United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 1, 2021
Lyle W. Cayce
Clerk

No. 20-20502

ALEXANDER ASCENCIO,

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-3286

ORDER:

Alexander Ascencio—convicted in Texas state court of aggravated sexual assault for repeatedly sexually abusing his daughter, beginning when she was 11 and ending when she was 13 years old—is currently serving a fifty-five-year prison sentence. Ascensio applied for a writ of habeas corpus under 28 U.S.C. § 2254, alleging: (1) insufficiency of the evidence; (2) a defect in his indictment; (3) ineffective assistance of trial counsel; and (4) ineffective assistance of appellate counsel. The district court denied Ascensio's application because his first two claims were procedurally defaulted in the Texas state courts and his last two claims lacked merit.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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

June 01, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 20-20502 Ascencio v. Lumpkin
USDC No. 4:19-CV-3286

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Gardner

By: _____
Christina A. Gardner, Deputy Clerk
504-310-7684

Mr. Alexander Ascencio
Ms. Lori Denise Brodbeck
Mr. Edward Larry Marshall

Ascencio now seeks a certificate of appealability to challenge the district court's dismissal. We may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This means that for all four of his claims, Ascencio must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). For the claims that were dismissed as procedurally defaulted, Ascencio must show also "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Ascencio has not made the required showing as to any of his four claims.

IT IS ORDERED that appellant's motion for a certificate of appealability is DENIED.

/s/ Jennifer Walker Elrod
JENNIFER WALKER ELROD
United States Circuit Judge

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

ALEXANDER ASCENCIO, TDCJ #2052956, Petitioner, VS. LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § § § §	CIVIL ACTION NO. H-19-3286

MEMORANDUM AND ORDER

State inmate Alexander Ascencio has filed a petition and supporting memorandum [Doc. # 1], seeking habeas corpus relief under 28 U.S.C. § 2254 from a conviction that resulted in a sentence of 55 years' imprisonment in the Texas Department of Criminal Justice – Correctional Institutions Division ("TDCJ"). The respondent has answered with a motion for summary judgment [Doc. # 8]. Although the Court granted him two extensions of time [Docs. # 11, # 14], Ascencio has not filed a response and his time to do so has expired. After reviewing all of the pleadings, the state court records, and the applicable law, the Court will grant the respondent's motion and dismiss this action for the reasons explained below.

I. BACKGROUND

A grand jury in Harris County, Texas, returned an indictment against Ascencio in Case No. 1302186, charging him with aggravated sexual assault of a child younger than 14 years of age.[1] Ascencio's defense counsel filed objections to the form and substance of that indictment, arguing that the charges did not sufficiently track the statutory language for such an offense as defined under Texas Penal Code § 22.021(a)(1)(B)(iii).[2] In response to those objections, the State submitted a revised charging instrument to the grand jury, which returned a new indictment against Ascencio in Case No. 1487505.[3] At a trial on those charges, the victim (J.C.) testified that Ascencio, who was her biological father, began sexually abusing her when she was as young as 11 years of age until she finally reported it at the age of 13.[4] A jury in the 209th District Court for Harris County, Texas, found Ascencio guilty as charged and sentenced him to 55 years' imprisonment.[5]

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1 Indictment in Case No. 1302186 [Doc. # 9-12], at 9. For purposes of identification, all page numbers reference the pagination for each docket entry imprinted by the Court's electronic case filing system (ECF).

2 Exception to Substance of the Indictment [Doc. # 9-13], at 56-58; Exception to Form of the Indictment [Doc. # 9-13], at 59-61.

3 Indictment in Case No. 1487505 [Doc. # 9-12], at 8.

4 Court Reporter's Record, vol. 3 [Doc. # 9-16], at 152-78; Court Reporter's Record, vol. 4 [Doc. # 9-17], at 5-37.

5 Judgment of Conviction by Jury [Doc. # 9-13], at 110.

On direct appeal, Ascencio argued that the trial court abused its discretion by (1) designating a forensic interviewer as an outcry witness under Article 38.072 of the Texas Code of Criminal Procedure because J.C. told her mother about the abuse first; and (2) improperly limiting the scope of closing argument by preventing defense counsel from stating that "an individual juror may form his or her own definition of proof beyond a reasonable doubt."[6] An intermediate court of appeals rejected both arguments and affirmed the conviction after setting out the following facts based on the evidence presented at trial:

> J.C. and her sister and mother, Ursula Canales, moved from El Salvador to Houston in 2003, when J.C. was six years old. At that time, J.C. had only had contact with her biological father, Ascencio, by phone. After spending approximately two years in Houston, Canales decided in 2005, when J.C. was eight years old, to move to Maryland, where Ascencio lived.
>
> After living together in Maryland for approximately three years, in 2008, the family moved from Maryland to Houston. Upon returning to Houston, Canales worked two jobs that kept her away from home from 8:00 a.m. to 11:00 p.m. While she was away, Canales would leave J.C., who was 11 years old at the time, in Ascencio's care.
>
> J.C. testified that the abuse began when she was in the sixth grade. Ascencio walked into the room when J.C. was on MySpace, and saw a picture of J.C. with a boy. Ascencio became angry and started to hit J.C. J.C. testified that Ascencio's behavior towards J.C. changed after that incident. J.C. testified that Ascencio refused to allow J.C.'s friends or cousins to visit the house, because Ascencio wanted her to be with him. Ascencio also refused J.C. access to a computer or phone. J.C. was only allowed to go to church, and only with her parents.

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[6] Brief of Appellant [Doc. # 9-6], at 11, 19.

J.C. testified that Ascencio first touched her inappropriately when she was 11 or 12 years old. J.C. testified that the first assault occurred one morning when J.C. was sleeping and Ascencio came into her room and got into her bed. J.C. woke up to him touching her breasts and vagina under her clothes.

The touching continued daily and escalated. After school, Ascencio would tell her to come to his room and shut the door. Ascencio would tell J.C. to take off her clothes and get into bed with him. He would touch her breasts and her vagina with his hands, sometimes he would put his mouth on J.C.'s vagina, and sometimes he would put his finger inside J.C.'s vagina.

J.C. testified at trial that Ascencio had the most time alone with her on Sundays. One Sunday when J.C. was 11 or 12 years old, Ascencio positioned himself on top of her and tried to penetrate her vagina with his penis. When J.C. felt Ascencio's penis against her vagina, she screamed and tried to move, and Ascencio became angry and hit her with his fist. Ascencio complained that J.C. "can have sex with [her boyfriend], why can't I." J.C. testified that this assault was painful and caused her to bleed.

On another Sunday, J.C. falsely told Ascencio that she was on her period in the hopes that he would not abuse her. But he discovered the ruse, became angry, and threatened her with a machete, whereupon J.C. fell to the floor, unable to breathe.

Ascencio assaulted J.C. for the last time in January 2011, when J.C. was 13 years old and in the eighth grade. Ascencio called J.C. into his room, made her get into bed, touched her vagina with his penis, and then tried to penetrate her vagina with his penis.

Shortly after this final assault, Ascencio traveled to Maryland. While in Maryland, Ascencio called Canales and learned that a nephew was with Canales and J.C. Ascencio became upset, asked to speak to J.C. by phone, and then caused J.C. to start crying while on the phone. Canales testified that she sensed something was wrong, and asked J.C. whether Ascencio had ever touched her. J.C. cried and told Canales that Ascencio had "touched her all over," kissed her, grabbed her, and tried to penetrate her with his penis.

Canales did not immediately report the abuse to police. But J.C. did talk to Lisa Holcomb, a forensic interviewer at the Children's Assessment Center.

During trial, the court held a hearing outside of the jury's presence regarding the testimony of Holcomb, who was the State's proposed outcry witness. During the hearing, Holcomb testified that she interviewed J.C. in April 2011, when J.C. was 13 years old. Holcomb testified that J.C. told her that Ascencio started to sexually assault her when they moved into their house in Houston in 2008, when J.C. was 11 years old. Holcomb testified that J.C. reported that Ascencio would touch her breasts and vagina. Holcomb also testified that J.C. told her that Ascencio would try to put his penis inside her vagina and it hurt.

Holcomb testified that J.C. reported that the last incident occurred when she was 13 years old in January 2011, when her father "put his penis on top of her vagina." Holcomb recounted that J.C. told her that Ascencio "tried to stick it in, and she felt pain, and he got mad at her, and hit her, and told her to leave." Holcomb testified that she was not aware of J.C. previously informing anyone else of the genital to genital contact that she had reported to Holcomb. Holcomb testified that while J.C. told her mother that the abuse was occurring, J.C. did not tell Canales all of the details that she had told Holcomb and, specifically, she did not tell Canales about the genital-to-genital contact.

Canales also testified during the hearing and related the facts that led J.C. to disclose the abuse. She testified that J.C. told her that Ascencio had "touched her all over," kissed her, grabbed her, and tried to penetrate her. But Canales also testified that J.C. never told her that Ascencio touched her vagina with his penis.

Following the hearing testimony, Ascencio objected to the State's proffer of Holcomb as the outcry witness, arguing that J.C. first told Canales about the sexual abuse, and, therefore, Canales was the only proper outcry witness under article 38.071. The trial court overruled Ascencio's objection and designated Holcomb as the outcry witness.

> Holcomb then testified, telling the jury the details that J.C. reported to her during their interview, including J.C's report of genital-to-genital contact. Canales also testified before the jury. She testified that J.C. told her that Ascencio had touched her, but did not discuss the details of the sexual abuse.

Ascencio v. State, No. 01-16-00200-CR, 2017 WL 2255720, at *1-2 (Tex. App. — Houston [1st Dist.] Sept. 27, 2017). Thereafter, the Texas Court of Criminal Appeals refused Ascencio's petition for discretionary review.

Ascencio challenged his conviction further by filing a state habeas corpus application under Article 11.07 of the Texas Code of Criminal Procedure, arguing that he was denied effective assistance of counsel in connection with his trial and direct appeal.[7] Ascencio argued further that the evidence was insufficient to support his conviction and that his second indictment was "fundamentally defective" because it violated Due Process and the Double Jeopardy Clause.[8] The state habeas corpus court entered findings of fact and concluded that Ascencio's challenges to the sufficiency of the evidence and his indictment were not cognizable on habeas review and that none of his other claims had merit.[9] The Texas Court of Criminal

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7 State Habeas Application [Doc # 9-21], at 12-13.

8 *Id.* at 15, 17.

9 Findings of Fact and Conclusions of Law [Doc. # 9-23], at 5-16.

Appeals agreed and summarily denied relief without a written order on findings made by the trial court.[10]

Ascencio now seeks federal habeas relief from his conviction under 28 U.S.C. § 2254, raising claims similar to those that were rejected previously on state habeas corpus review.[11] The respondent has filed a motion for summary judgment, noting that Ascencio's challenge to the sufficiency of the evidence and his indictment were rejected on state habeas review for procedural reasons and that those claims are barred as a result.[12] The respondent argues further that Ascencio fails to show that he is entitled to relief on any of his other claims under the legal standard that governs federal habeas corpus review.[13]

II. STANDARD OF REVIEW

Before a state prisoner can seek federal habeas corpus review he is required to exhaust remedies by presenting his claims for adjudication in a procedurally

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10 Action Taken on Writ No. 89,815-01 [Doc. # 9-20], at 1.

11 Petition [Doc. # 1], at 6-9. The petitioner proceeds *pro se* in this case. Courts are required to liberally construe pleadings filed by *pro se* litigants under a less stringent standard than those drafted by attorneys. *See Haines v. Kerner*, 404 U.S. 519, 521 (1972); *see also Hernandez v. Thaler*, 630 F.3d 420, 426 (5th Cir. 2011) ("The filings of a federal habeas petitioner who is proceeding *pro se* are entitled to the benefit of liberal construction," meaning that their submissions "are not held to the same stringent and rigorous standards as are pleadings filed by lawyers.") (internal citation marks and quotation omitted).

12 Respondent's Motion for Summary Judgment [Doc. # 8], at 22-24.

13 *See id.* at 8-21, 24-26.

proper manner in state court. *See* 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). Claims that have been properly raised and adjudicated on the merits are subject to the legal standard found in the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d). Under this standard, a federal habeas corpus court may not grant relief unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1).

"A state court's decision is deemed contrary to clearly established federal law if it reaches a legal conclusion in direct conflict with a prior decision of the Supreme Court or if it reaches a different conclusion than the Supreme Court on materially indistinguishable facts." *Matamoros v. Stephens*, 783 F.3d 212, 215 (5th Cir. 2015) (citations omitted). To constitute an "unreasonable application of" clearly established federal law, a state court's holding "must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (citation omitted). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 575 U.S. at 316 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

The standard found in 28 U.S.C. § 2254(d) "imposes a 'highly deferential standard for evaluating state-court rulings, . . . [which] 'demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted). This standard is intentionally "difficult to meet" because it was meant to bar relitigation of claims already rejected in state proceedings and to preserve federal habeas review as "a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Richter*, 562 U.S. at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring)).

A state court's factual determinations are also entitled to deference on federal habeas corpus review. Findings of fact are "presumed to be correct" unless the petitioner rebuts those findings with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Where a claim presents a question of fact, a petitioner cannot obtain federal habeas relief unless he shows that the state court's denial of relief "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). A federal habeas corpus court "may not characterize these state-court factual determinations as unreasonable 'merely because [it] would have reached a different conclusion in the first instance.'" *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) (quoting *Wood v. Allen*, 558 U.S.

290, 301, 130 S. Ct. 841, 849 (2010)). "Instead, § 2254(d)(2) requires that [a federal court] accord the state trial court substantial deference." *Id.*

III. DISCUSSION

A. Sufficiency of the Evidence

Ascencio contends that the evidence was insufficient to support his conviction for aggravated sexual assault of a child younger than 14 because there was no "eyewitness" testimony and no "medical evidence" showing that a sexual assault occurred.[14] The respondent notes that Ascencio raised this claim for the first time on state habeas corpus review, where it was rejected because "[c]hallenges to the sufficiency of the evidence are not cognizable on habeas [review]," relying on *Ex parte Christian*, 760 S.W.2d 659, 660 (Tex. Crim. App. 1988).[15] Arguing that Ascencio failed to raise this claim properly on direct appeal, the respondent maintains that his challenge to the sufficiency of the evidence must be dismissed as barred by the doctrine of procedural default.[16]

Federal habeas review is barred under the doctrine of procedural default if the last state court to consider the claim clearly based its denial of relief on an independent and adequate state-law procedural ground. *See Coleman v. Thompson*,

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[14] Petition [Doc. # 1], at 8-9.

[15] Findings of Fact and Conclusions of Law [Doc. # 9-23], at 11.

[16] Respondent's Motion for Summary Judgment [Doc. # 8], at 22-23.

501 U.S. 722, 729-30 (1991); *see also Ylst v. Nunnemaker*, 501 U.S. 797, 802-04 (1991) (explaining that a federal habeas corpus court looks at the "last reasoned opinion on the claim" to determine whether a procedural default occurred in state court). Texas state courts have long held that challenges to the sufficiency of the evidence should be made on direct appeal and may not be raised in a post-conviction writ of habeas corpus. *See Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004); *see also Ex parte Christian*, 760 S.W.2d at 660 (citing *Ex parte Ash*, 514 S.W.2d 762, 763 (Tex. Crim. App. 1974)). The Fifth Circuit has recognized that this rule constitutes an independent and adequate state procedural ground that bars federal habeas review. *See Register v. Thaler*, 681 F.3d 623, 628 (5th Cir. 2012); *see also Busby v. Dretke*, 359 F.3d 708, 718-19 (5th Cir. 2004) (finding it firmly established by the Texas courts that a challenge to the sufficiency of the evidence must be raised on direct appeal and is not actionable on state habeas review). Consequently, Ascencio's challenge to the sufficiency of the evidence is procedurally barred from consideration unless an exception applies.

Where a petitioner has committed a procedural default, federal habeas corpus review is available only if he can demonstrate: (1) "cause for the default and actual prejudice as a result of the alleged violation of federal law," or (2) that "failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To satisfy the exception reserved for

fundamental miscarriages of justice, a petitioner must provide the court with evidence that would support a "colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). Ascencio has not responded to the motion for summary judgment and the record does not otherwise disclose that any exception applies.[17] Accordingly, his challenge to the sufficiency of the evidence is procedurally barred from federal review.

Alternatively, the Court concludes that Ascencio's challenge to the sufficiency of the evidence is without merit. On habeas corpus review of a state court conviction, a challenge to the sufficiency of the evidence is governed by *Jackson v. Virginia*, 443 U.S. 307 (1979), which reflects the federal constitutional due process standard. *See Woods v. Cockrell*, 307 F.3d 353, 358 (5th Cir. 2002). This standard requires only that a reviewing court determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

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[17] The Court notes that ineffective assistance of counsel may, in some circumstances, constitute cause to excuse a procedural default. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (citing *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986)). "Not just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution." *Carpenter*, 529 U.S. at 451. Although Ascencio has raised ineffective-assistance claims against his appellate attorney, he does not establish that he was denied effective assistance in connection with his appeal or that he has a valid claim. Therefore, his counsel's performance cannot constitute cause that would excuse the procedural default in this case.

Ascencio was charged with aggravated sexual assault of a child who was younger than 14 at the time of the offense. In Texas, a person commits aggravated sexual assault in this context if the accused intentionally or knowingly "causes the penetration of the anus or sexual organ of a child by any means" or "causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor," and the child is younger than fourteen years of age. Tex. Penal Code § 22.021(a)(1)(B) & (2)(B). As noted above, the victim testified against Ascencio at trial, describing acts of sexual assault that occurred when she was under the age of 14.[18] Under Texas law, the uncorroborated testimony of a child victim, standing alone, is sufficient to support a conviction for aggravated sexual assault. *See Paul v. State*, Nos. 14-08-00437-CR, 14-08-00439-CR, 2009 WL 2145912, at *2 (Tex. App. — Houston [14th Dist.] July 21, 2009, no pet.) (citing *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. 1978); *Lane v. State*, 174 S.W.3d 376, 386 (Tex. App. — Houston [14th Dist.] 2005, pet. ref'd)). After viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. As a result, Ascencio's challenge to

[18] Court Reporter's Record, vol. 3 [Doc. # 9-16], at 152-78; Court Reporter's Record, vol. 4 [Doc. # 9-17], at 5-37.

the sufficiency of the evidence is without merit and fails to state a claim upon which habeas relief can be granted.

B. Challenges to the Indictment

Ascencio contends that the second indictment that was returned against him in Case No. 1487505, violated the Double Jeopardy Clause and his right to Due Process because it was sought after the United States Department of Immigration and Customs Enforcement ("ICE") imposed a detainer against him and he had turned down a plea-bargain offer for a 10-year prison sentence.[19] Ascencio raised similar claims on state habeas corpus review,[20] which were rejected by the state habeas corpus court.[21] In particular, the state habeas corpus court concluded that Ascencio "waived" his claims by failing to raise an objection to the indictment before the day of trial.[22]

The respondent contends that this claim is procedurally barred from federal review, noting that the state courts considered Ascencio's allegations and determined that review was not available under a state procedural rule announced in

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19 Petition [Doc # 1], at 8.

20 State Habeas Application [Doc # 9-21], at 17.

21 Findings of Fact and Conclusions of Law [Doc. # 9-23], at 7.

22 *Id.* (citing *Ex parte Gibson*, 800 S.W.2d 548 (Tex. Crim. App. 1990)).

Ex parte Gibson, 800 S.W.2d 548 (Tex. Crim. App. 1990).[23] According to that rule, challenges to the validity of an indictment are waived if not made before trial and may not be raised for the first time on appeal or collateral review. *See id.* at 551; *see also* Tex. Code Crim. Proc. art. 1.14(b) ("If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.").

A procedural default under this clearly established rule has been held adequate to bar federal habeas corpus review. *See, e.g., Avila v. Director, TDCJ-CID*, No. 4:16-cv-875, 2019 WL 2881579, at *6 (E.D. Tex. May 8, 2019); *Ringer v. Quarterman*, No. 4:07-cv-501, 2009 WL 35059, at *6 (N.D. Tex. Jan. 6, 2009). Ascencio fails to show that the claims concerning his indictment are not barred by the doctrine of procedural default or that an exception applies. Therefore, the respondent is entitled to summary judgment on this issue. Alternatively, Ascencio's claims concerning his indictment are without merit for other reasons raised by the respondent.[24]

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[23] Respondent's Motion for Summary Judgment [Doc. # 8], at 23-24.

[24] *Id.* at 24-26.

Ascencio contends that his conviction violated the Double Jeopardy Clause, which provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This provision, which is applicable to the states through the Due Process Clause found in the Fourteenth Amendment, protects against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (citations omitted); *Ohio v. Johnson*, 467 U.S. 493, 489 (1984).

Ascencio, who appears to allege that his second indictment constituted an impermissible second prosecution, does not establish that a violation of the Double Jeopardy Clause occurred. As noted above, Ascencio was charged with aggravated sexual assault of a child younger than 14 in an indictment that was returned against him initially in Case No. 1302186.[25] The State submitted a revised charging instrument to the grand jury, which returned a new indictment against Ascencio in Case No. 1487505,[26] after Ascencio's defense counsel filed objections to the form and substance of the initial indictment because it did not track the language required

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25 Indictment in Case No. 1302186 [Doc. # 9-12], at 9.

26 Indictment in Case No. 1487505 [Doc. # 9-12], at 8.

to charge an offense under relevant statute.[27] The initial indictment in Case No. 1302186 was dismissed before trial on the State's motion, noting that a new indictment was returned against Ascencio in Case No. 1487505.[28]

The Supreme Court has consistently held that a criminal defendant is not placed in jeopardy for purposes of the Double Jeopardy Clause until the defendant is "put to trial before the trier of facts, whether the trier be a jury or a judge." *United States v. Jorn*, 400 U.S. 470, 479 (1971) (citations omitted). In a non-jury trial, jeopardy attaches "when the court begins to hear evidence." *Serfass v. United States*, 420 U.S. 377, 388 (1975) (citations omitted). In the case of a jury trial, jeopardy attaches "when a jury is empaneled and sworn." *Id.*; *see also Crist v. Bretz*, 437 U.S. 28, 35-38 (1978). Because the record confirms that the original prosecution under the indictment in Case No. 1302186 never proceeded to trial, Ascencio does not show that jeopardy attached or that his conviction on the charges lodged against him in Case No. 1487505 violated the Double Jeopardy Clause. Ascencio does not otherwise show that the State obtained a second indictment against him for any improper reason related to his immigration status or his decision to reject a plea

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[27] Exception to Substance of the Indictment [Doc. # 9-13], at 56-58; Exception to Form of the Indictment [Doc. # 9-13], at 59-61.

[28] Order [Doc. # 9-12], at 27.

bargain. Accordingly, Ascencio is not entitled to relief on any of the claims he makes concerning his indictment.

C. Ineffective Assistance of Counsel at Trial

Ascencio contends that his trial attorneys were constitutionally ineffective for failing to investigate: (1) his original indictment in Case No. 1302186 and its dismissal; (2) a defense based on his claim that J.C. fabricated her claim after consulting Internet resources by attempting to get him deported or imprisoned in retaliation for his discovery that she had "multiple boyfriends"; (3) a potential witness, Puerto Arturo, who would have substantiated his claim that J.C. concocted her claims against him; and (4) letters sent to him by J.C.'s mother, stating that she believed him.[29] The state habeas corpus court rejected these claims after considering affidavits from both of Ascencio's trial attorneys,[30] which the state habeas corpus court found "credible," and concluded that he was not denied effective assistance of counsel under the legal standard found in *Strickland v. Washington*, 466 U.S. 668 (1984).[31]

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[29] Petition [Doc # 1], at 6-7.

[30] Affidavit of Jimmy J. Ortiz, Jr. ("Ortiz Affidavit") [Doc. # 9-23], at 1-3; Affidavit of Charles Hinton ("Hinton Affidavit") [Doc. # 9-22], at 40-45.

[31] Findings of Fact and Conclusions of Law [Doc. # 9-23], at 12-14.

As the state habeas corpus court correctly determined, a criminal defendant's ineffective-assistance claim is analyzed under the clearly established standard set forth in *Strickland*. *See Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To prevail under this two-prong standard, a defendant must demonstrate (1) constitutionally deficient performance by counsel, and (2) actual prejudice as a result of the alleged deficiency. *See Strickland*, 466 U.S. at 687. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that rendered the result unreliable." *Id.*

To demonstrate deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This is a "highly deferential" inquiry in which "counsel is strongly presumed to have rendered adequate assistance" and that the challenged conduct was the product of reasoned trial strategy. *Id.* at 690. To overcome this presumption, a defendant must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *Id.* However, mere error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Id.* at 691. "It is only when the lawyer's errors were so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth

Amendment that *Strickland's* first prong is satisfied." *Buck v. Davis*, — U.S. —, 137 S. Ct. 759, 775 (2017) (citation and internal quotation marks omitted).

To satisfy the prejudice prong, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A habeas petitioner must "affirmatively prove prejudice." *Id.* at 693. A petitioner cannot satisfy the second prong of *Strickland* with mere speculation and conjecture. *See Bradford v. Whitley*, 953 F.2d 1008, 1012 (5th Cir. 1992). Conclusory allegations are insufficient to demonstrate either deficient performance or actual prejudice. *See Day v. Quarterman*, 566 F.3d 527, 540-41 (5th Cir. 2009).

Ascencio's allegations of ineffective assistance are addressed below under the doubly deferential *Strickland* standard that applies on federal habeas review. *See Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *see also Richter*, 562 U.S. at 105 (emphasizing that the standards created by *Strickland* and § 2254(d) are both "highly deferential," and "'doubly' so" when applied in tandem) (citations and quotations omitted).

1. Failure to Investigate the Indictment

Ascencio contends that his attorneys were deficient for failing to investigate the reason that his initial indictment in Case No. 1302186 was dismissed or object

that the second indictment was fundamentally defective.[32] Specifically, Ascencio maintains that his first indictment was dismissed for "questionable" reasons regarding his immigration status, but that his attorneys failed raise this issue with the trial court.[33] The state habeas corpus court rejected this claim after finding that Ascencio failed to demonstrate "how his indictment was invalid and fail[ed] to show that an objection to the indictment by his trial counsel would have been successful."[34]

As discussed previously, the record reflects that the initial indictment against Ascencio in Case No. 1302186 was dismissed on the State's motion because a new indictment was obtained against him in Case No. 1487505.[35] The State sought a new indictment against Ascencio after his defense counsel filed objections to the form and substance of the initial indictment.[36] Ascencio does not show that the second indictment was obtained for any improper purpose related to his immigration status and he does not demonstrate that counsel was deficient for failing to investigate or raise an objection to his second indictment. Because Ascencio does not show that

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32 Petition [Doc # 1], at 7, 15.

33 *Id.*

34 Findings of Fact and Conclusions of Law [Doc. # 9-23], at 8.

35 Order [Doc. # 9-12], at 27.

36 Exception to Substance of the Indictment [Doc. # 9-13], at 56-58; Exception to Form of the Indictment [Doc. # 9-13], at 59-61.

his counsel had a valid objection to make, he fails to show that his counsel was deficient or that he was prejudiced as a result. *See Turner v. Quarterman*, 481 F.3d 292, 298 (5th Cir. 2007) (holding that "counsel cannot have rendered ineffective assistance of counsel by failing to make an objection that would have been meritless"); *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998) ("[F]ailure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness."). As a result, Ascencio fails to show that the state court's decision to reject this claim was unreasonable and he is not entitled to relief on this claim.

2. Failure to Investigate Fabrication by the Victim

Ascencio contends that his attorneys were deficient for failing to investigate his claim that J.C. fabricated her accusations against him after consulting Internet resources.[37] Ascencio maintains that J.C. fabricated the accusations against him in an attempt to get him deported or imprisoned in retaliation for his discovery that she had "multiple boyfriends."[38] The state habeas corpus court rejected this claim based on "credible" affidavits from Ascencio's trial attorneys, who stated that Ascencio never discussed as a potential defensive theory his claim that the victim used the

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37 Petition [Doc # 1], at 7, 15.

38 *Id.*

Internet to fabricate her allegations.[39] As a result, counsel did not believe it was necessary to investigate such a claim by conducting a search of her home computer.[40]

Credibility findings, such as those made by the state habeas corpus court with respect to the affidavits from Ascencio's defense counsel, are entitled to substantial deference on federal habeas review. *See Coleman v. Quarterman*, 456 F.3d 537, 541 (5th Cir. 2006) (citing *Guidry v. Dretke*, 397 F.3d 306, 326 (5th Cir. 2005)); *see also Kinsel v. Cain*, 647 F.3d 265, 270 (5th Cir. 2011) (recognizing that a state court's credibility determinations "are entitled to a strong presumption of correctness" under the AEDPA) (citation omitted). Ascencio does not present any evidence to rebut the state habeas corpus court's fact findings and he does not otherwise demonstrate that an investigation by counsel would have disclosed proof that the victim used the Internet to fabricate her accusations against him. Under these circumstances, he does not demonstrate that counsel was deficient or that the state court's decision to reject this claim was unreasonable under the deferential standard found in 28 U.S.C. § 2254(d). *See Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005) (citing *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989)) ; *see also Lincecum v. Collins*, 958 F.2d 1271, 1279 (5th Cir. 1992) (denying habeas relief where petitioner "offered nothing more than the conclusory allegations in his

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39 Findings of Fact and Conclusions of Law [Doc. # 9-23], at 8-9.

40 *Id.*

pleadings" to support claim that counsel was ineffective for failing to investigate and present evidence). Therefore, he is not entitled to relief on this claim.

3. Failure to Investigate a Potential Witness

Ascencio contends that his attorneys were deficient for failing to investigate or interview a potential witness named Puerto Arturo, who would have substantiated Ascencio's claim that J.C. fabricated her claims against him.[41] The state habeas corpus court rejected this claim based on the credible affidavits from Ascencio's trial counsel, who stated that Ascencio never mentioned that anyone named Puerto Arturo had pertinent information.[42] Therefore, counsel did not find it necessary to interview this person or call him has a witness.[43]

The Fifth Circuit has held 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." *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007) (citations omitted). "Where the only evidence of a missing witnesses' testimony is from the defendant, [the Fifth Circuit] views claims of ineffective assistance with great caution." *Sayre v. Anderson*, 238 F.3d 631, 635-36 (5th Cir. 2001) (citations and quotations omitted). To demonstrate the required

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41 Petition [Doc # 1], at 7, 15-16.

42 Findings of Fact and Conclusions of Law [Doc. # 9-23], at 9.

43 *Id.*

prejudice for an ineffective-assistance claim in this context, a petitioner "must show not only that [the] testimony would have been favorable, but also that the witness would have testified at trial." *Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir. 2002).

Ascencio does not present evidence to rebut the state habeas corpus court's finding that he did not make his trial attorneys aware of Puerto Arturo as a potential witness. More importantly, Ascencio does not present a statement from Arturo or any other information showing that he would have testified favorably for the defense if called as a witness. His bare allegations are not sufficient to demonstrate deficient performance or actual prejudice attributable to his trial attorneys. *See Sayre*, 238 F.3d at 636. Because Ascencio does not show that the state habeas corpus court's decision to reject this claim was unreasonable, he is not entitled to relief on this claim.

4. Failure to Investigate Letters From the Victim's Mother

Ascencio contends that his attorneys were deficient for failing to investigate or present evidence of letters that were sent to Ascencio by J.C.'s mother, Ursala Canales, stating that she believed him.[44] Ascencio appears to claim that the letters would have shown that Ms. Canales committed perjury at trial and that J.C.'s accusations were not credible because Canales's testimony was coerced by threats

[44] Petition [Doc # 1], at 7, 16.

from the prosecutor to deport her and her children if she did not cooperate.[45] The state habeas corpus court rejected this claim based on credible affidavits from defense counsel, who stated that they never received information from Ascencio about the alleged letters and had no basis to impeach Canales with this information at trial.[46] The state habeas corpus court concluded further that Ascencio did not prove that his trial attorneys "committed any error" and that he failed to "show any prejudice from the alleged deficient performance."[47]

The state court record reflects that Ascencio did not submit copies of any letters that he claimed to have received from J.C.'s mother. Likewise, Ascencio also has not presented copies of those letters in support of his federal habeas petition. His bare allegations about what those letters said are insufficient to refute the state habeas corpus court's findings and conclusions. *See Day*, 566 F.3d at 540-41. Accordingly, Ascencio does not demonstrate that the state court's decision was unreasonable and, therefore, he is not entitled to relief on this claim.

D. Ineffective Assistance of Counsel on Appeal

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45 *Id.* at 16.

46 Findings of Fact and Conclusions of Law [Doc. # 9-23], at 10.

47 *Id.* at 11.

Ascencio contends that his appellate counsel was deficient because she did not retain an interpreter to help him communicate with her or allow him to help prepare the appellate brief.[48] As a result, Ascencio claims that his appellate counsel failed to raise a valid challenge to his indictment for lack of jurisdiction.[49] He claims further that his appellate attorney failed to challenge the sufficiency of the evidence, which he describes as a "dead bang winner."[50] The state habeas corpus court rejected this claim, concluding that Ascencio failed to show that his appellate attorney "neglected to raise a claim that has indisputable merit under well-settled law" that would have resulted in reversible error.[51] The state habeas corpus court concluded further that Ascencio failed to show that there was support in the record for his proposed claims or that his appellate counsel unreasonably failed to raise a particular claim on his behalf.[52]

A claim of ineffective assistance on appeal is governed by the two-prong test set out in *Strickland,* which requires the defendant to establish both constitutionally deficient performance and actual prejudice. *See Smith v. Murray*, 477 U.S. 527, 535-

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48 Petition [Doc # 1], at 8, 17.

49 *Id.* at 17.

50 *Id.* at 18.

51 Findings of Fact and Conclusions of Law [Doc. # 9-23], at 11-12.

52 *Id.* at 12.

36 (1986). To establish that counsel's performance was deficient in the context of an appeal, the defendant must show that his appellate attorney was objectively unreasonable in failing to find arguable issues to appeal or "that counsel unreasonably failed to discover non-frivolous issues and raise them." *Smith v. Robbins*, 528 U.S. 259, 285 (2000). If the defendant succeeds in such a showing, then he must establish actual prejudice by demonstrating a "reasonable probability" that, but for his counsel's deficient performance, "he would have prevailed on his appeal." *Id.*

Appellate "[c]ounsel need not raise every nonfrivolous ground of appeal, but should instead present solid, meritorious arguments based on directly controlling precedent." *Ries v. Quarterman*, 522 F.3d 517, 531-32 (5th Cir. 2008) (internal quotation marks and citation omitted). For reasons discussed previously, Ascencio fails to establish that his indictment was defective or that he had a valid challenge to the sufficiency of the evidence. He does not demonstrate that his appellate counsel was deficient for failing to retain the services of an interpreter to communicate with him or that she had, but failed to raise, a valid argument that would have changed the result of his appeal. Accordingly, Ascencio does not demonstrate that the state court's decision to reject this claim was unreasonable and he is not entitled to relief on this issue. Because Ascencio has not established that he has a valid claim, the

respondent's motion for summary judgment will be granted and this action will be dismissed.

IV. 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. 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 v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Under the controlling standard, a petitioner must 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*, 537 U.S. at 336 (internal citation and quotation marks omitted).

After careful review of the pleadings and the applicable law, the Court concludes that reasonable jurists would not find its assessment of the claims debatable or wrong. Because the petitioner does not allege facts showing that his claims could be resolved in a different manner, a certificate of appealability will not issue in this case.

V. CONCLUSION AND ORDER

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

1. The respondent's motion for summary judgment [Doc. # 8] is **GRANTED**.

2. The petition for a writ of habeas corpus filed by Alexander Ascencio [Doc. # 1] under 28 U.S.C. § 2254 is **DENIED** and this case is **DISMISSED with prejudice**.

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

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

SIGNED at Houston, Texas on August 13, 2020.

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALEXANDER ASCENCIO, TDCJ #2052956, Petitioner, VS. LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § § § §	CIVIL ACTION NO. H-19-3286

FINAL JUDGMENT

For the reasons set forth in the Court's Memorandum and Order of even date, this case is **DISMISSED** with prejudice.

This is a **FINAL JUDGMENT**.

The Clerk's Office will provide a copy of this order to the plaintiff.

SIGNED at Houston, Texas on August 13, 2020.

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE