No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

CESAR GOMEZ
_____ — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE TEXAS COURT OF CRIMINAL APPEALS, AT AUSTIN, TEXAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CESAR GOMEZ, TDCJ-ID # 1839985
(Your Name)
EASTHAM STATE FARM
2665 PRISON ROAD # 1
(Address)

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

N/A
(Phone Number)

QUESTION(S) PRESENTED

A: Whether Texas Penal Code § 21.02, is Constitutional under the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution?

B: Whether a State Jury Charge must accurately describe the charge against the defendant, and make no comment on the weight of the evidence?

C: Whether a defendant is entitled to effective assisatnce of counsel when deciding whether to accept a plea agreement?

D: Whether defense counsel has a duty to object to inadmissible evidence?

E: Whether defense counsel has a duty to fully investigate the facts of the case prior to trial?

F: Whether counsel has a duty to object to circumstantial evidence not related to the case, minus benefit of a nexus, and completely legal to possess?

G: Whether defense counsel has a duty to object to inadmissible evidence and request curative instructions?

H: Whether the existence of biological evidence, in an area frequented by petitioner, equates guilt?

I: Whether the State of Texas may use improper methods, i.e. perjury, improper comments, personal beliefs, etc., to produce a wrongful conviction?

J: Whether the State must reveal agreements with State witnesses concerning immigration Status?

LIST OF PARTIES

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

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

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TABLE OF AUTHORITIES CITED

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at **Appendix - A** to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was October 25, 2017. A copy of that decision appears at **Appendix - A.**

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

CONSTITITONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), and due to the length and number of the provisions involved, the Petitioner cites the provisions, and included them within the Appendix to the Petition pursuant to Supreme Court Rule 14.1(i). The Provisions are as follows:

STATEMENT OF THE CASE

The Petitioner filed an Application for Writ of State Habeas Corpus, pursuant to Texas Code of Criminal Procedure ("Tex.C.C.P.") art. 11.07 on October 7, 2016, challenging his conviction pursuant to Texas Penal Code § 21.02. Continuous Sexual Abuse of a Young Child or Children, and sentence of Life Without Parole. (See, Appendix ["App"] - I, - J, - K) The trial court never officially signed any finding of fact or conclusions of law in the instant case. The Petitioner enunciated eighteen (18) claims for habeas relief in the instant case. The Texas Court of Criminal Appeals on October 25, 2017, denied the Petitioner's application without a written order. (See, App - A)

The Petitioner challenged the Constitutionality of Texas Penal Code § 21.02; (App. - L) Due Process, pursuant to the United States Constitutional Amendment, Fifth and Fourteenth Section 1. (App - C, - E), in the failure to properly admonish

the jury in the jury charge; Seven (7) separate enumerated instances of Ineffective Assistance of Counsel under the United States Constitutional Amendment Sixth, (App - D); Seven (7) instances of prosecutorial misconduct pursuant to the Due Process Clause of the Fifth and Fourteenth Amendment, (App - C, - E) Including but not limited to: One instance of presenting irrelevant evidence to the case, and prosecutorial misconduct in implying said items were illegal, when in fact they were legally available to all persons of the United States pursuant to the privileges and immunities clause of the Fourteenth Amendment, (App - E); the prosecution presenting false evidence under the Due process clause of the Fourteenth Amendment, (App - E); the prosecutor inserting personal belief as to guilt and implying silence under the Fifth Amendment equates guilt, (App - C); and Finally, the failure of the prosecution to reveal agreements for State court witnesses which would have demonstrated bias in the testimony of the State witnesses, under the Fifth, Sixth, and Fourteenth Amendment. (App - C, - D, - E).

REASONS FOR GRANTING THE PETITION

The Questions Presented, supra at p. ii, represent the issues the Petitioner believes are subject to this Court's Jurisdiction. The Texas Court of Criminal Appeals has decided an important question of federal law in a way that conflicts with the decisions of this Honorable Court, other courts of last resort, and the United States Court of Appeals for the Fifth Circuit. Furthermore, the statute the Petitioner was convicted under has not been subject to any authoritive State or Federal

Supreme Court decision, fairly new to the judicial system, has not been decided by this Honorable Court, but should be, settled by this Court. Lastly, the State of Texas judicial system has so far departed from the accepted and usual course of judicial norms, as to call for an exercise of this Honorable Court's supervisory power.

The Petitioner shall address each question separately as follows:

QUESTION A:

Whether Texas Penal Code § 21.02, is Constitutional under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution?

Texas Penal Code § 21.02, provides in pertinent part: "**(d)** If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed." (See, App. - L) However, given the wide spectrum and amalgamation of requisite specific intent required under the statute makes this provision unconstitutional. **Id.** Texas Penal Code § 21.02(c)(1-8)

In essence Texas Penal Code § 21.02, unconstitutionally circumvents the precepts of this Honorable Court. This Court has expressed concerns when the State is allowed to present "propensity evidence." **Old Chief v. United States**, 519 U.S. 172, 117 S.Ct. 644, 650 (1997) A defendant has the express right to be tried upon the charged allowed, and this would not amount to an amalgamation of allegations clumped into a single charge.

This Honorable Court has held: "[u]nanmitity . . . means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the factual elements underlying a specific offense. This rule does not require each bit of evidence by unanimously credited or entirely discarded, but it does require as to the nature of the defendant's violation, not simply that a violation occurred." **McKay v. North Carolina**, 494 U.S. 433, 449 n. 5 (1999)(J Blackman, concurring)(Internal citations and quotation marks omitted.)

Both the Statute and the jury Charge in the instant case failed to require an adequate specific intent to commit an enumerated offense be found unanimously by the jury. Therefore, the statute and conviction in this case is unconstitutional.

This Honorable Court has yet to weigh on the Constitutionality of the instant statute. Furthermore, the Texas Court of Criminal Appeals has, as of date, failed to directly address the issue of the constitutionality of the penal statute. Therefore, the Petitioner hopes that this Honorable Court will finally pick up the issue and make a determinative answer on the constitutionality of the statute in relation to the unanimity of the verdict by jury members.

QUESTION B:

Whether a State Jury Charge must accurately describe the charge against the defendant, an make no comments on the weight of the evidence?

In the instant case, the jury charge erroneously gave improper comments on the evidence.

A jury charge should always provide the jury with the correct legal premise and applicable law in a specific case. This instruction should not improperly comment on the weight of the evidence or the specificity of the evidence in a specific question. See, **Almanza v. State**, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985)

In this case, Texas Penal Code § 21.02, did not exist prior to September 1, 2007. Therefore, as a result there should not be any evidentiary consideration by a jury prior to this date, however, the jury charge allowed a much greater consideration.

Within the jury charge the comment, "if any," appeared twice when considering evidence of alleged misconduct. Such comments on the evidence allowed the jury to consider any evidence prior to the enactment of the statute. Furthermore, the Texas penal Code § 21.02, as literally read prohibits a conviction after an alleged victim reaches the age of fourteen (14). (See, App - L) Through the inclusion of the periods of limitation within the evidentiary explainations of the case, but outside statutory due process, the jury charge allowed for a conviction outside the requisite and applicable statute. As such the jury charge was impermissibly suggestive. U.S. Const. Amends. V, XIV; Tex.C.C.P. art 1.04, 1.05. (See, App - C, - E, - F, - G)

QUESTION C:

Whether a defendant is entitled to effective assisatnce of counsel when deciding whether to accept a plea agreement?

In 2012, this Honorable Court held that new rule apply to plea bargins, and the determination of effectiveness of counsel's performance. See, **Missouri v. Frye**, 132 S.Ct. 1399 (2012), and **Lafluer v. Cooper**, 132 S.Ct. 1376 (2012), expanding upon: **Hill v. Lockhart**, 474 U.S. 52 (1984)

It is well determined federal law that the Sixth Amendment Constitutional right to the assistance of counsel is a right to the effective assisatnce of counsel in all critical stages of a criminal proceeding. **Strickland v. Washington**, 466 U.S. 668, 694 (1984), requires that a petitioner demonstrate:

1: That counsels performance fell below an objective standard of reasonableness, by identifying act or omission showing that counsels performance was deficient, and

2: that but for cote unprofessional errors there is a reasonable probability that the outcome of the proceeding would have been different.

A single error may be so substantial tat it alone causes counsel's performance to fall below the Sixth Amendment standard. see, **Murry v. Carrier**, 477 U.S. 478, 496 (1986)(dictum)

In all cases, it falls upon defense counsel to make a full and thorough investigation of the case, including the applicable law relating to the case. **Strickland**, 466 U.S., at 694 Furthermore, well prior to **Starickland**, it was well established an attorney must have a firm command of the facts of the case as well as the law before he or she can render reasonable effective assistance. **Powell v. Alabama** 284 U.S. 45, 48 (1932)

In the instant case, trial counsel advised the Petitioner he would be eligible for probation if he took his case to the jury. However, the charge in the instant case bars all forms of community supervision. See, Tex. Governement Code §§ 311.016, 508.145. (App - J, - K)

Defense counsel convinced the Petitioner that if he threw himself upon the mercy of the jury he would be eligible for probation, however, this assertion was, as demonstrated, completely false.

The evidence to support the contentions of the Petitioner is demonstrated through the appearance of an "**APPLICATION FOR COMMUNITY SUPERVISION FROM THE JURY**" filed by defense counsel prior to trial. (See, App - T, Exhibit C) Furthermore, the investigator for the defense was at the alleged discussion concerning probation. (See, App - T, Exhibit - B)

In the instant case, the evidence was before the Court, and no amount of explaining is adequate to explain away the existence of such false advisement by defense counsel. The Petitioner received life WITHOUT parole, a sentence far greater than the forty (40) years offered prior to trial in the plea agreement. (See App - T, Exhibit A)

The Petitioner is not an older person, and even a forty (40) year sentence would have given him possibility of discovering liberty once more. However, defense counsels egregious conduct robbed him of even this small consideration. Therefore, prejudice is inherent and apparent in this case.

QUESTION D:

Whether defense counsel has a duty to object to inadmissible evidence?

The Two-Prong standard of **Strickland**, supra, applies in the instant case. The question in this case concerns the referencing of an alleged victim as a "victim," instead of a "complainant," prior to conviction.

It has been held that when a prosecutor refers to an alleged victim as a "victim" prior to conviction this is an impermissible comment on the weight of the evidence. See, **Casey v. State**, 160 S.W.3d 218, 225 (Tex.App. - Austin 2005)

Throughout the trial in this case, the prosecution referred to the complainant as a "victim." Defense counsel wholly failed to subject the prosecutions case to any adversial proceeding. In fact, the State's preclassifying the complainant as a victim, prior to guilt, falls within the realms of bolstering a witnesses testimony.

Furthermore, minus any testimony of alleged torture, the prosecution continually classified the manner and means of committing the instant offense as "torture." Defense counsel wholly failed to object to even a single instance of such saber rattling.

This Honorable Court has made clear, prosecutors are to, "refrain from improper methods calculated to produce a wrongful conviction . . . it is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the

defendant." **United States v. Young**, 470 U.S. 1, 7 (1985) As will be demonstrated later, this is exactly what the prosecution did, and defense counsel wholly failed to subject such misconduct to any adversial process. U.S. Const. Amend. VI. (App - D)

QUESTION E:

Whether defense counsel has a duty to fully investigate the facts of the case prior to trial?

The question is answered plainly in **Strickland**, 466 U.S. at 694, supra, plainly counsel has long had such a duty.

In the instant case, the prosecution made, false, allegations concerning a home security system installed in the home after multiple burglaries of the residence. The State, falsely, claimed the video tapes from the security system were "encrypted." (12 RR 49) However, testimony was taken from the prosecutions expert witnesses stating that the digital images contained upon the hard drive had been damaged through the ham-fisted removal of the system by police investigators. (13 RR 19-20) Therefore, the State's allegations of "encryption" being the reason they had no physical evidence on video was false, misleading, and perjury. See, **Giglio v. United States**, 405 U.S. 150 (1972), and **Napue v. Illinois**, 360 U.S. 264 (1959) This issue will be covered in more detail later, however, suffices to say that the "knowing use of false testimony by the prosecutor violates a defendants due process right's under the Fifth and Fourteenth Amendment." **Guerra v. Collins**, 916 F.Supp. 620 (S.D. Tex. 1995)

The failure to investigate the allegations of encryption in the instant case, clearly would have been relevant, and of such a nature as to render counsel ineffective. See, **Bryant v. Scott**, 28 F.3d 1411, 1417 (5th Cir. 1994)

QUESTION F:

Whether counsel has a duty to object to circumstantial evidence not related to the case, minus benefit of a nexus, and completely legal to possess?

In the instant case, the prosecution was allowed to introduce into evidence a great amount of evidence minus any benefit of a nexus to the alleged charges, all minus benefit of any objection.

The Petitioner's vehicle and home was searched, and legally owned items confiscated in violation of the Fourth Amendment. (See, App - B)

Taken from the vehicle of the Petitioner were several firearms and ammunition for said weapons. The prosecution put on no evidence of any form of threats or violence in their case-in-chief. However, during close, the prosecution was allowed to argue the complainant was in fear for her life due to the weapons presence. Furthermore, the pornography and sexual devices located within the bedroom of the Petitioner had no nexus to the instant case. Instead, the prosecution used these pieces of evidence, completely legal to own, as relevant evidence to demonstrate the petitioner was allegedly a voyeur.

Also, the prosecution brought before the jury the immigration status of the petitioner to further prejudice the

jury in this case. Defense counsel wholly failed, once again, to subject the prosecutions case to any adverse test, and a such the failure to object is to be ineffective.

QUESTION G:

Whether defense counsel has a duty to object to inadmissible evidence and request curative instructions?

Erroneous admission of prejudicial evidence can justify habeas relief. **Bryson v. Alabama**, 634 F.2d 862 (5th Cir. 1981) Furthermore, "[d]efense counsel who failed to specifically object, ask for curative instruction, or preserve for appeal error as to prejudicial testimony, did not render reasonably effective assistance of counsel." **Vela v. Estelle**, 708 F.2d 954, 963-64 (5th Cir. 1983)

The pattern of egregious conduct perpetrated by the prosecution in the continual barrage of insults and derogatory comments was wholly uncalled for, and misplaced in the jurisprudence of the United States. The comments of the prosecution had zero bearing on the instant case, and the referencing of the defendant as a "piece of trash," (13 RR 117) concerning the "filthy poison that came out of his filthy penis," (13 RR 119) questions concerning his right to confront the witnesses in that the complainant was "forced to look at him," (13 RR 119) calling the Petitioner a "demon," repeatedly; (13 RR 122, 136, 137, 138) and comments outside of evidence, "and I bet you in the second grade she's sitting there probably wearing Barbie panties or something." (13 RR 137)

Furthermore, defense counsel failed to object to personal interjections and opinions by the prosecution. (13 RR 135-136)("I do |136| think he is a demon, and I do think he is a predator,. . . He is a demon.")

There were no objection, there can be no doubt as to the egregious nature of the comments, and there is no place for such conduct in the jurisprudence of the United States, no matter what the allegations within the indictment may claim. See, **United States v. Young**, 470 U.S. 1, 8 (1985), supra.

Prosecutor misconduct will be address later, however, counsels performance can be summed up in one word, "INEFFECTIVE."

Plainly, the comments of the prosecution were not evidence, however, such comments carry the imprimatur of the government, and constitute ineffecive when defense counsel wholly failed to object to continual misconduct by the prosecution.

The State, in essece, minus any "open door" made statement concerning the petitioner's alleged propensity to commit the crime in question. Texas Rules of Evidence, Rules 401, 403, 404, 405, strickly forbid such action by the State. (See, App - M, - N, - O, - P) Furthermore, Rule 405 applies prohibitions under Rule 607, 608 and 609. (See, App - Q, - R, - S) Had counsel merely objected, such objection would have been sustained, ad such comments and evidence not commented on, or created during closing statements.

QUESTION H:

Whether the existence of biological evidence, in an area frequented by petitioner, equates guilt?

The State of Texas has held that the mere existence of semen on a comfortor is inadequate to demonstrate guilt in a sexual assault case. See, **Patterson v. State**, 96 S.W.3d 427 (Tex.App. - Austin 2002)

The Statements to police by the Petitioner's wife leave no doubt as to the reason for the presence of the semen on the bed of the complainant. "M. Gomez said . . . if they ever did had (sic) sex on Fanni's bed, that it must have been about a year ago or longer than that." (App - T, Exhibit F, p. 96)

The mere fact that the Petitioner's wife was unable to remember the last time they had sex on the complainant's bed, does not negate the fact that it did indeed occur. Therefore, "Counsel's failure to call an alibi witness ready and willing to testify, when coupled with arguably less egregious errors, did deprive [petitioner] of effective assistance of counsel." **Wilson v. Cowan**, 578 F.2d 166, 168 (6th Cir. 1978)(Accord, **Bell v. Georgia**, 554 F.2d 1360 (5th Cir. 1977))

QUESTION I:

Whether the State of Texas may use improper methods, i.e. perjury, improper comments, personal beliefs, etc., to produce a wrongful conviction?

The Supreme Court held "Nearly a half century ago . . . counseled prosecutors 'to refrain from improper methods calculated to produce a wrongful conviction . . ." **Berger v. United States**, 294 U.S. 78, 85 (1935) This priciple is just as valid today as 50 years ago.

"The adversal system permits the prosecutor to 'prosecute with earnest and vigor,...he is not at liberty to strike foul ones." **United States v. Young**, 470 U.S. 1, 7 (1985)(internal citations and quotation marks omitted.)

Furthermore, "'[i]t is unprofessional conduct for the prosecutor to express his or her belief or opinions as to the truth of falsity of any testimony or evidence or the guilt of the defendant." **Id.** 470 U.S., at 8.

As addressed above, defence counsel failed to object to the prosecutions continual and prevalent misconduct. Therefore, the Petitioner sees no need to recite the instance of prosecutorial misconduct, but instead incorporates the ereferences herein.

The prosecution made prejducial comments with no factual bases in the record, presented false evidence concerning "encryption" of digital devices which did not exist, and misrepresented facts continually during their presenation of the case.

Also, the weapons and ammunition located within the Petitioner's vehicle were completely legal to own and/or possess. The trumped up allegation, allegedly, in support of the prosecution. Thus, the State of Texas has so far departed from the accepted and usual norms of judical proceedings as to call for this Honorable Courts supervisory power.

QUESTION J:

Whether the State must reveal agreements with State witnesses concerning immigration Status?

The State of Texas had an agreement with the witnesses, in the instant case, to allow them to stay in the United States for life in return for their testimony against the Petitioner. The witnesses were all Mexican Nationals, in the country illegal, and not subjected to any form of immigration screening or processing prior to or after trial. Instead, the State actively assisted the witnesses in obtaining legal status in the United States.

The failure to reveal such an agreement denied the Petitioner the right to adequately cross examine the witnesses for the State and demonstrate bias. See, **Delaware v. Arsdall**, 475 U.S. 673, 680 (1986) Also, the State aware of the many defense witnesses from Mexico actively blocked such participation by defense witnesses, thereby, violating the Petitioner's Sixth Amendment compulsory process right's. (See, App - T, Exhibit E; App - D)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Cesar Gomez

Cesar Gomez
TDCJ-ID # 1839985
Eastham State Farm
2665 Prison Road # 1
Lovelady, Texas 75851

Date: January 9, 2018