cases, an aggravated kidnapping, and an aggravated assault as extraneous offenses that were neither remote nor convictions that, in her professional opinion, could still be used against Lopez if he testified.[13]

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[10] Lopez does not specify what motion trial counsel could have filed other than motion under *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992) (en banc) ("*Theus* motion") that counsel filed and the trial court granted. *See* Clerk's Record, Doc. No. 27-2, at 115-118. The record also reflects that trial counsel filed, and the court granted, a motion in limine to prevent the State from mentioning Lopez's alleged gang affiliation without first informing defense counsel of the State's intent to introduce such evidence and be given an opportunity to object. *See id.* at 640.

[11] *Id.* at 214.

[12] *Id.* at 115-118.

[13] SHCR at 00028, Doc. No. 27-35 at 30.

Summers also stated that the prosecutor in the case was very aggressive and competent and that she felt Lopez would not do well under cross examination because of his confession as a party.[14]

The state habeas court found, based on Summers's affidavit that it found to be credible, that trial counsel had no reason to prevent Lopez from testifying, except that the extraneous offenses could potentially be used against him.[15] The state habeas court found that Lopez was well aware of his right to testify, but that he told Summers and Salhab that he did not want to do so.[16] The state habeas court further found that the decision regarding whether to testify was Lopez's choice and that he chose not to testify.[17] Regarding Lopez's claim for ineffective assistance of counsel in connection with his decision not to testify, the state habeas court found that Lopez failed to show that trial counsel's assistance was deficient or that he was harmed by trial counsel's actions.[18]

The state court's factual findings regarding whether it was Lopez's choice not to testify are entitled to deference under AEDPA. Further, the state court's conclusion that Lopez failed to show that trial counsel was deficient or that he was harmed by their actions was not contrary to, or an unreasonable application of *Strickland*, nor was it an unreasonable factual determination based on the record. Accordingly, Lopez's claim regarding the decision not to testify (Claim 4) is denied.

2. Failure to Impeach Yeni Rivas

Lopez also claims that trial counsel failed to impeach Yeni Rivas ("Yeni") because they did not introduce Yeni's prior inconsistent statement from a 2008 interview between Yeni and private investigator Richard D. Rodriguez. Lopez contends that Yeni previously stated that:

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[14] *Id.*
[15] *Id.* at 00045.
[16] *Id.*
[17] *Id.*
[18] *Id.*

police threatened to take her to jail and that she would have her baby in jail and never see her baby; police threatened to taser Yeni when they were searching the house in December 2005; she never implicated Lopez in the shooting; and she did not remember making the particular written statement that private investigator Rodriguez showed her.[19]

The state habeas court found, based on the appellate record, that trial counsel elicited the following testimony from Yeni on cross examination: (1) there was tension in her relationship with Lopez because of Lopez's unemployment; (2) there was tension in the relationship because Yeni did not approve of Lopez's friend group; (3) Lopez's clothes were not disheveled on the night of the murder and Yeni did not see him with a gun; (4) Yeni thought Lopez was acting weird later, but not the night of the murder; (5) police told Yeni that she might end up in jail pregnant; (6) police did not threaten to taser Yeni; and (7) Lopez had told her that he did not know that anybody had died and that he was not in the room when the shootings occurred.[20] The habeas court found that trial counsel argued to the jury that Yeni's statements corroborated the defense theory that Lopez was not one of the shooters, was not in the room, and remained outside during the robbery and shooting.[21] The state habeas court also found that trial counsel pointed out to the jury that Yeni testified that she never saw Lopez with a shotgun at the time of the murder.[22] Based on this record, the state habeas court concluded that Lopez did not show that trial counsel was ineffective regarding Yeni's testimony or that the result of the trial would have been any different if trial counsel had been able to impeach her with prior inconsistent statements.[23] Therefore, Lopez does not show that the state habeas court's determination that counsel was not deficient regarding Yeni's testimony was contrary to, or an unreasonable

[19] *Id.* at 00046-47.
[20] *Id.* at 00047-48.
[21] *Id.*
[22] *Id.* at 00048.
[23] *Id.*

application of, federal law under *Strickland*, or that its determination of the facts was unreasonable based on the record. Accordingly, he is not entitled to habeas relief on Claim 5(a).

3. Failure to Move for a Continuance

Lopez contends that trial counsel was deficient for failing to move for a continuance so that Alejandro Garcia ("Alejandro") could be sentenced before testifying. As the state habeas court found, Lopez was not entitled to insist on a codefendant's sentencing prior to proceeding to trial in his own case.[24] Moreover, as Respondent points out, Alejandro's sentence was contingent on his truthful testimony in Lopez's trial; hence, Alejandro's testimony necessarily preceded his sentencing.

The record reflects, and the state habeas court found, that trial counsel elicited testimony from Alejandro that he obtained a favorable plea deal in exchange for his testimony.[25] The record also reflects that both the prosecution and trial counsel elicited testimony that Alejandro had received a lesser charge and was hoping for as little as five years' probation.[26] Thus, trial counsel ensured that the jury was informed that Alejandro made a favorable deal in exchange for his testimony and could possibly receive as little as five years' probation for his guilty plea to aggravated robbery in connection with the Loma Vista case.

The state habeas court found that Lopez failed to show that trial counsel was deficient in not moving for a continuance when Lopez had no right to insist that a codefendant be sentenced before testifying against him and trial counsel presented testimony to the jury regarding the favorable plea deal. Lopez does not show that the state habeas court's determination that counsel was not deficient in this regard is contrary to, or an unreasonable application of, federal law

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[24] *Id.* at 00049.
[25] *Id.*
[26] Reporter's Record ("RR") Vol. 8, Doc. No. 27-10, at 65-66, 176-178.

under *Strickland*, nor does he show that the habeas court's determination of the facts was unreasonable based on the record. Accordingly, Claim 5(b) is denied.

4. Failure to Challenge Life Sentence and Move for a New Trial (Claim 6)

Lopez contends that trial counsel rendered ineffective assistance when they failed to object to the imposition of a life sentence and that either trial counsel or appellate counsel, if applicable, should have filed a motion for new trial to challenge the sentence.

The record reflects that the jury returned a verdict of guilty for the capital murder charge.[27] Texas law provides that a person adjudged guilty of a capital felony in a case where the State does not seek the death penalty "shall be punished by imprisonment in the Texas Department of Criminal Justice for: (1) life, if the individual committed the offense when younger than 18 years of age; or (2) life without parole, if the individual committed the offense when 18 years of age or older." TEX. PENAL CODE §12.31(a). This sentence is mandatory on conviction of a capital felony. *Id.* §12.31(b)(1). The state habeas court found that Lopez's life sentence was within the range prescribed by the Texas legislature and that Lopez failed to show that trial counsel's performance fell below an objective standard of reasonableness.[28]

Lopez does not show that his counsel was deficient for failing to object to a sentence that fell within the range prescribed by statute, and fails to establish that trial counsel had a meritorious objection to make in light of established law. *See Parr v. Quarterman*, 472 F.3d 245, 256 (5th Cir. 2006) (holding that counsel was not deficient in failing to present a meritless argument) (citation omitted); *see also United States v. Sparks*, --- F.3d ----, 2019 WL 5445897, at *4 (5th Cir. Oct. 24, 2019) (explaining that a sentence of life with the possibility of parole "can be imposed on a mandatory basis for juveniles without implicating *Miller* [*v. Alabama*, 567 U.S.

[27] *See* Clerk's Record at 692 (Judgment), Doc. No. 27-2 at 692
[28] SHCR at 00049, 00053.

460 (2012)]" because it is not a life without parole sentence). Accordingly, Lopez does not show that the habeas court's rejection of this claim was contrary to, or an unreasonable application of, Supreme Court precedent or that it was an unreasonable determination of the facts in light of the record. Claim 6 is denied.

E. Suppression of Evidence (Claim 7)

Lopez claims that the prosecution withheld favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, Lopez contends that the State withheld the fact that Alejandro received a favorable plea deal in exchange for his testimony against him.

To establish a *Brady* claim, a petitioner must establish that the evidence was (1) suppressed, (2) favorable, and (3) material. *Wright v. Quarterman,* 470 F.3d 581, 591 (5th Cir. 2006). Evidence is not "suppressed" if the petitioner either knew or should have known of the essential facts that would have permitted him to take advantage of any exculpatory evidence. *West v. Johnson,* 92 F.3d 1385, 1399 (5th Cir. 1996). Evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley,* 514 U.S. 419, 435 (1995). The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of trial, does not establish "materiality" under this standard. *United States v. Agurs,* 427 U.S. 97, 109-10 (1976). In short, a petitioner must show a "reasonable probability of a different result." *Banks v. Dretke,* 540 U.S. 668, 699 (2004).

Lopez's contention that the State did not disclose that Alejandro received a favorable plea deal in exchange for his testimony is belied by the record. The record reflects that the prosecutor asked Alejandro what he already received as a result of the agreement with the State, and Alejandro testified that his charge was reduced from capital murder to aggravated robbery in

exchange for truthful testimony in Lopez's case.[29] On cross examination, Lopez's attorney elicited testimony from Alejandro that he received a plea deal in exchange for his testimony against Lopez and that he could receive as little as five years' probation, which Alejandro stated he would choose if he could.[30] Lopez does not show that the State withheld any favorable, material information from either him or the jury. Further, Lopez fails to show that the state court's rejection of this claim was contrary to, or an unreasonable application of, Supreme Court precedent or an unreasonable determination of the facts in light of the record. Claim 7 is denied.

F. Due process regarding Yeni's Testimony (Claim 8)

Lopez argues that his due process rights were violated because Yeni testified falsely at his trial and, therefore, he is actually innocent and that the state court should have granted an evidentiary hearing. Respondent correctly notes, and Lopez acknowledges, that this is a "rehashing" of Claims 1 and 2,[31] which have been addressed and denied as explained above. For the reasons set forth in sections III.A. and III.B. above, Lopez fails to show that the state court's rejection of this claim was contrary to, or an unreasonable application of, Supreme Court precedent or an unreasonable determination of the facts in light of the record. Claim 8 is denied.

G. Life Sentence (Claim 9)

Lopez challenges his life sentence, claiming that it is a violation of due process to have a mandatory life sentence for capital murder where the defendant was only 17 at the time of the offense. The state habeas court found that this is a "record claim," and, therefore, Lopez is procedurally barred from litigating this claim.[32] *See Coleman v. Thompson,* 501 U.S. 722, 732 (1991); *see also Magwood v. Patterson,* 561 U.S. 320, 340 (2010) ("If a petitioner does not

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[29] RR Vol. 8, Doc. No. 27-10, at 65:2-66:20.
[30] *Id.* at 176-78.
[31] *See* Doc. No. 32 at 22.
[32] SHCR at 00052, 00054-55.

satisfy the procedural requirements for bringing an error to the state court's attention—whether in trial, appellate, or habeas proceedings, as state law may require—procedural default will bar federal review."). The state court further found that Lopez's life sentence falls within the range of punishment prescribed by the Texas legislature and does not violate the Eighth Amendment or due process.[33]

Even if this claim were not procedurally barred, the state court's conclusion that Lopez's punishment is within the range prescribed by the Texas legislature and does not violate the Eighth Amendment or due process is not contrary to, or an unreasonable application of, Supreme Court precedent. In *Miller v. Alabama*, the Supreme Court held that a mandatory life sentence *without the possibility of parole* for a 17-year-old is cruel and unusual punishment under the Eighth Amendment. 132 S. Ct. 2455 (2012). However, the record reflects that Lopez was sentenced to life in prison, not life without parole.[34] Because Lopez's sentence is not "life without parole," *Miller* does not apply. *See Sparks*, --- F.3d ----, 2019 WL 5445897, at *4 (holding that "*Miller* has no relevance to sentences less than [life without parole]" and that "sentences of life *with* the possibility of parole or early release do not implicate *Miller*") (citing cases). Lopez does not show that the state court's conclusion that his sentence did not violate the Eighth Amendment or due process is contrary to, or an unreasonable application of, clearly established law as announced by the Supreme Court. Accordingly, Claim 9 is denied. Because all of Lopez's grounds for relief have been denied, his petition is subject to dismissal.

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[33] *Id.*

[34] *See* Clerk's Record at 692 (Judgment), Doc. No. 27-2 at 692; *see also* TEX. PENAL CODE § 12.31(b) (providing that a sentence of life imprisonment is mandatory on conviction of the capital felony, if the individual committed the offense when younger than 18 years of age, but that a sentence of life without the possibility of parole is mandatory if the individual committed the offense when 18 years of age or older).

IV. MOTION FOR APPOINTMENT OF COUNSEL

Lopez moves for the appointment of counsel. There is no constitutional right to counsel on federal habeas review. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions") (citation omitted).

Lopez contends that his case is a "landmark" case and that he needs counsel to help him. The Court observes that Lopez has done a capable job of representing himself to date. His pleadings and motions are neatly prepared and include citations to legal authorities upon which he relies. In his motion, Lopez does not state what efforts, if any, he has made to secure private counsel or whether he has even tried to find a lawyer that would take his case on a pro bono basis. Further, although Lopez raises several issues, none of them are completely novel or complex. Lopez does not allege facts showing that the "interests of justice" require the appointment of counsel. *See Schwander v. Blackburn*, 750 F.2d 494, 502-03 (5th Cir. 1985). Accordingly, his Motion for Appointment of Counsel (Docket Entry No. 22) is denied.

V. MOTION FOR DISCOVERY

Lopez has requested discovery. Under the federal rules, discovery is limited in habeas proceedings. The Supreme Court has clarified that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181. Likewise, "Rule 6 of the Rules Governing § 2254 cases permits discovery only if and only to the extent that the district court finds good cause." *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000); *see also Hill v. Johnson*, 210 F.3d 481, 487 (5th Cir. 2000). Lopez has not demonstrated that good cause exists for further discovery in his federal habeas case. Accordingly, Lopez's motion for discovery (Doc. No. 29) is denied.

VI. MOTION FOR AN EVIDENTIARY HEARING

Lopez has requested an evidentiary hearing. Whether to hold an evidentiary hearing is governed by 28 U.S.C. § 2254(e)(2) and is within the district court's discretion. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000) (Congress intended "to avoid unneeded evidentiary hearings in federal habeas corpus" proceedings); *Robinson v. Johnson*, 151 F.3d 256, 268 (5th Cir. 1998), *cert. denied*, 526 U.S. 1100 (1999). Under section 2254(e)(2), if an applicant "failed to develop the factual basis of a claim in State court proceedings," then the federal habeas corpus court may hold a hearing if:

> (A) the claim relies on–
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2)(A)–(B). An evidentiary hearing is not required if there are "no relevant factual disputes that would require development in order to assess the claims." *Robinson*, 151 F.3d at 268. This Court has been able to resolve all issues raised in this case by referring to the pleadings and the state court record. Lopez's motion for an evidentiary hearing (Doc. No. 30) is denied.

VII. CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. *See* 28 U.S.C. § 2253. A certificate of appealability will not issue unless the petitioner makes "a

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

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

VIII. CONCLUSION AND ORDER

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

1. The respondent's motion for summary judgment (Doc. No. 26) is **GRANTED**.
2. The habeas corpus petition is **DISMISSED** with prejudice.
3. The petitioner's motions for appointment of counsel (Doc. No. 22), an evidentiary hearing (Doc. No. 29), and discovery (Doc. No. 30) are **DENIED**.
4. All other pending motions (Doc. Nos. 13, 14, 16, 17, 23, 24, 25) are **DENIED as MOOT**.

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

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

SIGNED at Houston, Texas, this 19th day of November 2019.

ANDREW S. HANEN
UNITED STATES DISTRICT JUDGE

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