APPENDICES

APPENDIX A

APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 28, 2021
Lyle W. Cayce
Clerk

No. 20-40587

JOSE DIAZ PEREZ,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Texas
USDC No. 6:18-CV-255

ORDER:

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

/s/ Cory T. Wilson
CORY T. WILSON
United States Circuit Judge

APPENDIX B

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

JOSE DIAZ PEREZ	§	
v.	§	CIVIL ACTION NO. 6:18cv255
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The Petitioner Jose Diaz Perez, a prisoner of the Texas Department of Criminal Justice, Correctional Institutions Division, filed this petition for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of his conviction. The petition has been referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

I. Background

Perez was convicted by a jury of murder in the 2nd Judicial District Court of Cherokee County, Texas, receiving a sentence of 50 years in prison. He took a direct appeal, and the Twelfth Judicial District Court of Appeals affirmed the conviction on May 29, 2015. Perez v. State, slip op. no. 12-14-00116-CR, 2015 Tex.App. LEXIS 5475, 2015 WL 3451556 (Tex.App.-Tyler, May 29, 2015, pet. ref'd). The Texas Court of Criminal Appeals refused his petition for discretionary review, and the United States Supreme Court denied certiorari. Perez v. Texas, 136 S.Ct. 2417 (2016).

On May 2, 2017, Perez filed a state habeas corpus application, and the Court of Criminal Appeals remanded it for an evidentiary hearing. This hearing was conducted by the trial court on March 23, 2018. Following the hearing, the trial court made findings of fact, and the Court of

Criminal Appeals dismissed Perez's state habeas petition without written order on the findings of the trial court after a hearing. Perez then filed his federal habeas corpus petition on June 5, 2018.

The facts of the case, as briefly recounted by the Twelfth Court of Appeals, were as follows:

> At trial, the evidence showed that Appellant had known the victim, Martha Caselin Ramirez, for about fifteen years. The two dated for about eight months and lived together for a few months prior to the offense. About two weeks prior to the offense, Ramirez moved out of Appellant's house. One night, Appellant came to Ramirez's home. He remained in his pickup while Ramirez's son went to get her. Ramirez got into Appellant's pickup with him and they talked. At some point, Appellant retrieved a .9 millimeter handgun from inside the vehicle and fired three shots, two of which hit and fatally wounded Ramirez. Appellant drove across town to his land with Ramirez's body still in the vehicle. Shortly thereafter, he called 911 and reported the incident.

II. The Petition for Habeas Corpus Relief

Perez's amended petition (docket no. 10) is the operative pleading in the case. He raises nineteen grounds for relief in his amended petition and adds a twentieth in a supplemental response.

Perez's amended petition asserts that: (A) the State of Texas violated his rights under the Vienna Convention because he is a citizen of Mexico but authorities did not notify his consular general for almost a month after his arrest, and then only to verify that he was a Mexican citizen and had a passport. He contends that he was never notified of his rights as a Mexican citizen, including the right to contact the Consular General, and he was held incommunicado and denied the right to speak to anyone outside the jail until he agreed to speak with detectives without benefit of counsel, and the waiver was signed under duress and unlawfully obtained. He states that Detective Captain Raffield learned that Perez was a citizen of Mexico but he and Detective Battley failed to advise him of his rights under the Vienna Convention.

(B) Perez states that his confession was obtained through duress in that he was incarcerated, placed in a "violent cell," and denied an attorney and "basic human rights" for some 72 hours until he confessed. Perez states that the jailers lied about his being placed in the "violent cell" until a handwritten log was discovered showing that he had in fact been placed in the "violent cell," known as the V/C or VHC. He describes this cell as a "rubber room" with a very small window, no sanitary

fixtures, no phone or television, no writing instruments, and no means of contacting the outside world. According to Perez, the prosecutor reviewed the initial interview he had with Detective Gina Battley and was concerned about admissibility, so another statement was obtained from Perez while he was in the jail.

After again complaining about lack of notice under the Vienna Convention, Perez states that on March 19, 2012, he was pulled out for a visit with a defense attorney named Chris Day. This visit lasted almost two hours, and when it ended, Day was told to speak with Captain Raffield. Some 20 minutes later, Perez says that he was taken to the office in chains. He refused to speak with authorities, instead asserting his right to counsel. Some eleven hours later, he was placed into the violent cell. According to Perez, he only had contact with jail personnel over the next three days, and these contacts were for purposes of using the toilet, a single trip to the shower, or pressure to force him to speak to sheriff's department personnel without benefit of counsel.

After three days, Perez states that he finally broke down and agreed to give another statement. After he did, he was placed back in the violent cell for nine hours and then moved to another cell, and finally back to his original cell.

(C) Perez contends that defense counsel Chris Day incorrectly identified the Vienna Convention as the "Geneva Convention" when arguing the motion to suppress. Had he properly raised the Vienna Convention, Perez maintains that the proceedings would have been different.

(D) Perez contends that the prosecution committed misconduct by offering perjured testimony. He states that jailer Alma Creel testified that Perez had been booked into the jail and placed in B Cell, and was never moved to any other cell. This testimony was shown to be false through the handwritten log because Perez was moved from B Cell to the "violent cell." Defense counsel moved to admit the handwritten log and the prosecution objected, but then agreed to stipulate that the log was authentic. Captain Raffield also testified that he was unaware that Perez had been placed in the violent cell, but the log showed that he had spoken with Perez at the violent cell for at least seven minutes.

Perez also says that the prosecution put on evidence of what was continually referred to as an "attempted murder" but which in fact was a 28-year-old charge of aggravated assault which was dismissed in 1986 on the request of the complaining witness, his ex-wife Barbara Ward.[1] He says that the State "sanctioned perjury" from all of the witnesses concerning the nature of this dismissed charge.

(E) In another claim of prosecutorial misconduct, Perez complains that the prosecutor repeatedly characterized the offense as a "murder," even over defense counsel's objections. The prosecution also referred to the place where the deceased's body was found as the "dump site," or claimed Perez "threw the body out of the truck," or said that Perez "dumped" the body, all over the objections of defense counsel. Perez states that the trial court agreed with defense counsel and admonished the prosecutor to change the phrasing, but the prosecution continued to use the phrases even after being ordered to stop. However, Perez contends that the prosecution repeated these phrases for the sole purpose of inflaming the minds of the jury; he states that the body was not "dumped," as shown by the fact that he called 911 himself and led the detectives to the body.

(F) Perez complains that extraneous offense evidence was offered because the trial court failed to sign a limine order, and this caused Perez to have to take the stand in his own defense. He states that during cross-examination, Captain Raffield spontaneously testified, in a non-responsive answer, that during the investigation, it was discovered that Perez had merely shot his ex-wife but did not murder her. Counsel immediately objected, which was sustained, and the jury was instructed to disregard the answer.

Perez contends as follows:

> Prior to this ruling, the court had agreed that it would have to grant a mistrial, due to the prior shooting testimony. (9 RR 186). The state's reply was 'it was coming anyway.' Granted the State may have been able to introduce the evidence after a

[1]Ward testified to the jury that in January of 1986, she was married to Perez but separated from him. He came over to the house where she was staying to talk to her, wanting her to get back together with him. When she told him no, Perez shot her three times. She later signed an affidavit of non-prosecution and the charges against Perez were dropped (docket no. 25-15, pp. 28-31).

> ruling by the Court, however, Det. Raffield took it upon himself, with the State's blessing, to introduce such evidence himself. The State cannot disown the fact that they were aware of such evidence or such intent, as the State was well aware the Court had NOT signed the [motion] in limine filed by the defense. (10 RR 4) The Court, upon realizing this oversight, immediately remedied this oversight by granting the [motion] in limine, however, the damage was already done. The Petitioner was forced to take the stand in violation of his Fifth Amendment rights, despite his limited proficiency in the English language, and forced to endure rigorous cross-examination by the prosecution. Had Det. Raffield never made the comment concerning the 1986 shooting, the defense would have had the choice of whether or not to put the Petitioner on the stand in his own defense, however, this option was stripped from the defense as a result of this calculated slip by the State's witness. The State was then able to put on evidence of what it continually referred to as an 'attempted murder,' despite the case being an aggravated assault.

Perez goes on to contend that the State was forbidden from going into extraneous offense evidence but knew that the motion in limine had not been signed and thus abused the proceedings. He argues that the State wanted the trial court to believe that the witness was confused about which wife defense counsel was referring to, but defense counsel never mentioned the name of Barbara Ward, instead specifically naming "Delores."

(G) Perez asserts that the trial court's failure to grant the defense motion in limine allowed the State to put on evidence of an extraneous offense which was never prosecuted. He argues that the failure to sign the motion in limine amounted to a denial of due process.

(H) Perez states as follows:

> The court, during an ex parte communication with the jury on evidence, stated that the jury was complaining about their inability to hear portions of the videotaped interview of the Petitioner by Det. Gina Battley. (9 RR 1-5). The Court then allowed the State, over the objections of defense counsel, to transcribe the interview, and without prior notice, represent the evidence to the jury. Id. The court was aware of the law that required any transcript to be offered with the recorded evidence when presented. (9 RR 11). Even with this knowledge, the court allowed the State to rush a transcript of the video, and re-present the same evidence to the jury with the unreviewed transcript in hand. The transcript was never placed into evidence as an exhibit." (Amended Complaint, docket no. 16, p. 22).

Perez asserted that the State chose to forego transcription of the video despite having some two years to prepare for trial and has thus waived this option. He states that this was also done with an English translation of the conversation in Spanish between Perez and the 911 operator.

(I) Perez complains that during closing arguments, the State was allowed to split its closing between two different prosecutors, thereby "double-teaming the defense." He dropped this claim in his response to the State's answer.

(J) Perez contends that the prosecutor committed misconduct by arguing at closing that "he deserves life for the life he took." He says that she also argued that the jury never promised the Petitioner that they would consider the full range of punishment. According to Perez, the argument that he deserved life for the life he took was a variation of the "eye for an eye, tooth for a tooth Biblical adage," and that these principles based on Hammurabi's Code of Laws are not the jurisprudence of the United States. He states that retribution is not listed within the precepts of the U.S. Constitution but the State was arguing for such action.

Perez also contends that at the beginning of the trial, the jury swore that they could consider the full range of punishment and the prosecutor's argument was in contradiction of this oath. He claims the fact that he received less than the maximum punishment does not negate the fact that prosecutorial misconduct occurred or had an effect on the jury's decision.

(K) Perez asserts that counsel was ineffective by failing to object to the State's reference to the dismissed 1986 charge as "attempted murder" instead of "aggravated assault." This allowed the jury to consider the case as an attempted murder.

(L) Perez asserts that counsel was ineffective for failing to object to the prosecution's statements concerning retribution and consideration of the full range of punishment during closing argument.

(M) Perez asserts that counsel was ineffective for failing to secure a ruling on the motion in limine prior to trial, with the result that the State offered the evidence of the aggravated assault (referred to as "attempted murder") as "propensity evidence," even though the charge was never proven beyond a reasonable doubt.

(N) Perez complains that counsel failed to object to the jury charge allowing the jurors to consider the existence of good time. He contends that the instruction read by the court stated that

good time applied to a murder conviction, which likely led to a greater sentence. Perez also asserts that the charge contained several inconsistencies, including saying that he could earn good time and then saying he couldn't as well as saying that he could not be sentenced to less than five years and then saying that if he received less than two years, he would have to serve the entire sentence. Perez maintains that defense counsel should have discovered these errors and had them corrected before the jury was charged.

(O) Perez states that he received ineffective assistance of counsel in that Day argued against the introduction of improperly seized evidence before the court, and the court initially agreed that certain writings were unlawfully seized. However, the court wanted some precedents, and Day failed in this regard. Perez says that the personal writing in question was covered by another letter and by a remote control and there was no evidence as to when it was written. He claims that the State would have the court "stretch the boundaries of imagination" in defending Captain Raffield's decision to collect an item plainly not identified in the warrant; the State first indicated that the officers believed it possible that the letter belonged to the victim, and then changed their position to say that it may have had traces of blood on it, even though the shooting took place some 20 to 30 miles away.

According to Perez, the State put together a well-thought out and researched brief, but Day only filed an untimely letter brief. The trial court denied the motion to suppress on June 11, 2013, and then changed the denial date to June 25 after receiving the letter brief.

Perez further contends that Day failed to properly argue the motion to suppress Perez's oral statements. Perez contends that these failures resulted in prejudice to him.

(P) Perez contends that counsel's errors at trial were cumulative and resulted in prejudice to him.

(Q) Perez claims that the Twelfth Judicial District Court of Appeals erred by holding that while Perez's statement was not taken in strict compliance with the Texas Code of Criminal

Procedure, article 38.22(3)(a), the State established an exception under subsection 3(c). This resulted in an abridgement of his right not to incriminate himself.

(R) Perez asserts that he was denied an unbiased jury because during the guilt or innocence phase, prior to calling witness Barbara Ward to the stand, a juror named Geraldine Griffin advised the court she had worked for Ward for five years and would give Ward greater credibility. Defense counsel argued that the juror should be dismissed for cause, but the State maintained that no agreement was reached and the trial court denied the request. However, Perez says that the Court of Appeals erroneously found that the appellant expressed no desire to dismiss the juror and the trial continued.

(S) Perez says that the alleged "propensity evidence" (i.e. the prior incident involving Ward) was close to 30 years old, but the Court of Appeals "went on a long diatribe" to support admission of this evidence, even though it should have been inadmissible.

(T) In an amended / supplemental response, filed May 10, 2019, Perez appears to add a claim that he was originally appointed an attorney named Sten Langsjoen to represent him in his state habeas proceeding, but Langsjoen filed a motion to withdraw and to substitute an attorney named Jeffrey Clark. The trial court granted Langsjoen's motion to withdraw, but appointed an attorney named Allen Ross, whom Perez says "had almost zero working knowledge of the state habeas application and was sorely taxed during the hearing to appropriately question the witnesses as a result thereof." Other than this general assertion, Perez does not allege that Ross was ineffective in representing him, nor did he provide any specific instances of poor questioning or other purported ineffectiveness. Instead, he contends that the trial court "abused its discretion" by appointing Ross rather than Clark.

III. The Answer and the Response

The Respondent has filed an answer asserting that Perez has not shown that the state court's denial of relief was unreasonable and that Perez's claims are without merit. Perez has filed a

response and a supplemental response arguing that the state court's decision was unreasonable and further addressing his claims, as well as a memorandum of law.

IV. General Standards for Habeas Corpus Review

28 U.S.C. §2254(d) provides that in order to be granted a writ of habeas corpus in federal court, a petitioner must show that the state court's adjudication of his claim resulted in a decision which was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Moore v. Cockrell, 313 F.3d 880, 881 (5th Cir. 2002). An "unreasonable" application of federal law is different from an "incorrect" application of federal law. Renico v. Lett, 559 U.S. 766, 773, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010). This means that a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly; rather, the decision must be "objectively unreasonable," a standard which creates a substantially higher threshold for obtaining relief than *de novo* review. Schriro v. Landrigan, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007).

The "contrary to" clause of §2254(d)(1) applies when a state court fails to apply a legal rule announced by the Supreme Court or reaches a result opposite to a previous decision of the Supreme Court on materially indistinguishable facts. The "unreasonable application" clause of §2254(d)(1) applies when the state court correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case. Dorsey v. Stephens, 720 F.3d 309, 314 (5th Cir. 2013), (citations omitted). The AEDPA thus imposes a "highly deferential standard for evaluating state court rulings" and "demands that state court decisions be given the benefit of the doubt." Renico, 559 U.S. at 773.

In this regard, the Fifth Circuit has explained that "federal habeas review under AEDPA is therefore highly deferential. The question is not whether we, in our independent judgment, believe

that the state court reached the wrong result. Rather, we ask only whether the state court's judgment was so obviously incorrect as to be an objectively unreasonable resolution of the claim." Cardenas v. Stephens, 820 F.3d 197, 201-02 (5th Cir. 2016). State courts' findings of fact are entitled to a presumption of correctness and a petitioner can only overcome this presumption through clear and convincing evidence. Reed v. Quarterman, 504 F.3d 465, 49 (5th Cir. 2007).

V. Application of the Standards to the Claims

A. The Vienna Convention

Perez contends that he is a citizen of Mexico but the State of Texas failed to notify the consul general of Mexico for almost a month after his arrest, and then only to verify whether or not Perez was a citizen of Mexico with a passport. He states that he was never notified of his rights as a citizen of Mexico, including the right to contact the Consular General.

The state court found that trial counsel personally notified the Mexican Consulate of the pendency of Perez's case. (Docket 26-19, p. 29); *see* docket no. 26-22, p. 33 (testimony of defense attorney Chris Day at the state habeas hearing). Day stated that while the Mexican consul was very friendly, he did not really offer any assistance. Id. at p. 35. Perez has not shown that this finding was in error.

In any event, the Fifth Circuit has held that the Vienna Convention does not give rise to individually enforceable rights. Cardenas v. Stephens, 820 F.3d 197, 203 (5th Cir. 2016). As a result, federal; habeas corpus relief cannot be granted under 28 U.S.C. §2254(d)(1) because such a right is not part of clearly established law as determined by the Supreme Court. Id.; *see also* Ramos v. Davis, 653 F.App'x 359, 2016 U.S. App. LEXIS 12091 (5th Cir., June 30, 2016), *cert. denied*, 137 S.Ct. 2116 (2017).

In his memorandum of law, Perez argues that "the Vienna Convention grants foreign nationals who have been arrested, imprisoned, or taken into custody the right to contact their consulate and required the arresting government authorities to inform the individuals of this right without delay," citing Contreras v. State, 324 S.W.3d 789, 792 (Tex.App.-Eastland 2010, no pet.).

However, the very next sentence in the opinion reads "Contreras acknowledges that the United States Supreme Court has held that the Vienna Convention does not control Texas or national law. *See* Medellin v. Texas, 552 U.S. 491, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008)." Id. Perez has not shown that the state courts' adjudication of his claim resulted in a decision which was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. His first ground for relief is without merit.

B. Confession Obtained through Duress

Perez complains that he was held in a "violent cell" for some 72 hours under harsh conditions, at the conclusion of which time he agreed to give a statement under the pressures of "continuing incarceration and foul treatment" by the officials. Specifically, Perez claims that he was denied an attorney and placed in a "rubber room" with a very small window, no sanitary fixtures, no phone or television, no writing instruments, and no means of contacting the outside world. He argues in his memorandum of law that these conditions demonstrate coercion.

A hearing on a defense motion to suppress was conducted on November 4, 2013. (Docket no. 25-8, p. 1). At this hearing, Detective Battley testified that a search of Perez's house turned up a notepad containing a note from Perez indicating that he may be suicidal. (Docket no. 25-8, p. 67; docket 25-18, p. 42). On March 22, 2012, she received a note from Perez indicating that Perez wanted to talk to her. Perez was brought to an interview room to speak to Battley and a detective named Joel Ray. Prior to the conversation, Battley stated that Perez was given Miranda warnings. (Docket no. 25-8, p.70).

Jailer Alma Creel testified that after Perez was booked in, she took him to Cell B, which has a shower, a toilet, a pay phone, and a metal bed. She stated on direct examination that she believed that Perez remained in that cell the entire time he was in the jail. (Docket no. 25-8, p. 103). On cross-examination, however, she acknowledged that a jail log showed that he was moved to the

violent cell on Tuesday, March 20, and then moved back to B Cell on March 22. (Docket no. 25-8, p. 111).

In his closing at the suppression hearing, Day argued that on March 19, Battley tried to interview Perez and Perez stated that his lawyer had told him not to give any statements. The next day, March 20, Day stated that Perez was removed from B Cell and placed in the violent cell, which did not have a toilet, water, or a television. He stayed there until he sent a note saying that he was ready to give a statement, and when he had finished giving his statement, Day stated that Perez asked "can I get out of that cell now." The next day, Perez was moved back into B Cell. Day argued that this was not just a coincidence and that there was no reason to put Perez back in B Cell if the jail administration had really been concerned about suicide.

The prosecutor, Rachel Patton, responded that there was no evidence of any connection between Perez's statement and the cell in which he was confined, and that if the jail staff had been trying to coerce him into making a statement, they would have moved him to the violent cell immediately and not the next day.

Following the suppression hearing, the trial court stated that "I - I - trust Ms. Battley's testimony" and that the motion to suppress the statement made to Battley in the jail would be denied. (Docket no. 25-8. p. 160).

With regard to purportedly involuntary statements to law enforcement, the Supreme Court has explained as follows:

> The Due Process Clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect. The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.
>
> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, his lack of education or

> his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.

Schneckloth v. Bustamonte, 412 U.S. 218, 225-26, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

The state court did not make any specific factual findings with regard to the March 22, 2012 statement given by Perez, either at the hearing on the motion to suppress or in the state habeas proceeding. However, the court recommended denial of Perez's state habeas petition, and the Texas Court of Criminal Appeals denied the petition without written order. The Fifth Circuit has held that when the Court of Criminal Appeals denies relief in a state habeas petition without written order, this is an adjudication on the merits which is entitled to a presumption of correctness. Singleton v. Johnson, 178 F.3d 381, 384 (5th Cir. 1999). The federal court will assume that the state court applied correct standards of federal law to the facts, unless there is evidence that an incorrect standard was applied, and infer fact findings consistent with the state court's disposition. *See* Catalan v. Cockrell, 315 F.3d 491, 493 n.3 (5th Cir. 2002).

The state court's denial of habeas corpus relief necessarily carries with it the implicit finding that Perez's statement on March 22, 2012 was not coerced but was voluntarily given. This finding is supported by the fact that Perez initiated the contact and received Miranda warnings prior to the giving of the statement. While Perez's attorney argued at the suppression hearing that there was evidence showing the statement was influenced by coercion or duress, Perez has failed to show that this evidence was so clear and convincing as to overcome the presumption of correctness accorded to the state court's findings. *See, e.g.*, Ford v. Davis, 910 F.3d 232, 234-35 (5th Cir. 2018) (presumption of correctness extends to implicit findings). Perez's second ground for relief is without merit.

C. Failure to Properly Identify the Geneva Convention

Perez contends that he received ineffective assistance of counsel in that Day cited the "Geneva Convention" when the correct treaty was the "Vienna Convention." He cites to RR 5, p. 78 (docket no. 25-8, p. 82), a cross-examination of Detective Battley during a hearing on a motion

to suppress, in which Day asked "and you also testified earlier you did not advise him of his rights under the Geneva Convention regarding being able to contact his consulate, is that correct?" to which Battley replied "no, I didn't."

At the writ hearing, Day acknowledged that he may have said "Geneva Convention" instead of "Vienna Conviction" during a bond reduction [sic] hearing, but that it was also possible that the court reporter could have recorded it incorrectly. In any event, Day stated that the discussion concerned the rights under the Vienna Convention dealing with the consulate and the judge understood what he was talking about. (Docket no. 26-22, pp. 49-50).

In order to prevail on a claim of ineffective assistance of counsel, a state prisoner seeking federal habeas corpus relief must show that his attorney's performance was deficient and that the deficiency prejudiced him to the point that he was denied a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This means that the habeas petitioner must establish both that (1) counsel's performance was deficient in that it fell below an objective standard of reasonable competence and (2) the deficient performance so prejudiced the defense that the outcome of the trial was unreliable and there is a reasonable probability that, but for counsel's performance, the result of the trial would have been different. Unless a petitioner makes both showings, he is not entitled to relief. Del Toro v. Quarterman, 498 F.3d 486, 490 (5th Cir. 2007). The burden of proving ineffective assistance of counsel is on the petitioner. Hayes v. Maggio, 699 F.2d 198, 201 (5th Cir. 1983).

A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. This requires a substantial, not merely a conceivable, likelihood of a different result. Cullen v. Pinholster, 563 U.S. 170, 189, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

Counsel has wide latitude in making tactical decisions, including formulating a strategy which was reasonable at the time. Strickland, 466 U.S. at 689; Harrington v. Richter, 562 U.S. 86, 107, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). This means, for example, that it is reasonable trial

strategy for counsel to try to cast "pervasive suspicion of doubt [rather] than to try to prove a certainty that exonerates." Id. at 109.

The Fifth Circuit has explained that a conscious and informed decision on trial tactics and strategy cannot be the basis of constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness. Pape v.Thaler, 645 F.3d 281, 291 (5th Cir. 2011).

In reviewing counsel's performance through the lens of an ineffective assistance claim, the Supreme Court has explained as follows:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf.* Engle v. Isaac, 456 U.S. 107, 133–134, 102 S.Ct. 1558, 1574–1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See* Michel v. Louisiana, *supra*, 350 U.S. [91, 101, 76 S.Ct. 158, 100 L.Ed.83 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *See* Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).

Strickland, 466 U.S. at 689–90.

In the context of analyzing claims of ineffective assistance of counsel, the Supreme Court has explained the standards created by Strickland and 28 U.S.C. §2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. Harrington, 562 U.S. at 105.

Application of this doubly deferential review is different from asking whether defense counsel's performance fell below the Strickland standard. The question is not whether the federal court believes that the state court's determination under Strickland was incorrect, but whether that determination was unreasonable - a substantially higher threshold. Knowles v. Mirzayance, 556

U.S. 111, 129 S.Ct. 1411, 173 L.Ed.3d 251 (2009). This is because the state court must be granted a deference and latitude which is not in operation when the case involves review under the Strickland standard itself. Consequently, the Fifth Circuit has stated that even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable; rather, in order to obtain habeas corpus relief, the petitioner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement. Druery v. Thaler, 647 F.3d 535, 539 (5th Cir. 2011).

Perez has not shown that Day's slip of the tongue in referring to the "Geneva Convention" rather than the "Vienna Convention" fell below an objective standard of reasonable performance. Nor has he demonstrated that but for these verbal errors, the result of the proceeding would probably have been different. The state courts denied relief not because Day referred to the wrong treaty, but because the Texas Court of Criminal Appeals has held that the Vienna Convention is not a "law" subject to the Texas exclusionary rule and so a violation of the convention does not exclude the statements of defendants. State Habeas Findings of Fact, docket no. 26-23, p. 10, *citing* Rocha v. State, 16 S.W.3d 1 (Tex.Crim.App. 2000). Perez's claim on this point is without merit.

D. Perjured Testimony

Perez contends that the State offered perjured testimony in that Creel testified that he had been placed in B Cell and not moved out of there, and Raffield testified that he did not know Perez was in the violent cell even though jail logs show he spoke to Perez there.

The Due Process clause is violated when the government knowingly uses perjured testimony to obtain a conviction. Vasquez v. Thaler, 505 F.App'x 319, 2013 U.S. App. LEXIS 51, 2013 WL 28432 (5th Cir., January 2, 2013), *citing* Kinsel v. Cain, 647 F.3d 265, 271 (5th Cir. 2011). In order to establish a denial of due process through the use of perjured testimony, the petitioner must show that: (1) the witness gave false testimony; (2) the falsity was material in that it would have affected

the jury's verdict, and (3) the prosecution used the testimony knowing it was false. Reed v. Quarterman, 504 F.3d 465, 473 (5th Cir. 2007).

Creel testified at a suppression hearing that she took Perez to Cell B when he was booked in. She described Cell B as having "a shower, it has a toilet, it has a pay phone, it has a TV and a metal bed." She stated that she believed he remained in Cell B the entire time he was in the jail, stating that she had "verified it awhile ago to make sure that my - from what I remembered was correct, in which I was." (Docket no. 25-8, pp. 98-99).

On cross-examination, Creel stated that she had verified this through the computer system. She conceded that the handwritten jail log indicated that Perez had been moved out of B cell to the violent cell, but said that she did not see this in the computer system. Creel did not testify at all as to Perez's movements in the jail before the jury. (Docket no. 25-12, pp. 13-29).

During his cross-examination, Raffield stated that there was a point at which the law enforcement officers pulled Perez out of his cell and Perez did not want to talk at that time. Day asked if Perez had been placed in the violent cell and Raffield responded "I don't know what cell he was in." There was no follow-up of this point; the cross-examination moved on to discuss Perez's interview with Battley and other officers a few days later. (Docket no. 25-12, p. 163).

Perez has not shown that either of these instances amounted to a due process violation. Creel's allegedly false testimony occurred at a suppression hearing, outside of the presence of the jury, and thus could not have affected the jury's verdict. Raffield's allegedly false testimony consisted of the single brief statement that "I don't know what cell he was in." Even assuming this assertion was not true, Perez offers nothing to suggest that this statement was material or that it would have affected the jury's verdict in any way. His claims regarding the allegedly perjurious statements by Creel and Raffield are without merit.

Perez's third claim under this ground reads as follows:

> Third, the State put on evidence of what is continually, throughout the proceeding, referred to as an "attempted murder," when referencing a twenty-eight year old, DISMISSED aggravated assault in cause no. 10101, in the 2nd Judicial District

> Court of Cherokee County, Texas. Cause no. 10101 was filed Jan. 23, 1986, and dismissed on June 18, 1986, on request of the complaining witness. (See Exhibit D).
>
> Nowhere in the original charge is there any mention of an Attempted Murder. Instead, the case is continually referred as an "aggravated assault." Id. The prosecution sanctioned perjury by all witnesses concerning the nature of the dismissed charge from 1986. As such, the prosecution itself committed perjury with respect to the nature of the 1986 aggravated assault, by consistently, throughout the proceedings, referring to the dismissed case as an attempted (CR 81). Petitioner's decision in the Court of Criminal Appeals was contrary to or involved an unreasonable application of federal law as determined by the Supreme Court of the United States, and the decision resulted in an unreasonable determination of facts in light of the evidence presented in state court proceedings.

The reference to CR 81 is the State's notice of intent to use evidence of other crimes, wrongs or acts, which was provided to the defense prior to trial. This notice indicated that the State intended to offer evidence of the offense of attempted murder against Barbara Wyatt Perez (now Barbara Ward), occurring on January 23, 1986 in Cherokee County. An amended notice of intent (docket no. 26-19, p. 86) also refers to the offense as attempted murder.

The "Exhibit D" to which Perez refers is found at docket no. 20, p. 31, and consists of an indictment concerning the 1986 incident, a motion to dismiss the charges, and a police report indicating that Perez was arrested on the charge of aggravated assault.[2] Perez does not allege that the incident was ever referred to as an "attempted murder" in front of the jury, and a review of the record does not reveal any such reference.

Even had the prosecution actually referred to the incident as an "attempted murder" in front of the jury, Perez has not shown that this would have amounted to such prosecutorial misconduct as to warrant habeas corpus relief. In order to make such a showing, Perez would have to demonstrate that the prosecution's allegedly improper remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Geiger v. Cain, 540 F.3d 303, 308 (5th Cir. 2008), *citing* Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). This requires a showing that the prosecutor's misconduct was persistent and pronounced or that the

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[2]As will be discussed below, Count II of the indictment for the 1986 incident charged Perez with attempted murder.

evidence was guilt was so insubstantial that the conviction would not have occurred but the improper remarks. Geiger, 540 F.3d at 308, *citing* Jones v. Butler, 864 F.2d 348, 356 (5th Cir. 1988).

Even were the prosecution's characterizations of the incident as "attempted murder" before the jury, which Perez has not shown, he has not demonstrated that any such characterizations infected his trial with unfairness such that his conviction amounted to a denial of due process. The jury heard Barbara Ward, the victim of the 1986 shooting, testify about the incident and were thus able to draw their own conclusions about it. The Twelfth Court of Appeals held that the admission of the evidence of the 1986 shooting was not improper because the mode of committing the 1986 shooting and the current offense were so similar that evidence of the 1986 shooting was relevant to Perez's intent, and was admissible to negate the possibility that the current offense was an accident. Perez, 2015 WL 3451556 at *5. He has failed to show that the adjudication of his claim resulted in a decision which was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This claim for relief is without merit.

E. Referring to the Current Crime as a "Murder"

Perez complains that during the trial before the jury, the prosecution characterized the case as a "murder," many times over defense counsel's objection. Perez also contends that the prosecution referred many times to the victim's body being "dumped." On several occasions, Perez states that the trial court agreed with defense counsel and told the prosecution to not use the terms "murder" or "dumped," but the prosecution nonetheless repeated these phrases in an effort to inflame the minds of the jurors. He asserts that the body was not "dumped," as shown by the fact that he himself called 911 and took law enforcement to the location of the body.

In Tollefson v. Stephens, civil action no. SA:14-cv-144, 2014 U.S. Dist. LEXIS 176573, 2014 WL 7339119 (W.D.Tex., December 23, 2014), the petitioner complained, *inter alia*, that

prosecution witnesses repeatedly used the terms "victim," "crime," "crime scene," and "murder," even though his defense was that he had acted in self-defense, which would mean that the person shot was not the "victim" of a "murder" and the location of the shooting was not a "crime scene." He argued that it was improper to refer to the person shot as a "victim" if there is a dispute as to whether a crime was committed. The federal habeas court determined that "terms like 'victim,' 'murder,' 'crime,' and 'crime scene' are frequently used in homicide trials, and in the greater context of the testimony in this case the court finds that these terms carried no specific implication of guilt," *citing* Cueva v. State, 339 S.W.3d 839, 864 (Tex.App.-Corpus Christi 2011, no pet.) (use of the term "victim" by defense counsel was not deficient in light of the fact that such terms are commonly used at trial in a neutral manner to describe the events in question and, in context, carry no implication as to whether the person using the term has an opinion as to the guilt of the defendant).

Similarly, in Pridgen v. Director, TDCJ-CID, civil action no. 6:17cv128, 2019 U.S. Dist. LEXIS 67783, 2019 WL 2464769 (E.D.Tex., March 21, 2019), *Report adopted at* 2019 U.S. Dist. LEXIS 67447, 2019 WL 1760079, (E.D.Tex., April 21, 2019), *aff'd* slip op. no. 19-40431 (5th Cir., January 2, 2020), this Court held that failure to object to the prosecution witnesses' references to the deceased person as the "victim" did not constitute ineffective assistance of counsel, citing Tollefson and Tran v. Davis, civil action no. 4:17cv330, 2018 U.S. Dist. LEXIS 80538, 2018 WL 2193925 (S.D.Tex., May 14, 2018) (failure to object to the term "victim" was not ineffective assistance of counsel because the person involved died as a result of gunshot wounds and the term carries no implication of the speaker's opinion of guilt).

In Corder v. State, slip op. no. 07-00-0453-CR, 2001 U.S. Dist. LEXIS 6184, 2001 WL 1011468 (Tex.App.-Amarillo, September 5, 2001, no pet.), the appellant complained that counsel "agreed with the prosecutor's argument during the punishment phase that he dumped her body 'like trash.'" The state appellate court determined that in the context of the entire record, the appellant failed to show that counsel was ineffective.

The Fifth Circuit has stated that in order to constitute a denial of due process, the prosecutorial acts complained of must be of such character as to necessarily prevent a fair trial. Nichols v. Scott, 69 F.3d 1255, 1278 (5th Cir. 1995). It is not enough that the prosecutor's remarks are undesirable or even universally condemned. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Rather, the relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. The burden is on the habeas petitioner to show a reasonable probability that but for the remarks or actions, the result would have been different, and only in the most egregious situations will a prosecutor's improper conduct violate constitutional rights. Ortega v. McCotter, 808 F.2d 406, 410-11 (5th Cir. 1987).

The evidence shows that Perez shot Ramirez while at her home and then drove across town and left her body in a partially wooded area on a hill. At one point, Day objected to the use of the word "dumped" and the court told the prosecutor to rephrase. In his memorandum of law, Perez argues that "dumping a body" amounts to a separate crime under Texas law. He contends that the State continually disregarded the admonitions of the trial court over the objections of the defense and characterizes the use of the term as unethical and improper.

Nonetheless, Perez has failed to show that the use of the terms"murder" or "dumped" so infected the trial with unfairness as to make his conviction a denial of due process. As noted above, the use of the term "murder" in a homicide trial is hardly unusual and does not itself carry an implication of the speaker's opinion as to guilt or innocence. Even if the phrase "dumped the body" could be considered inflammatory, it was not so egregious as to infect the entire trial with unfairness.

Perez has not shown that the state court's adjudication of his claim resulted in a decision which was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable

determination of the facts in light of the evidence presented in the state court proceeding, and his claim on this point is without merit.

F. The Introduction of Extraneous Evidence

Perez complains that extraneous offense evidence was offered because the trial court failed to sign a limine order, forcing him to take the stand in his own defense. He complained that Captain Raffield testified in a non-responsive answer that during the investigation, it was discovered that Perez had merely shot his ex-wife but did not murder her. He concedes that counsel immediately objected, which was sustained, and the jury was instructed to disregard the answer.

The record shows that at one point during the trial, Captain Raffield was on the stand being cross-examined about speaking to Ramirez's family. He stated that he did not speak to anyone on Perez's side of the family. The following colloquy occurred:

Q: Do you ever recall another investigator in another report saying that "we went to talk to Jose Perez's daughter, who saw him, you know, three hours before the shooting?"

A: I don't recall that, no.

Q: Okay. Or 'Jose Perez's first wife Delores, who saw Jose three hours before the shooting?'[3] Do you remember that at all in the investigation?

A: That would be someone else's testimony. I don't know.

Q: But you didn't see that in any reports that you -

A: I don't recall that I did. I remember that there was - there was talk of a prior incident. And the first information we had is that he had actually killed his first wife, but we found out that she had actually lived.

Day promptly objected and moved for a mistrial, and the jury was excused. After considerable discussion, the trial court denied the motion for a mistrial and instructed the jury to disregard the statement and not consider it for any purpose. (Docket no. 25-12, pp. 182-194).

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[3]The identity of "Delores" is not clear. As noted above, the ex-wife whom Perez shot in 1986 was named Barbara. Day pointed out that Delores and Barbara were different people, and Patton said that Barbara Ward was the only ex-wife whom Raffield knew about, so Raffield was trying to answer the question about the ex-wife. (Docket no. 25-13, pp. 8-10).

The Fifth Circuit has explained that "a curative instruction may reduce the risk of prejudice to the defendant." Hughes v. Quarterman, 530 F.3d 336, 347 (5th Cir. 2008), *citing* Ward v. Dretke, 420 F.3d 479, 499 (5th Cir. 2005). Unlike the attorney in Ward, Day promptly objected and secured an instruction to disregard the challenged testimony. Furthermore, evidence of the prior incident to which Raffield referred was presented during the State's rebuttal case and was subsequently held to be admissible by the Twelfth Court of Appeals and the state habeas court.

The Twelfth Court of Appeals held that any error in Raffield's reference to an extraneous offense was cured by the instruction to disregard, and that the trial court did not err in denying a mistrial. Perez has not shown that this finding was contrary to or involved an unreasonable application of clearly established federal law or was an unreasonable determination of the facts. Mere speculation that a curative instruction is insufficient to neutralize an error is not sufficient. Trottie v. Stephens, 720 F.3d 231, 255 (5th Cir. 2013). In his response to the Respondent's answer, Perez simply offers the bare assertion that "the multiple admonishments of the trial judge in the instant case do not cure the error." This is not sufficient to overcome the state court's finding that any error was cured by the instruction to disregard. To the extent Perez complains of the offering of extraneous evidence, his complaint is without merit.

Perez also complains that the evidence came in because the trial court failed to rule on his motion in limine to require a hearing before offering evidence of a crime or prior bad act. However, he has not shown that the failure to grant his motion in limine amounted to constitutional error, nor that he suffered harm as a result. Had his motion been granted, the State would have been required to seek a hearing prior to offering evidence of a prior crime or bad act, such as his shooting Dolores. However, the trial court ultimately held the evidence of the 1986 shooting of Ward admissible after a hearing, and this holding was affirmed on appeal. Perez offers no reason to suppose that a hearing on a motion in limine concerning the same evidence would have resulted in a different outcome. His claim on this point is without merit.

G. Failure to Sign the Motion in Limine

In a related claim, Perez asserts that the trial court's failure to sign the motion in limine was itself a denial of due process. He contends that the failure to sign this motion allowed the State to put on the evidence of the extraneous offense; however, as stated above, the evidence was ultimately held to be admissible. The granting of the motion in limine would not have rendered the evidence inadmissible or otherwise kept it away from the jury. Perez has failed to show a constitutional violation or resulting harm. Consequently, he has not demonstrated that the state court's adjudication of his claim resulted in a decision which was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Perez's claim on this point is without merit.

H. Failure to Give 20 Days Notice on a Transcript

Perez asserts that the trial court had an ex parte communication with the jury in which the jurors complained that they could not hear portions of the video-taped interview of Perez conducted by Detective Battley. The trial court then allowed the State to have the interview transcribed and represent it to the jury. The transcript was never put into evidence and defense counsel was not given the 20 days required under Texas law to review the transcript.

The trial record shows that the judge checked on the jury to see how they were doing and some of the jurors asked for a transcript of the interview. Day stated that he believed it would be objectionable to have Perez's recorded statement transcribed because the recording should speak for itself. The State responded that they did not think there would be any problems with a transcript. (Docket no. 25-12, pp. 7-8). The transcript was subsequently prepared and the jury allowed to read it while listening to the recording. Day offered no objection at that time, subject to his right to make corrections and examine the person who transcribed it in the event there was any errors in the transcription. (Docket no. 25-13, p. 38).

Perez's complaints in this ground of error, as made clear in his responses and his memorandum of law, revolve around state evidentiary rules. As a general rule, errors of state law, including evidentiary errors, are not cognizable on federal habeas corpus. Derden v. McNeel, 978 F.2d 1453, 1458 (5th Cir. 1992). Instead, an evidentiary error in a state trial justifies federal habeas corpus relief only if the error is so extreme that it constitutes a denial of fundamental fairness under the Due Process Clause. Bridge v. Lynaugh, 838 F.2d 770, 772 (5th Cir. 1988). The challenged evidence must be a crucial, critical, or highly significant factor in the context of the entire trial. Bridge, 838 F.2d at 772. In order to obtain relief, the petitioner must show that the trial court's error had a "substantial and injurious effect or influence in determining the jury's verdict." *See* Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The petitioner must also show that "there is more than a mere reasonable possibility that [the error] contributed to the verdict. It must have had a substantial effect or influence in determining the verdict." Woods v. Johnson, 75 F.3d 1017, 1026 (5th Cir.1996).

Perez has not shown that the fact that the trial court had a transcript prepared of his interview with Detective Battley, or that counsel was not given 20 days in which to review it, was an error so extreme as to constitute a denial of fundamental fairness. He has not shown that the transcript was in error in any way or that he was otherwise harmed. Perez has not demonstrated that the state court's adjudication of his claim resulted in a decision which was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Perez's claim on this point is without merit.

I. Two Different Prosecutors

Perez complained that two different prosecutors, Rachel Patton and Deborah Dictson, split the State's closing argument. The Court is aware of no authority holding that attorneys for a party cannot split their time for closing statements, and this claim sets out no basis for habeas corpus relief; in any event, Perez withdrew this claim in his response to the answer.

J. Improper Closing Argument

Perez complains that at closing, the prosecutor committed misconduct by arguing that "he deserves life for the life he took." He contends that this is a variation of the "eye for an eye, tooth for a tooth Biblical adage," and that these principles based on Hammurabi's Code of Laws are not the jurisprudence of the United States. Perez argues that retribution is not listed within the precepts of the U.S. Constitution but the State was arguing for such action.

In similar vein, Perez complains that the prosecution said that the jury never promised the defendant that they would consider the full range of punishment. He asserts that at the beginning of the trial, the jury swore that they could consider the full range of punishment and the prosecutor's argument was in contradiction of this oath. He claims the fact that he received less than the maximum punishment does not negate the fact that prosecutorial misconduct occurred or had an effect on the jury's decision.

The trial record shows that in her closing argument on punishment, Patton argued as follows:

> She's his victim. He did this. He chose to do this. He's the reason his child had to come take the witness stand after her father had been found guilty of murder and ask you to have mercy on him. Because that's what he's asking for. He's asking for mercy. He ain't asking for justice, because he knows what justice is. Don't give me what I deserve. Don't give me what I deserve. Because Jose Perez knows he deserves life. He deserves life for the life that he took, he deserves life for the life that he stole from this family.
>
> You never promised Jose Perez you would consider the full range of punishment. You never promised a man who shot one wife and then murdered another woman you would consider the full range of punishment. You said you could consider the full range of punishment in the most mitigating case you could possibly think of. Ladies and gentlemen, I submit to you that this is the exact opposite. I can't imagine a more aggravating circumstance than killing a woman in cold blood, and leaving her body, urine stained pants, legs splayed open. Come pick up that woman, I threw it out of a car. Martha Ramirez was not an it. Martha Ramirez was a loving human being who did not deserve this treatment, treatment at the hands of the defendant.

(Docket no. 25-15, p. 159).

Although Perez mentions a "Biblical adage" and "Hammurabi's Code," the prosecutor did not specifically mention or refer to either of these. Even had the prosecutor done so, Perez has not shown that such action would warrant federal habeas corpus relief. *See, e.g.*, Coe v. Bell, 161 F.3d

320, 351 (6th Cir. 1998) (prosecutor's statement that the law of the land was established on the Bible and the scriptures are replete with circumstances in which capital punishment was applied was "inappropriate" but did not so taint the proceedings as to constitute reversible error); Huffman v. Johnson, 265 F.3d 1059, 2001 WL 872855 (5th Cir., July 11, 2001) (prosecutor's use of extensive Biblical quotations was not grounds for federal habeas corpus relief).

More generally, improper prosecutorial comments will not vitiate a conviction unless the comments so infected the trial with unfairness that there is a reasonable probability that the result would have been different if the proceeding had been conducted properly. Id., *citing* Jackson v. Johnson, 194 F.3d 641, 653 (5th Cir. 1999). Perez has made no such showing with regard to the prosecutor's argument in this case. Ries v. Thaler, 522 F.3d 517, 529-30 (5th Cir. 2008) (prosecutor telling the defendant during closing argument that "you know it and you deserve to die," and expressing his personal belief in the death penalty, was not grounds for habeas corpus relief); *see also* Charles v. Thaler, 629 F.3d 494, 504 (5th Cir. 2011). His claim on this point is without merit.

Perez also takes issue with the prosecutor's statement that "you never promised Jose Perez that you would consider the full range of punishment." There was an extensive discussion during voir dire about consideration of the full range of punishment. (Docket no. 25-10, pp. 61-62). Patton told the jury in voir dire as follows:

> The only thing I want to point out is at this point you are not saying that you could give the full range -- or, you could consider giving the full range of punishment to this particular defendant. What you have to be able to do is say I could consider the full range of punishment in some hypothetical case. For example, like Judge Bentley told you about the elderly couple, that's a hypothetical case that would fit the definition of murder where a lot of people would be able to consider the minimum of five years. You do not have to say I can consider the full range of punishment in this particular case. You just have to be able to think of a case, any case in your mind where the facts would be mitigating enough that you would feel comfortable giving a five-year sentence.

(Docket no. 25-10, p. 72).

Patton's explanation to the jurors at voir dire comports with Texas law. The Texas Court of Criminal Appeals has explained that both the defendant and the State have the right to select from

jurors who believe in the full range of punishment. Rosales v. State, 4 S.W.3d 228, 233 (Tex.Crim.App. 1999). This means that prospective jurors must be "able, in a sense, to conceive both of a situation in which the minimum penalty wold be appropriate and a situation in which the maximum penalty would be appropriate." Id. The question is not whether the prospective jurors are willing to consider the entire range of punishment for the offense as the defendant committed it, but whether the juror can consider the entire range of punishment for the offense as defined by law. Id., *citing* Sadler v. State, 977 S.W.2d 140, 142 (Tex.Crim.App. 1998). The Court of Criminal Appeals has explained that the law requires jurors to use the facts of the case to tailor the punishment to the crime as committed by the guilty defendant, and therefore a prospective juror cannot be challenged for cause because he or she will use the acts to determine punishment. So long as the prospective juror can consider the full range of punishment for the offense as defined by law, the juror is not challengeable for cause based on inability to consider the full range of punishment. Lewis v. State, slip op. no. 05-98-02116-CR, 2000 Tex.App. LEXIS 4704, 2000 WL 772936 (Tex.App.-Dallas, June 15, 2000), pet. ref'd), *citing* Sadler, 977 S.W.2d at 142.

Thus, Patton's closing argument essentially reminded the jurors that they did not promise to consider the full range of punishment for the facts of the case which had been presented to them at trial, but only the full range of punishment for the offense of murder. This is consistent with Texas law. She then went on to argue that the facts of this case were aggravating and not mitigating, for which he deserved life. The jury did not accept her recommendation but instead imposed a sentence of 50 years, almost at the midpoint of the sentencing range between five and 99 years.

Even if Patton's argument perhaps could have been worded differently, Perez has not shown that her statements rendered the sentencing proceeding fundamentally unfair. Her statements were not improper, much less "persistent or pronounced," and were made in the context of an argument why the facts of Perez's case justified a life sentence. *See* King v. Puckett, 1 F.3d 280, 286 (5th Cir. 1993). Although Perez argues in his memorandum of law that Patton's arguments were "outside the permissible zone of closing arguments," he makes no such showing, much less demonstrate that the

state court's adjudication of his claim resulted in a decision which was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. His claim on this point is without merit.

K. Failure to Object - Attempted Murder

Perez complains that Day did not object to the State's references to the 1986 charge as "attempted murder," which he says allowed the jury to consider the case as an attempted murder. He does not point to any instance in which the State or any of its witnesses used the phrase "attempted murder" in front of the jury, and a search of the testimony does not reveal any. He refers to CR 81 (docket no. 25-2, p. 81), the State's notice of intent to use evidence of other crimes, wrongs, or acts, which says that the State intends to use evidence of the 1986 offense, which is referred to as attempted murder, but Perez does not show that the jury ever saw this notice.

The Fifth Circuit has stated that the courts are not required to scour the record for factual issues which might support the litigant's position, but rather it is the litigant's obligation to direct the court's attention to the relevant evidence. Perez v. Johnson, 122 F.3d 1067, 1997 U.S. App. LEXIS 42158, 1997 WL 464599 (5th Cir., July 31, 1997), *cert. denied*, 523 U.S. 1008 (1998), *citing* United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994). Because Perez has not shown any instance where the term "attempted murder" was used in front of the jury, he has not shown that Day could have objected to any such use.

As set out above, Day did object when Captain Raffield brought up the incident. His motion for a mistrial was denied, but the trial court instructed the jury not to consider the statement for any purpose. Day plainly was not ineffective in this regard.

In any event, although the indictment of Perez for the 1986 incident was captioned as aggravated assault, Count II of that indictment charged that Perez "did then and there intentionally, with the specific intent to commit the offense of murder of Barbara Perez, do an act, to-wit: shoot her with a firearm, which amounted to more than mere preparation that intended but failed to effect

to [sic] commission of the offense intended." (Docket no. 26-27, p. 76). This paragraph sets out a charge of attempted murder as it existed in 1986. *See* Tex. Penal Code art. 15.01 (Vernon 1974); Hall v. State, 640 S.W.2d 307, 308 (Tex.Crim.App. 1982). Had the prosecution said in front of the jury that Perez was charged with attempted murder in the 1986 incident, such a characterization would have been accurate.

In his response to the answer, Perez states that "the petitioner has searched the record before the court, high and low, and [has] been unable to locate any alleged indictment demonstrating the Respondent's false claim." The indictment - which begins by saying "In the name and by authority of the State of Texas" - is found at Exhibit D to Plaintiff's state habeas petition, no. 86,945-01. Perez has not demonstrated that the state court's adjudication of his claim resulted in a decision which was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. His claim on this point is without merit.

L. Failure to Object at Closing - Retribution

Perez asserts that counsel was ineffective for failing to object to the prosecution's statements concerning retribution and consideration of the full range of punishment during closing argument. The prosecutor did not use the word "retribution" during her closing statement, but instead argued that Perez should get life in prison based on the facts of the case. While the prosecutor talked about Martha Ramirez's life in this argument, similar arguments have been upheld by the Texas courts. *See, e.g.*, Espada v. State, slip op. no. AP-75,219, 2008 Tex.Crim.App. Unpub. LEXIS 806, 2008 WL 2809235 (Tex.Crim.App., November 8, 2008) (upholding prosecutor's argument telling the jury to think about how the defendant had the opportunity to explain how his life should be spared, but his victims did not, and asking the jury to give the victims the consideration that the defendant did not give them in life). As noted above, the prosecutor's argument concerning the full range of punishment comported with Texas law. Perez has not shown any valid objection which Day could

have raised to the prosecutor's closing argument, nor that but for the failure to object, the result of the proceeding would probably have been different. *See* Clark v. Collins, 19 F.3d 959, 966 (5th Cir. 1994) (counsel has no duty to make meritless objections); Koch v. Puckett, 907 F.2d 524, 527 (5th Cir. 1990). Perez has not demonstrated that the state court's adjudication of his claim resulted in a decision which was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. His claim on this point is without merit.

M. Failure to Secure a Ruling on the Motion in Limine

Perez asserts that trial counsel filed a motion in limine to prevent the State from offering evidence of the 1986 incident. However, counsel failed to ensure that the order was signed, and Perez claims this oversight allowed the State to put on the evidence as "propensity evidence" as though it had been proven in court, which it never was.

As set out above, the evidence of the 1986 incident was ultimately held to be admissible and was heard by the jury. The trial court's decision to admit the evidence was upheld on appeal. Had Day secured a favorable ruling on the motion in limine, the prosecutor would have had to seek a hearing before offering this evidence. However, Perez offers nothing to suggest that the evidence would have been excluded had the prosecutor been required to seek a hearing, nor that a decision to admit the evidence would have had a different fate on appeal. Thus, he has not shown that but for Day's failure to secure a ruling on the motion, the result of the proceeding would probably have been different. His claim of ineffective assistance of counsel on this point is without merit.

N. Failure to Object to the Charge on Punishment

Perez complains that counsel failed to object to the jury charge allowing the jurors to consider the existence of good time, in that the instruction read by the court stated that good time applied to a murder conviction, which likely led to a greater sentence. Perez also complained of inconsistencies in the charge including saying that he could earn good time and then saying he

couldn't as well as saying that he could not be sentenced to less than five years and then saying that if he received less than two years, he would have to serve the entire sentence. Perez maintains that defense counsel should have discovered these errors and had them corrected before the jury was charged.

The charge on punishment as read to the jury instructed them that they could assess punishment for life or any term of years not less than five or more than 99, and could assess a fine as well. The charge stated that the defendant could earn time off the period of incarceration imposed through the award of good conduct time and that if sentenced to a term of imprisonment, he would not be eligible for parole until the actual time served equals one-half the sentence imposed or 30 years, whichever is less, without consideration of good conduct time; however, if he is sentenced to less than four years, he must serve at least two before becoming eligible for parole. The charge instructed the jury that it cannot accurately be predicted how parole and good time might be applied to this defendant, and while the jury may consider the existence of parole and good conduct time, the jury is not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant, nor the manner in which the parole law may be applied to him.

The language included in the charge, including the jury eligibility for a person sentenced to less than four years, was taken directly from Tex. Code Crim. Pro. art. 37.07, sec. 4. This statute provides that the trial court "shall" charge the jury with that language. *See* Jordan v. Dretke, civil action no. 3:02cv86, 2006 U.S. Dist. LEXIS 7084, 2006 WL 536599 (N.D.Tex., February 24, 2006), *Report adopted at* 2006 U.S. Dist. LEXIS 31950, 2006 WL 1416750 (N.D.Tex., May 22, 2006) (giving charge set out in Article 37.07 was not error and counsel was not ineffective for failing to object), *citing* Luquis v. State, 72 S.W.3d 355, 363 (Tex.Crim.App. 2002) (charge set out in Article 37.07 does not violate due process).

Nonetheless, the habeas court found as a fact that counsel should have objected to the jury instruction stating that if the defendant was sentenced to less than four years, he must serve two before becoming eligible for parole. Even if this failure to object was ineffective, however, Perez

cannot prevail on this claim because he has not shown that but for the failure to object, the result of the proceeding would probably have been different. Ramirez v. Dretke, 398 F.3d 691, 698 (5th Cir. 2005) (prejudice in the context of failure to object to a jury charges requires a showing that but for counsel's error, there is a reasonable probability that the final result would have been different and confidence in the reliability of the verdict has been undermined).

In this case, the jury was correctly instructed that the minimum sentence which could be imposed, should they find Perez guilty of murder, was five years. Perez has not shown that the fact that counsel failed to object to a hypothetical situation being given to the jury about the parole eligibility for a person sentenced to less than four years resulted in such prejudice that but for the failure to object, the result of the proceeding would probably have been different.

Nor has Perez shown that Day was ineffective in failing to object to the charge's reference to good time. The Texas Court of Criminal Appeals has held that the instruction on good time is mandatory and does not violate due process. Luquis, 72 S.W.3d at 363-65; *see* Ross v. Thaler, civil action no. 5:08cv174, 2011 WL 10858083 (N.D.Tex., December 1, 2011), *aff'd* 511 F.App'x 293, 2013 U.S. App. LEXIS 2519, 2013 WL 586772 (5th Cir.), *cert. denied*, 570 U.S. 935 (2013) (jury instruction in a capital case stating that a defendant sentenced to life imprisonment would have to serve 40 years before becoming eligible for parole and the jury was instructed not to consider how good time would be applied to the defendant, and nothing in the record suggested that the jury discussed, considered, or tried to apply what they were told about good time and parole, did not show that the state court's denial of relief was unreasonable). Perez has not demonstrated that the state court's adjudication of his claim resulted in a decision which was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. His claim on this point is without merit.

O. Ineffective Assistance of Counsel - Failure to Furnish Precedents

Perez states that he received ineffective assistance of counsel in that his attorney argued against the introduction of improperly seized evidence and the trial court initially agreed that certain writings were unlawfully seized. However, the court wanted some precedents, and Perez contends that Day failed in this regard. He says that the State filed a "well thought out and researched brief," but defense counsel only filed a letter motion. Perez contends that this inadequate briefing, coupled with defense counsel's failure to properly argue the oral motion to suppress, had a "cumulative effect" in the proceedings resulting in prejudice.

The Fifth Circuit has held that there is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Harrington, 562 U.S. at 109; *see* Hamilton v. Stephens, 183 F.Supp.3d 809, 820 (W.D.Tex. 2016) (rejecting claim of ineffective assistance for allegedly failing to properly argue a motion to suppress). Perez has likewise failed to rebut the Harrington presumption.

Furthermore, Perez does not state what arguments he believes Day should have made at the hearing on the motion to suppress or what cases he believes Day should have cited in his brief, much less that any such arguments had a likelihood of success. He simply insists in his memorandum of law that the trial court agreed with counsel that the evidence was improperly seized, and that "minus the late filing [of counsel's letter brief,] the court was of the opinion that the defense was correct, and the State timely filed their brief and prevailed in getting the unconstitutionally seized evidence before the jury." However, Perez offers nothing to show that it was the timeliness of the filing of the letter brief, rather than the arguments and authorities put forth by the State, which resulted in the overruling of the motion to suppress by the trial court. This decision to overrule was affirmed by the Twelfth Court of Appeals. The mere fact that the motion to suppress was denied does not show that Perez received ineffective assistance of counsel or that but for such ineffectiveness, the result of the proceeding would probably have been different. His claim on this point is without merit.

P. Ineffective Assistance - Cumulative Error

Perez asserts that counsel's errors at trial were cumulative and resulted in prejudice to him. The Supreme Court has never squarely held that the cumulative error doctrine governs ineffective assistance of counsel claims. Hill v. Davis, 781 F.App'x 277, 2019 U.S. App. LEXIS 19973, 2019 WL 2895008 (5th Cir., July 3, 2019). Even if the cumulative error doctrine applied to ineffective assistance claims, however, Perez has fallen well short of showing that counsel's alleged errors, taken cumulatively, prejudiced him to such a degree that he qualifies for habeas corpus relief.

The Fifth Circuit has held that "there is no precedent supporting the idea that a series of 'errors' that fail to meet the standard of objectively unreasonable can somehow cumulate to meet the high burden set forth in Strickland." United States v. Thomas, 724 F.3d 632, 648 (5th Cir. 2013). Conclusory assertions are insufficient to sustain a claim of cumulative error. Id.; *see also* Miller v. Johnson, 200 F.3d 274, 286 n.6 (5th Cir. 2000) (in the absence of specific demonstrated error, a defendant cannot by definition show that cumulative error of counsel deprived him of a fair trial).

The Fifth Circuit has made clear that federal habeas corpus relief will not be granted where the cumulative errors complained of are not of a constitutional dimension. Livingston v. Johnson, 107 F.3d 297, 309 (5th Cir. 1997), *citing* Derden v. McNeel, 978 F.2d 1453, 1454 (5th Cir. 1992), *cert. denied*, 508 U.S. 960 (1993). Because Perez has not shown either deficient performance by his trial counsel nor any cumulative errors approaching constitutional dimensions, he has presented nothing to cumulate. Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993). His claim on this point is without merit.

Q. Appellate Court Error

Perez contends that the Twelfth Court of Appeals "circumvented the protections of the Constitution and Miranda" by holding that statements he made were admissible. He argues that the Court of Appeals misconstrued the Texas Code of Criminal Procedure in such a manner as to bypass constitutional protections.

Perez appears to refer to two separate statements, one which he made to jailer Alma Creel during book-in at the jail and the initial interview he had with Detective Battley. When Perez was booked into the jail, Creel, the book-in officer, asked him "do you know why you're here?" In response, Perez told her that he had killed his girlfriend because she was doing witchcraft on him. He then said that he thought she pulled something out, and he went for his gun, she shot him, and then he shot her twice. (Docket no. 25-8, pp. 98-99).

The Court of Appeals determined that Creel's questions were not part of a custodial interrogation, but were simply routine book-in questions, which are exempted from Miranda's requirements. Perez, 2015 WL 314556 at *4, *citing* Alford v. State, 358 S.W.3d 647, 652-54 (Tex.Crim.App. 2012). The court explained that the question "do you know why you're here" does not require an incriminating response, but instead had a legitimate administrative purpose in ensuring that the prisoner was competent to answer questions.

Perez argues that the Court of Appeals ignored the fact that he was drunk and that his native language was Spanish. However, neither of these facts converts Creel's question into a custodial interrogation. As an non-custodial administrative question, asked for the purpose of determining that Perez was competent to answer routine questions, it was exempt from Miranda. Perez has failed to show he is entitled to relief on this issue.

The discussion about the Texas Code of Criminal Procedure in the Court of Appeals' opinion appears in the context of the interview with Detective Battley. The Court of Appeals stated that in his second issue, Perez complained that his statement to Battley was involuntary because he was intoxicated and in pain from the handcuffs when he waived his rights and gave the statement. A hearing on the motion to suppress was held, at which a recording of the interview was played.

Perez argued on appeal that his statement was inadmissible under Article 38.22(a) of the Code of Criminal Procedure, which provides that a statement made by an accused as a result of custodial interrogation is not admissible unless the accused receives Miranda warnings and voluntarily waives the rights set out in the warning, and all voices on the recording are identified.

Section 38.22(c) creates an exception for statements which "contain assertions of fact or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he says the offense was committed." The Texas Court of Criminal Appeals has explained that this exception means that oral statements asserting facts or circumstances establishing the guilt of the accused are admissible if, at the time they were made, they contain assertions unknown by law enforcement but later corroborated. Woods v. State, 152 S.W.3d 105, 117 (Tex.Crim.App. 2004).

Detective Battley testified that several of Perez's assertions during her interview with him contained facts which were unknown to law enforcement but were later corroborated, including his statements that the shooting occurred at Ramirez's residence, that Ramirez was in the passenger seat when the shooting occurred, and that Perez fired the gun three times and Ramirez was hit twice. Thus, the Court of Appeals concluded that while the statement was not taken in full compliance with Article 38.22(a), apparently because not all of the voices on the recording were identified, the statement to Battley was properly admitted under Tex. Code Crim. Pro. art. 38.22(c). *See* docket no. 25-8, p. 141 (Day argued at the motion to suppress hearing that the statement was inadmissible because the voices on the recording are not identified).

To the extent that Perez contends the Court of Appeals misconstrued the Texas Code of Criminal Procedure, the Supreme Court has held that federal habeas corpus relief does not lie for errors of state law. Swarthout v. Cooke, 562 U.S. 216, 219, 131 S.Ct. 859. 178 L.Ed.2d 732 (2011). Nor has Perez shown a constitutional violation in this regard. The trial court denied the motion to suppress, the Court of Appeals upheld this decision, and the Texas Court of Criminal Appeals refused Perez's petition for discretionary review and denied his application for a writ of habeas corpus. Perez has not shown that the Texas courts' denial of relief on this claim was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light

of the evidence presented in the state court proceeding. *See* Dolph v. Davis, 765 F.App'x 986, 2019 U.S. App. LEXIS 8074 (5th Cir., March 19, 2019). His claim on this point is without merit.

R. A Potentially Biased Juror

Perez says that during the guilt-innocence phase of the trial, a juror named Geraldine Griffin told the Court that she had previously worked for the witness Barbara Ward, Perez's ex-wife, and that she would give Ward greater credibility. According to Perez, Day argued that she should be dismissed and the trial continue with eleven jurors and the State contended that no such agreement was reached, but the Court of Appeals found that the State said it would not object to the trial proceeding with eleven jurors if the appellant wished to dismiss this juror. However, Perez stated that the Court of Appeals erroneously found that "appellant expressed no desire to dismiss the juror, and the trial continued." Thus, Perez states that "the Court of Appeals misconstrued the cited states, rules and regulations and/or ordinances [sic] in the instant case."

The record shows that when Ward started to testify, juror Geraldine Griffin indicated that she wanted to speak to the judge. The jury was excused and Griffin told the judge that she used to work with Ward for five years. The judge asked "is that going to affect your ability to be fair and impartial," and Griffin replied "no." (Docket no. 25-15, p. 10).

Under questioning by Day, Griffin stated that she had worked with Ward at Jacksonville Nursing Home fourteen years earlier and did not know anything about any incidents regarding Ward's marital situations. Day asked if Griffin would be more likely to believe what Ward says, and Griffin answered "yes." She agreed that Ward would "automatically have credibility," then again said that she could be fair and impartial, and then said that she would be more likely to believe Ward. (Docket no. 25-15, p. 11).

Griffin was excused to return to the jury room and the judge took a recess. He then resumed with Griffin in the courtroom. Griffin stated that she did not have a bias or prejudice for Ward, that she could weigh Ward's testimony like any other witness, and that she could treat Ward like any other witness. (Docket no. 25-15, p. 17).

After more discussion, the trial court stated that the jury would be brought in and Ward allowed to testify. Day objected on the ground that Perez could not get a fair trial, which was overruled. The prosecutor stated that "if the defense would like to dismiss this juror and proceed to verdict with only 11 jurors, that is permissible by law, and the State would not object to that." The trial court stated "well folks, y'all decide, because I'm ready to bring them in." The court expressed concern that the jury was getting frustrated. Day asked for a mistrial, which was denied, and affirmed that he had been granted a running objection to Ward's testimony. Ward was then brought in to testify and the trial resumed.

The Court of Appeals recounted the exchange as follows:

> Appellant made an objection to Ward's testimony and moved for a mistrial on the basis that he could not receive a fair trial because of the juror's relationship with Ward. The trial court overruled the objection and denied the motion for mistrial. The State expressed that it would not object to proceeding with eleven jurors if Appellant wished to agree to dismiss the juror. Appellant expressed no desire to dismiss the juror, and the trial resumed.
>
> On appeal, Appellant does not argue that the juror was disqualified, but that the trial court erred by failing to excuse her based on the parties' agreement to proceed with eleven jurors as permitted by Article 36.29 of the code of criminal procedure. *See* Tex. Code Crim. Proc. Ann. art. 36.29(c) (West Supp.2014). However, the record shows that although the State voiced it would not object to dismissing the juror, there was no such agreement of the parties. Accordingly, we overrule Appellant's fourth issue.

Perez, 2015 WL 3451556 at *7.

Although Perez complains in his petition and his memorandum of law that the Court of Appeals erred in finding that "appellant expressed no desire to dismiss the juror," this finding was correct. Even after the prosecutor said that there would be no objection from the State if the defense wanted to dismiss this juror and proceed to verdict with only 11 jurors, Day did not state that he wanted the juror removed. In fact, at no point during the entire colloquy did Day express a desire to remove the juror. Instead, his objection was to Ward's testimony, not to Griffin remaining on the jury; Day stated that he believed Perez could not have a fair trial "and because of that, I object to this witness testifying based on those grounds. And I would like a ruling on that." The trial court

overruled the objection and at that point, the prosecutor stated there would be no objection to dismissing Griffin. Day did not respond to this offer, but asked for a mistrial and verified the trial court had granted a running objection "to this witness." (Docket no. 25-15, pp. 25-26).

Thus, contrary to Perez's claim, the record shows that the Court of Appeals was correct in determining that Day did not ask for the juror to be removed and that there was no agreement to remove the juror. This claim is without merit.

To the extent that Perez's claim may be read to include a claim of denial of an impartial jury, this claim likewise lacks merit. Griffin stated that she could be fair and impartial, she was not biased or prejudiced in favor of Ward, she would not believe Ward more than any other witness, and she would just go by the facts in the case. This testimony is sufficient to show that the state courts' denial of relief was not contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* Soria v. Johnson, 207 F.3d 232, 241-42 (5th Cir. 2000) (rejecting challenge to the jury based on the venire members' testimony that they could follow the court's instructions despite petitioner's claim that these venire members were unable to consider a life sentence if he was convicted of capital murder); Bell v. Lynaugh, 828 F.2d 1085, 1092-93 (5th Cir. 1987) (upholding the refusal to strike for cause a juror who initially testified that she would require the defendant to present some evidence before finding him not guilty, but then said that she would not hold against him the possibility that he might not testify or present evidence). Perez's claim on this point is without merit.

S. Court of Appeals wrongly upheld admission of the 1986 shooting

Perez complains that the evidence of the 1986 shooting was almost 30 years old. He states that the federal state rules of evidence mirror each other and Rule 609 forbids evidence of crimes over ten years old, while Rule 404 forbids admission of extraneous offenses. He complains that the Twelfth Court of Appeals "went into a long diatribe" to support admission of the evidence, but this

was improper because a 30-year-old non-prosecuted crime is not admissible to prove that Perez acted in conformity with his own character.

On appeal, Perez argued that the extraneous offense evidence was improperly admitted because it lacked the required similarities and was too remote in time to be admissible under Tex. R. Evid. 404(b). He also complained that admitting the evidence would result in unfair prejudice because the offense was so old he could not defend against it and that the prejudicial nature of the evidence outweighed its probative value under Tex. R. Evid. 403. The Court of Appeals determined that there was numerous similarities between the 1986 incident and the present offence and rendered the 1986 offense admissible to negate the possibility that the present offense was an accident, the trial court found that the jury could find beyond a reasonable doubt that the 1986 incident occurred, the 1986 incident was not so remote in time under Texas law as to render it inadmissible to show intent, and the trial court did not abuse its discretion in overruling Perez's Tex. R. Evid. 403 objection. Perez, 2015 WL 3451556 at *5-6.

The Court of Appeals applied the Texas Rules of Evidence and cited Texas state law cases in upholding the admission of the 1986 incident into evidence. As stated above, errors of state law, including evidentiary errors, are not cognizable on federal habeas corpus. Derden, 978 F.2d at 1458. Perez has not shown that any error in admitting the evidence of the 1986 incident was so extreme as to amount to a denial of fundamental fairness. Bridge, 838 F.2d at 772.

The Court of Appeals clearly explained why the incident was admissible and the Texas state courts found on direct appeal and collateral review that the admission of the 1986 incident was proper. Perez's bare assertion that "such evidence is inadmissible under any jurisprudence of the United States" is not sufficient to show that this decision was an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Perez's claim on this point is without merit.

T. Counsel in the State Habeas Proceedings

Perez complains that the trial court appointed Allen Ross rather than Jeffrey Clark as his attorney during the state habeas proceedings. Defendants seeking appointed counsel have no right to the appointment of counsel of their choice. *See* Morris v. Slappy 7, 461 U.S. 1, 14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983); Yohey v. Collins, 985 F.2d 222, 228 (5th Cir. 1993). Perez does not assert that Ross - a criminal defense practitioner - was ineffective during the state habeas hearing, but in any event, there is no right to counsel in state habeas proceedings, and therefore no right to effective counsel. Roberts v. Dretke, 356 F.3d 632, 640 (5th Cir. 2004).[4] Perez's claim on this point is without merit.

VI. Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. §2253(c)(1)(A). A district court may deny a certificate of appealability *sua sponte* because the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before that court. Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000).

The prerequisite for a certificate of appealability is a substantial showing that the petitioner has been denied a federal right. Newby v. Johnson, 81 F.3d 567, 569 (5th Cir. 1996). To do this, he must demonstrate that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. James v. Cain, 50 F.3d 1327, 1330 (5th Cir. 1995).

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[4]Martinez v. Ryan, 132 S. Ct. 1309 (2012) and Trevino v. Thaler, 133 S. Ct. 1911 (2013), which provide for excusing a procedural default of claims of ineffective assistance of trial counsel where the petitioner can show that state habeas counsel was ineffective in failing to present those claims, are not applicable because none of Perez's claims have been procedurally defaulted, nor do any of his ineffective assistance of trial counsel claims have merit. *See* Chanthakoummane v. Stephens, 816 F.3d 62, 72 (5th Cir., *cert. denied*, 137 S.Ct. 280 (2016).

Perez has not shown that the issues are debatable among jurists of reason, a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. Consequently, Perez is not entitled to a certificate of appealability.

RECOMMENDATION

It is accordingly recommended that the above-styled application for the writ of habeas corpus be dismissed with prejudice. It is further recommended that a certificate of appealability be denied *sua sponte*.

A copy of these findings, conclusions and recommendations shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendations must file specific written objections within 14 days after being served with a copy. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's proposed findings, conclusions, and recommendation where the disputed determination is found. An objection which merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific, and the district court need not consider frivolous, conclusive, or general objections. *See* Battle v. United States Parole Commission, 834 F.2d 419, 421 (5th Cir. 1987).

Failure to file specific written objections will bar the objecting party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted and adopted by the district court except upon grounds of plain error. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

So ORDERED and SIGNED this 31st day of March, 2020.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

JOSE DIAZ PEREZ	§	
v.	§	CIVIL ACTION NO. 6:18cv255
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

Having considered the application for the writ of habeas corpus and rendered its decision by order of dismissal issued this same date, the court **ORDERS** that the case is **DISMISSED** with prejudice.

SIGNED this the 5th day of August, 2020.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX B-2

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

JOSE DIAZ PEREZ	§	
v.	§	CIVIL ACTION NO. 6:18cv255
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner Jose Diaz Perez, an inmate confined in the Texas prison system proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 challenging his conviction for drunk driving. The petition was referred to United States Magistrate John D. Love, who issued a Report recommending that the petition for the writ of habeas corpus be denied. Petitioner has filed objections, arguing that the state habeas court's findings are not entitled to a presumption of correctness because the hearing was not held by the same judge who presided at trial, the allegedly false testimony by Detective John Rafferty was material, the trial court improperly held *ex parte* communications with the jurors, Petitioner received ineffective assistance of counsel, and the decision of the state appellate court was in error.

The Report of the Magistrate Judge, which contains proposed findings of facts and recommendations for the disposition of such action, has been presented for consideration, and having made a careful *de novo* review of Petitioner's objections, the court has determined that the findings and conclusions of the Magistrate Judge are correct and the Petitioner's objections are without merit. The court therefore adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the court. It is accordingly

ORDERED that the Report and Recommendation of the Magistrate Judge (docket no. 40) is **ADOPTED** as the opinion of the district court. It is further

ORDERED that the petition for the writ of habeas corpus is **DENIED** and the above-styled civil action is **DISMISSED** with prejudice. It is further

ORDERED that a certificate of appealability is **DENIED**. All motions not previously ruled on are **DENIED.**

SIGNED this the 5th day of August, 2020.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX C

NO. 12-14-00116-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JOSE DIAS PEREZ, APPELLANT	§	*APPEAL FROM THE 2ND*
V.	§	*JUDICIAL DISTRICT COURT*
THE STATE OF TEXAS, APPELLEE	§	*CHEROKEE COUNTY, TEXAS*

MEMORANDUM OPINION

Jose Dias Perez appeals his conviction for murder, for which he was sentenced to imprisonment for fifty years. Appellant raises six issues challenging the trial court's admission of certain evidence, its failure to excuse a juror from service, and the sufficiency of the evidence. We affirm.

BACKGROUND

Appellant was charged by indictment with murder. He pleaded "not guilty," and the matter proceeded to a jury trial.

At trial, the evidence showed that Appellant had known the victim, Martha Caselin Ramirez, for about fifteen years. The two dated for about eight months and lived together for a few months prior to the offense. About two weeks prior to the offense, Ramirez moved out of Appellant's house. One night, Appellant came to Ramirez's home. He remained in his pickup while Ramirez's son went to get her. Ramirez got into Appellant's pickup with him and they talked. At some point, Appellant retrieved a .9 millimeter handgun from inside the vehicle and fired three shots, two of which hit and fatally wounded Ramirez. Appellant drove across town to his land with Ramirez's body still in the vehicle. Shortly thereafter, he called 911 and reported the incident.

Ultimately, the jury found Appellant "guilty" of murder and assessed his punishment at imprisonment for fifty years. This appeal followed.

ADMISSIBILITY OF EVIDENCE

In his first, second, and third issues, and part of his sixth issue, Appellant complains about the admissibility of a handwritten note, his statements to a detective and a jailer, and extraneous offense evidence.

Standard of Review and Applicable Law

Generally, we review a trial court's decision to admit evidence under an abuse of discretion standard. *See **Martin v. State***, 173 S.W.3d 463, 467 (Tex. Crim. App. 2005). We must uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. ***Willover v. State***, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002). We will not reverse a trial court's ruling admitting evidence unless that ruling falls outside the zone of reasonable disagreement. *See **Burden v. State***, 55 S.W.3d 608, 615 (Tex. Crim. App. 2001).

Appellant's Handwritten Note

After Appellant's arrest, a search warrant was issued for officers to search for certain items at his home, including firearms, ammunition, firearm magazines, firearm cleaning kits, items with possible blood evidence on them, and items belonging to Ramirez. While searching for these items, officers saw a notepad on the kitchen table. The notepad was opened to a note written in Spanish and apparently signed by Appellant. A Spanish speaking officer was called to the scene to translate the note. The translation reads, "Ok I want to make a testament. I leave everything to my daughters. They deserve my house, my land, and everything I have. Now I'm leaving, but I'm taking someone with me. Signed Jose Perez." The officers decided that the note appeared to be related to the offense they were investigating and seized it as evidence.

At a pretrial suppression hearing, Appellant argued that the note was inadmissible because it was not and could not have been included in a valid search warrant. Appellant contended that the note was a "personal writing" within the meaning of Article 18.02(10) of the code of criminal procedure. This provision reads, "A search warrant may be issued to search for and seize . . . property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person

committed an offense." *See* TEX. CODE CRIM. PROC. ANN. art. 18.02(10) (West Supp. 2014). The State argued that the note was not a personal writing within the meaning of Article 18.02(10). The State further contended that the note was admissible even though it was not listed in the search warrant because it was found in plain view. The trial court denied the motion to suppress. At trial, Appellant renewed his objection when the note was offered as evidence, and the trial court overruled the objection.

In his first issue, Appellant reasserts his position that the note was a personal writing within the meaning of Article 18.02(10). The State argues that regardless of whether the note is a personal writing, Article 18.02(10) does not apply. We agree. Article 18.02 governs the items for which a search warrant may be issued. Here, the search warrant was not issued for Appellant's note. Therefore, Article 18.02(10) does not apply. *See* ***Reeves v. State***, 969 S.W.2d 471, 486 (Tex. App.—Waco 1998, pet. ref'd).

Appellant further argues that the note was not admissible under the plain view exception to the search warrant requirement because the officers could not have entered the home had it not been for the issuance of the search warrant. However, in the course of a good faith search conducted within the parameters of a search warrant, an officer may sometimes seize objects that are not particularly described in the search warrant. ***Bower v. State***, 769 S.W.2d 887, 906 (Tex. Crim. App. 1989); *see also* ***Reeves***, 969 S.W.2d at 486. An officer may seize such objects if he has a reasonable basis at the time of the seizure for drawing a connection between the objects and the offense that furnished the basis for the search warrant. ***Id.***

Here, there is no dispute that the note was discovered and seized in the course of a good faith search conducted within the parameters of a valid search warrant. *See* ***id.*** Furthermore, the officers had a reasonable basis at the time of the seizure for drawing a connection between the note and the murder. *See* ***id.*** We conclude that the trial court did not abuse its discretion by admitting the note into evidence. *See* ***id.*** Accordingly, we overrule Appellant's first issue.

Appellant's Statement to Detective Battley

After Appellant called 911, he told the 911 operator that he would meet the police at his house. When Appellant arrived at his house, police officers handcuffed him and read him his rights. The reading of his rights was captured by the recording equipment of one of the police vehicles. Appellant then led the officers to Ramirez's body. At the scene, Detective Gina Battley interviewed Appellant. Before questioning Appellant, Detective Battley asked if he had

been read his rights and understood them, and he said that he did. Appellant told Detective Battley that he had gone to Ramirez's home that night to talk. He stated that Ramirez was upset because he had been drinking. Ramirez went inside the house and came back to his pickup with something in her hand. He thought it was a weapon, so he took his gun and fired three times at her. He believed that two of the shots hit Ramirez.

In his second issue, Appellant argues that his statement to Detective Battley is inadmissible because it was involuntarily given. He contends that the statement was involuntary because he was intoxicated and in pain from the handcuffs when he waived his rights and gave the statement. Evidence as to both of these factors was presented during a pretrial hearing on Appellant's motion to suppress the statement.

The determination of whether a confession is voluntary must be based on an examination of the totality of the circumstances surrounding its acquisition. ***Armstrong v. State***, 718 S.W.2d 686, 693 (Tex. Crim. App. 1985). Relevant circumstances to determine if a defendant's will has been overborne include length of detention, incommunicado or prolonged interrogation, denying a family access to a defendant, refusing a defendant's request to telephone a lawyer or family, and physical brutality. ***Id.***

Intoxication, while relevant to the issue, does not automatically render a confession involuntary. ***Nichols v. State***, 754 S.W.2d 185, 190 (Tex. Crim. App. 1988). The central question is the extent to which the person was deprived of his faculties due to the intoxication. ***Id.*** If the person's intoxication rendered him incapable of making an independent, informed choice of free will, then his confession was given involuntarily. ***Id.***

A recording of the interview was played at the suppression hearing. At the beginning of the recording, Appellant asked for his handcuffs to be loosened. Within a very short time, Detective Battley had another officer loosen Appellant's handcuffs. Detective Battley testified that during her interview of Appellant, he smelled like alcohol, had somewhat slurred speech, and told her that he had been drinking. She believed Appellant was "somewhat intoxicated" but was able to communicate. Nothing in the recording or the testimony indicates that Appellant's will was overborne. Based on the totality of the circumstances, we conclude that the trial court did not abuse its discretion by finding that Appellant's statement was voluntarily given.

Appellant further argues that his statement to Detective Battley is inadmissible under Article 38.22, Subsections 3(a)(2) and 3(a)(4) of the code of criminal procedure. These subsections read as follows:

> (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:
>
> . . . .
>
> (2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;
>
> . . . .
>
> (4) [and] all voices on the recording are identified.

TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a)(2), (a)(4) (West Supp. 2014).

The State argues that even though the statement was not obtained in full compliance with Subsection 3(a), it is nonetheless admissible under Subsection 3(c) of the same article. That subsection reads as follows:

> Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.

TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a)(c) (West Supp. 2014). Under the exception set out in Subsection 3(c), oral statements asserting facts or circumstances establishing the guilt of the accused are admissible if, at the time they were made, they contained assertions unknown by law enforcement but later corroborated. ***Woods v. State***, 152 S.W.3d 105, 117 (Tex. Crim. App. 2004). Such oral statements need only circumstantially demonstrate the defendant's guilt. ***Id.*** If even a single assertion of fact in such an oral statement is found to be true and conducive to establishing the defendant's guilt, then the statement is admissible in its entirety. ***Id.***

Here, Detective Battley testified that Appellant's assertions during the interview that the shooting occurred inside his pickup, that it occurred at Ramirez's residence, that Ramirez was in the passenger seat at the time it occurred, and that Appellant fired the gun three times and hit Ramirez twice were unknown at the time of the interview. Detective Battley further testified that all of these assertions were later determined to be true. We conclude that although Appellant's statement was not taken in strict compliance with Subsection 3(a), the State established an

exception under Subsection 3(c). Therefore, the trial court did not err in admitting the statement. Accordingly, we overrule Appellant's second issue.

Appellant's Statement to Jailer

When Appellant was booked into jail for Ramirez's murder, the jailer who booked him in asked him the questions that she was trained to ask, including, "Do you know why you're here and where you're at?" The jailer testified that the purpose of those questions is to determine whether the person is too intoxicated or otherwise unable to complete the booking process. When the jailer asked Appellant, "Do you know why you're here," he responded that he had killed his girlfriend because she was performing witchcraft on him. He continued talking, unprovoked, and stated that his girlfriend shot at him and he shot her twice. The jailer proceeded to ask the rest of the normal booking questions.

In his third issue, Appellant argues that his statements to the jailer are inadmissible because they are products of a custodial interrogation without the provision of ***Miranda***[1] warnings. "Interrogation" refers to (1) express questioning and (2) any words or actions of the police, other than those normally attendant to arrest and custody, that police should know are reasonably likely to elicit an incriminating response from the suspect. ***Alford v. State***, 358 S.W.3d 647, 652 (Tex. Crim. App. 2012) (citing ***Rhode Island v. Innis***, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)). Routine booking questions, because they are "normally attendant to arrest and custody," are a recognized exception to ***Miranda***. ***Alford***, 358 S.W.3d at 654. To fall within the exception's parameters, a routine booking question must be reasonably related to a legitimate administrative concern. ***Id.*** at 659-60. Questions such as a defendant's name, address, height, weight, eye color, date of birth, age, place of employment, and physical disabilities have been accepted as falling within the exception's parameters. ***Id.*** at 654-55. Questions such as where the defendant was going when he was pulled over, when and what he had last eaten, and whether he had consumed alcohol have not. ***Id.*** at 655.

A trial court must examine whether, under the totality of the circumstances, a question is reasonably related to a legitimate administrative concern. ***Id.*** at 661. Whether a question reasonably relates to an administrative concern must be ascertained by both the content of the question and the circumstances in which the question is asked. ***State v. Cruz***, No. PD-0082-14, 2015 WL 2236982, at *7 (Tex. Crim. App. May 13, 2015). An appellate court generally reviews

[1] ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

de novo the objective reasonableness of a question's stated administrative purpose, but defers to the trial court's resolution of disputed facts. ***Alford***, 358 S.W.3d at 661.

The jailer in this case testified that she routinely asked prisoners at the beginning of the booking process whether they knew where they were and why they were there. She stated that the purpose of these questions was to make sure the prisoners knew why they were there and were not too intoxicated to continue the booking process. The jailer testified that when she was booking Appellant, she first asked his name and then whether he knew why he was there. She was particularly interested in Appellant's answer to the latter question because she smelled alcohol on him. After Appellant answered the question, the jailer finished booking him and returned him to his cell. The jailer testified that she had no intent to elicit incriminating information when she asked the question.

Just as the government has a legitimate administrative interest in asking a defendant questions such as his name, address, and physical disabilities, it also has an interest in determining whether the defendant is competent to answer such questions before asking them. The question "Do you know why you're here?" does not require an incriminating response. A defendant could easily answer "yes," "no," or "I was arrested for [a particular offense]." Based on the totality of the circumstances, including both the content of the question and the circumstances in which it was asked, we conclude that the question had a legitimate administrative purpose. *See* ***Alford***, 358 S.W.3d at 661; ***Cruz***, 2015 WL 2236982, at *7. Therefore, the trial court did not err in admitting Appellant's statements under the booking question exception to ***Miranda***. Accordingly, we overrule Appellant's third issue.

Extraneous Offense Evidence

In Appellant's case in chief, he took the stand and testified that the shooting of Ramirez was accidental. In the State's rebuttal case, it offered evidence of an extraneous offense to rebut Appellant's claim that Ramirez's shooting was accidental. In January 1986, Appellant was married to Barbara Ward. The two had been separated for approximately two months, and Ward was living with her parents. Appellant went to the house one night and remained in the car. A family member told Ward that Appellant was there and wanted to talk. Ward went outside and leaned into the car window to talk to Appellant. At one point, she turned her head to look at something and Appellant shot her in the face. Ward looked back at Appellant and he shot her two more times in the arm and shoulder. She ran as far as she could before falling. After firing

six shots, Appellant drove away. Ward survived the wounds and later filed an affidavit of nonprosecution. The charges against Appellant were dismissed.

As part of his sixth issue, Appellant argues that the trial court erred by admitting the extraneous offense evidence because it lacked the required similarities and was too remote in time to be admissible under Rule 404(b). Generally, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *See* TEX. R. EVID. 404(b). It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* ***id.***

When a defendant claims his act was free from criminal intent, extraneous offenses may be relevant to prove such intent. ***Plante v. State***, 692 S.W.2d 487, 491-92 (Tex. Crim. App. 1985). To be admissible to negate the possibility of accident, the extraneous offense must be sufficiently similar in nature to the charged offense that the inference of improbability of accident logically comes into play. ***Cantrell v. State***, 731 S.W.2d 84, 90 (Tex. Crim. App. 1987). The degree of similarity required in cases where intent is the material issue is not, however, as great as in cases where identity is the material issue and extraneous offenses are offered to prove modus operandi. ***Id.***

In this case, the mode of committing the offenses and the circumstances surrounding the offenses are sufficiently similar for the extraneous offense to be relevant to intent. The primary and extraneous offenses were similar in that (1) the victims were women who had been in relationships with Appellant; (2) both victims had recently left Appellant; (3) Appellant arrived at the victims' homes at night, remained in his vehicle, and asked family members to go and get the victims; (4) Appellant asked both victims to come back to him; (5) Appellant shot both victims multiple times with a handgun; and (6) Appellant claimed that both shootings were accidental. We conclude that Ward's shooting is sufficiently similar in nature to Ramirez's shooting that the inference of improbability of accident logically comes into play. Therefore, the evidence of Ward's shooting was admissible to negate the possibility that Ramirez's shooting was an accident. *See* ***id.***

At trial, Appellant argued that admitting evidence of the extraneous offense would result in unfair prejudice because the offense was so old that he could not adequately defend against it. However, after a hearing outside the presence of the jury in which the trial court heard the

testimony of both Ward and Appellant regarding the extraneous offense, the trial court found that the jury could find beyond a reasonable doubt that it occurred. Furthermore, there is no per se rule as to when an extraneous offense is too remote in time to be introduced in evidence. ***Templin v. State***, 711 S.W.2d 30, 34 (Tex. Crim. App. 1986); ***Corley v. State***, 987 S.W.2d 615, 620 (Tex. App.—Austin 1999, no pet.). The factors of remoteness and similarity are important, not in and of themselves, but only as they bear on the relevancy and probative value of the extraneous offense. ***Plante***, 692 S.W.2d at 491. The period of time separating the extraneous offense from the primary offense is a factor to be considered, along with all other relevant factors. ***Templin***, 711 S.W.2d at 34. Based on the facts of this case and the extraneous offense, we conclude that the extraneous offense is not so remote in time as to make it inadmissible to show intent in this case.

Finally, Appellant claims that the trial court erred by admitting the extraneous offense evidence over his Rule 403 objection. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 403. Rule 403 favors admissibility, and the presumption is that relevant evidence will be more probative than prejudicial. ***Montgomery v. State***, 810 S.W.2d 372, 389 (Tex. Crim. App. 1991). A proper Rule 403 analysis includes, but is not limited to, four factors: (1) the probative value of the evidence, (2) the potential to impress the jury in some irrational yet indelible way, (3) the time needed to develop the evidence, and (4) the proponent's need for the evidence. ***State v. Mechler***, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). Although extraneous offenses always possess the potential to impress the jury of a defendant's character conformity, any impermissible inference of character conformity can be minimized through a limiting instruction. ***Lane v. State***, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996).

Keeping in mind the above standards, we examine whether the trial court abused its discretion in admitting the extraneous offense evidence. First, the evidence of Ward's shooting made Appellant's intent to kill Ramirez more probable and rebutted Appellant's theory that her shooting was accidental. Second, the trial court gave a limiting instruction in the jury charge, which served to minimize any impermissible inference of character conformity. *See* ***id.*** Third, the prosecutor used a minimal amount of time to develop evidence of the extraneous offense. Finally, although there was other evidence that might have established beyond a reasonable doubt Appellant's intent to commit murder—including Appellant's handwritten will and the

evidence of multiple gunshots—we cannot say that the State did not need the extraneous offense evidence to prove his intent to the jury beyond a reasonable doubt. Under these circumstances, we cannot conclude that the trial court abused its discretion in admitting the extraneous offense evidence.

Accordingly, we overrule Appellant's sixth issue as it relates to the admission of the extraneous offense evidence.

FAILURE TO EXCUSE JUROR

In Appellant's fourth issue, he complains that the trial court erred by failing to excuse a juror who knew one of the witnesses.

When Barbara Ward took the stand during the State's rebuttal, a juror indicated that she needed to speak with the judge. Outside the presence of the other jurors, the juror told the trial court that fourteen years prior to that time, she had worked with Ward for five years. She stated that they had not associated outside of work, and that she was not familiar with any details of Ward's marriage relationships. The juror said that she believed Ward was a trustworthy person, but that she could nonetheless be fair and impartial and weigh Ward's testimony like that of any other witness.

Appellant made an objection to Ward's testimony and moved for a mistrial on the basis that he could not receive a fair trial because of the juror's relationship with Ward. The trial court overruled the objection and denied the motion for mistrial. The State expressed that it would not object to proceeding with eleven jurors if Appellant wished to agree to dismiss the juror. Appellant expressed no desire to dismiss the juror, and the trial resumed.

On appeal, Appellant does not argue that the juror was disqualified, but that the trial court erred by failing to excuse her based on the parties' agreement to proceed with eleven jurors as permitted by Article 36.29 of the code of criminal procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 36.29(c) (West Supp. 2014). However, the record shows that although the State voiced it would not object to dismissing the juror, there was no such agreement of the parties. Accordingly, we overrule Appellant's fourth issue.

EVIDENTIARY SUFFICIENCY

In Appellant's fifth issue, he argues that without his handwritten note and his statements to law enforcement, the evidence in this case would be legally and factually insufficient to support his conviction. We have previously concluded that the handwritten note and the statements to law enforcement were admissible. Therefore, we overrule Appellant's fifth issue.

DENIAL OF MOTION FOR MISTRIAL

In part of his sixth issue, Appellant complains that the trial court erred by denying his motion for mistrial after a witness for the State mentioned the extraneous offense during cross examination.

Standard of Review and Applicable Law

A trial court's denial of a mistrial is reviewed under an abuse of discretion standard, and its ruling must be upheld if it was within the zone of reasonable disagreement. ***Coble v. State***, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). Generally, it is presumed that the jury can and will follow a court's curative instruction to disregard objectionable testimony. *See* ***Bauder v. State***, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996). Mistrial is an extreme and exceedingly uncommon remedy that is appropriate only when it is apparent that an objectionable event at trial is so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant. ***Id.*** Whether a particular error calls for a mistrial depends on the peculiar facts and circumstances of the case. ***Hernandez v. State***, 805 S.W.2d 409, 413 (Tex. Crim. App. 1990).

Analysis

During defense counsel's cross examination of a detective who was involved in the case, the following exchange took place:

> DEFENSE COUNSEL: Do you ever recall another investigator in another report saying that *We* went to talk to Jose Perez's daughter, who saw him, you know, three hours before the shooting?
>
> DETECTIVE: I don't recall that, no.
>
> DEFENSE COUNSEL: Okay. Or Jose Perez's first wife Dolores, who saw Jose three hours *before the shooting*? Do you remember that at all in the investigation?
>
> DETECTIVE: That would be someone else's testimony. I don't know.
>
> DEFENSE COUNSEL: But you didn't see that in any reports that you –

> DETECTIVE: I don't recall that I did. I remember that there was—there was talk of a prior incident. And the first information we had is that he had actually killed his first wife, but we found out that she had actually lived.

Defense counsel objected, asked that the testimony be stricken, and moved for a mistrial. The trial court denied the motion for mistrial but instructed the jury to disregard the testimony.

An inadvertent reference by a witness to an extraneous offense is generally cured by a prompt instruction to disregard. *See **Nobles v. State***, 843 S.W.2d 503, 514 (Tex. Crim. App. 1992). Here, the detective was apparently unaware that the "first wife" defense counsel was referring to was not the same ex-wife Appellant had shot. The trial court gave an instruction to disregard. Furthermore, evidence regarding the extraneous offense was presented in the State's rebuttal case, and we have held that the evidence was admissible. We conclude that the trial court did not abuse its discretion by denying the motion for mistrial. Accordingly, we overrule Appellant's sixth issue as it relates to the denial of his motion for mistrial.

DISPOSITION

Having overruled Appellant's first, second, third, fourth, fifth, and sixth issues, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered May 29, 2015.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

APPENIDIX D

APPENDIX D

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

U.S. Constitution, Fourth Amendment

APPENDIX E

APPENDIX E

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

U.S. Constitution, Fifth Amendment.

APPENDIX F

APPENDIX F

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

U.S. Constitution Fourteenth Amendment, Section 1.

APPENDIX G

APPENDIX G
TEXAS CODE OF CRIMINAL PROCEDURE
ARTICLE 18.02 - GROUNDS FOR ISSUANCE

"A search warrant may be issued to search for and seize:"

Tex.C.C.P., Article 18.02(a).

"property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense;"

Tex.C.C.P., Article 18.02(a)(10).