United States Court of Appeals

FIFTH CIRCUIT
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LYLE W. CAYCE
CLERK

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September 05, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 24-40190 Puente v. Lumpkin
USDC No. 1:23-CV-52

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

By: _____
Melissa V. Mattingly, Deputy Clerk
504-310-7719

Ms. Cara Hanna
Mr. Luis Fernando Puente

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 5, 2024
Lyle W. Cayce
Clerk

No. 24-40190

LUIS FERNANDO PUENTE,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC No. 1:23-CV-52

ORDER:

Luis Fernando Puente, Texas prisoner # 02306524, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application challenging his convictions for continuous sexual abuse of a child under 14 years of age and possession of child pornography. In his COA motion, Dixon argues that he received ineffective assistance of appellate counsel when counsel failed to raise on appeal that (i) the record is devoid of any findings of fact and conclusions of law with respect to the trial court's denial of his motion to suppress and (ii) he had standing to raise a

Fourth Amendment challenge to the seizure of his cell phone. He additionally argues that the trial court erred by failing to make any findings and conclusions with respect to the denial of his motion to suppress despite his trial counsel's request for them. Finally, Puente argues that he received ineffective assistance of trial counsel when counsel failed to file a motion to sever his trial on his sexual abuse charge from his child pornography charges.

As a preliminary matter, Puente fails to reprise in his COA pleadings his claims raised in his § 2254 application that his trial counsel was ineffective for failing to (i) file a motion to sever the count alleging sexual abuse as between the two victims identified in the indictment and (ii) raise an issue that the prosecution violated a disciplinary rule or acted unethically when it charged him with offenses that were not alleged or were not supported by probable cause. Accordingly, those claims are abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1995).

A COA may issue only if the applicant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where, as here, the district court denies relief on the merits, an applicant must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Puente fails to meet the requisite standard. *See id.* His motion for a COA is DENIED.

Dana M. Douglas

DANA M. DOUGLAS
United States Circuit Judge

United States District Court
Southern District of Texas
ENTERED
February 29, 2024
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LUIS FERNANDO PUENTE,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION NO. 1:23-CV-052
	§	
BOBBY LUMPKIN,	§	
	§	
Respondent.	§	

ORDER

In March 2023, Plaintiff Luis Puente, representing himself, filed a Petition for a Writ of Habeas Corpus by a Person in State Custody (Doc. 1) challenging his 2019 convictions in a Texas state court for one count of Continuous Sexual Abuse of a Child and four counts of Possession of Child Pornography. (*See* State Court Records, Doc. 17–1, 139–141) In June, Puente filed an Amended Petition after the Texas Court of Criminal Appeals denied his state habeas petition. (Am. Pet., Doc. 20). Puente challenges his convictions on the grounds that he received ineffective assistance from both his trial and appellate lawyers. (*See* Am. Pet., Doc. 20, 6)

A United States Magistrate Judge recommends that Puente's Amended Petition be denied as substantively meritless. (R&R, Doc. 28, 12) Puente timely filed Objections (Doc. 35) to the Report and Recommendation. As a result, the Court reviews the portions of the Report and Recommendation to which Puente objects *de novo* and all other portions for clear error. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(3).

In his Objections, Puente raises the same arguments as within his Amended Petition, effectively arguing that the Report and Recommendation misapplied the relevant law to his claims. But contrary to Puente's arguments, the Court concludes that the Report and Recommendation correctly applies the law to the record in this case. Several of Puente's claims turn on issues that the Texas state courts have determined and to which this Court must defer.

(*See* R&R, Doc. 28, 9–12) Puente's other claims fail to implicate clearly established federal law, or do not demonstrate the unreasonable application of any federal law or unreasonable determination of the facts. (*See* R&R, Doc. 28, 9–12); *see also* 28 U.S.C. § 2254(d). As a result, Puente is not entitled to relief on any of his claims.

The Court **OVERRULES** Puente's objections and **ADOPTS** the Report and Recommendation (Doc. 28). It is:

ORDERED that Plaintiff Luis Fernando Puente's Amended Petition for a Writ of Habeas Corpus by a Person in State Custody (Doc. 20) is **DENIED**.

In addition, the Court finds that no outstanding issue would be debatable among jurists of reason, and that Puente fails to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Accordingly, the Court **DENIES** a Certificate of Appealability.

The Clerk of Court is directed to close this matter.

Signed on February 29, 2024.

Fernando Rodriguez, Jr.

Fernando Rodriguez, Jr.
United States District Judge

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

LUIS FERNANDO PUENTE, Petitioner,	§ §	
v.	§	CIVIL ACTION NO. 1:23-cv-52
BOBBY LUMPKIN, Respondent.	§ §	

REPORT & RECOMMENDATION ON HABEAS PETITION

On March 27, 2023, Petitioner Luis Fernando Puente filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Dkt. No. 1. On July 28, 2023, Respondent Bobby Lumpkin ("the State") filed a response, arguing that the petition should be denied. Dkt. No. 27.

After reviewing the record and the relevant case law, it is recommended that the petition be denied. Puente has not shown that he is entitled to relief.

I. Background

A. Factual Background

1. Indictment & Trial

On February 7, 2019, a grand jury sitting in Cameron County, Texas, indicted Puente on one count of continuous sexual abuse of a child and four counts of possession of child pornography. Dkt. No. 17-1, pp. 5-7.[1] Puente was accused of abusing and showing pornography to his nieces. As to the continuous sexual abuse of a child count, the State alleged that Puente had abused his 13 year old niece and his eight year old niece. The Court's recitation of the facts is limited to the facts necessary to resolve the petition.

As part of the investigation, Texas Ranger Patrick O'Connor went with Puente's wife to the home of Heron Ramirez, who was the victims' uncle. Dkt. No. 17-1, p. 827. Puente had left the phone at Ramirez's home. *Id.* The victims' mother gave Puente's cell

[1] All page numbers correspond to the Bates-stamped page numbers on the bottom right page of the record.

phone to O'Connor, who later obtained a search warrant to search the phone for evidence of pornography or sexual abuse. *Id.* O'Connor did not enter the residence. *Id.* The phone had pornographic images of the victim on it. *Id.*, at 829.

Prior to trial, Puente's counsel moved to suppress the phone from evidence, arguing that O'Connor obtained the phone from the victim's mother, who did not have the "authority" to give the phone to the police. Dkt. No. 17-1, p. 681. Puente's counsel argued that the phone was illegally seized without a warrant. *Id.* In response, the State argued that Puente lacked standing to challenge the seizure of the phone because he lacked any reasonable expectation of privacy in Ramirez's home. *Id.*, at 683. The State additionally argued that exigent circumstances existed to seize the phone to prevent the destruction of evidence. *Id.*

At the conclusion of the suppression hearing, the trial court stated, "I'm going to deny the motion to suppress without explanation. I'm going to deny it based on the evidence that's come forward to this point in time, and so it's denied." Dkt. No. 17-1, p. 687. Puente's counsel moved for the Court to make specific findings of fact and conclusions of law. *Id.* The trial court stated that it would "do that." *Id.* The record does not include any written findings of fact or conclusions of law as to the motion to suppress.

A jury found Puente guilty on all counts. Dkt. No. 17-1, p. 139. As to the conviction for continuous sexual abuse of a child, Puente was sentenced to 60 years of incarceration. *Id.* As to the convictions for possession of child pornography, Puente was sentenced to 10 years of incarceration for each count. *Id.* His sentences on all counts were to be served concurrently.

2. Direct Appeal

Puente, via counsel, filed a notice of appeal. Dkt. No. 17-1, p. 144. Puente raised three issues on direct appeal: (1) the trial court permitted testimony that violated his rights under the Confrontation Clause; (2) the trial court permitted the State to unlawfully bolster a witness's testimony; and (3) the trial court erred in denying the motion to suppress. *Puente v. State*, 2021 WL 2461173, at *1 (Tex. App. June 17, 2021). As to the motion to suppress, appellate counsel did not raise the issue that the trial court failed to issue written

findings of fact and conclusions of law. Additionally, as to the suppression, appellate counsel focused solely on the issue of the lack of exigent circumstances and did not challenge the trial court's determination that Puente lacked standing to challenge the seizure. *Id.*

On June 17, 2021, the Court of Appeals affirmed Puente's conviction. *Puente v. State*, 2021 WL 2461173, at *1 (Tex. App. June 17, 2021). As to the suppression issue, the state appellate court found that by not challenging the issue of standing, Puente had forfeited that issue. *Puente*, 2021 WL 2461173, at *7 ("Puente has not challenged all grounds relied upon by the trial court in denying his motion to suppress; accordingly, he cannot show that the trial court erred in denying his motion.").

On October 20, 2021, the Court of Criminal Appeals refused Puente's petition for discretionary review. Dkt. No. 17-1, p. 1220.

3. Habeas Petitions

On January 17, 2023, Puente filed an application for a writ of habeas corpus with the Court of Criminal Appeals. Dkt. No. 17-1, p. 1267. In that petition, Puente raised seven issues: (1) appellate counsel was ineffective for failing to raise the issue of an incomplete record based on the trial court's failure to issue written findings of fact and conclusions of law as to the suppression motion; (2) appellate counsel was ineffective for not raising the issue of standing when challenging the denial of the suppression motion; (3) trial counsel was ineffective for failing to move to sever the continuous sexual abuse of a child count from the child pornography counts; (4) trial counsel was ineffective for failing to move to sever the claim of sexual abuse of the 13 year old niece from the claim of sexual abuse of the eight year old niece; (5) trial counsel was ineffective for failing to move to quash the indictment as to continuous sexual abuse of a child because the count illegally charged him with abusing two different victims; (6) appellate counsel was ineffective for failing to challenge the denial of a motion for directed verdict; and (7) trial counsel was ineffective for failing to raise the issue that the prosecution acted unethically by charging Puente with sex acts that were not supported by evidence as part of the continuous sexual abuse of a child charge. Dkt. No. 17-1, pp. 1266-80.

In reviewing the petition, the trial court held that "there are no controverted, previously unresolved facts before this Court," and stated as such to the Court of Criminal Appeals. Dkt. No. 17-1, p. 1328.

While this habeas petition was pending in the state courts, Puente filed a "protective" petition with this Court, on the grounds that if he waited to receive notice of how the state courts ruled on his petition, he would likely be out of time to file his federal petition. Dkt. Nos. 1, 4. The State has conceded that Puente's petition is timely filed. Dkt. No. 27.

On April 5, 2023, the Court of Criminal Appeals denied Puente's state habeas petition based on the "findings of the trial court" and on its own "independent review of the record." Dkt. No. 17-1, p. 1351. The denial indicated that the Court of Criminal Appeals rejected the petition on substantive grounds, rather than on procedural grounds. *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (*en banc*) (indicating that a "denial" signifies adjudication on the merits, while "dismissal" reflects a claim declined on grounds other than upon the merits).

On June 28, 2023, Puente filed an amended petition, raising the following claims: (1) appellate counsel was ineffective for not raising the issue of an incomplete record based on the lack of written findings by the trial court judge on the motion to suppress; (2) appellate counsel was ineffective for not raising the issue of standing in challenging the suppression issue; (3) trial counsel was ineffective for not seeking to sever the continuous sexual abuse of a child charge from the child pornography charges; (4) trial counsel was ineffective for failing to move to quash the indictment as to the continuous sexual abuse of a child charge because the introduction of the claims of the 8 year old were made "to prejudice Puente" and bolster the allegations made by the 13 year old; (5) trial counsel was ineffective for failing to raise the issue that the prosecution acted unethically by charging Puente with "almost every available 'sex act' within the purview" of the continuous sexual abuse of a child charge. Dkt. No. 20.

On July 28, 2023, the State filed an answer, arguing that the petition was meritless. Dkt. No. 27. As to the issue regarding the incomplete record, the State argues that such a

claim requires a resolution of state law, and this Court must defer to how the state court interpreted Texas law. As to the issue of appellate counsel's failure to raise the standing issue, the State argues that Puente has not shown that the state court's ruling was unreasonable. As to the issue of trial counsel's failure to move to sever, the State again argues that such a claim requires a resolution of state law, and this Court must defer to how the state court interpreted Texas law. As to the claim that trial counsel failed to challenge the prosecution's unethical charging him with crimes for which there was no probable cause, the State argues that there is no basis for defense counsel to object to prosecutors acting unethically and that the state court's resolution of this claim was not unreasonable.

II. Applicable Law

A. Habeas Corpus

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a prisoner convicted in a state court may challenge his conviction to the extent it violates "the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Accordingly, only violations of the United States Constitution or federal law are subject to review by this Court under § 2254.

In conducting such a review, a federal district court may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the claim by the state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." *Riddle v. Cockrell*, 288 F.3d 713, 716 (5th Cir. 2002) (quoting 28 U.S.C. § 2254(d)(1)-(2)).

"A decision is contrary to clearly established federal law under § 2254(d)(1) if the state court (1) arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law; or (2) confronts facts that are materially indistinguishable from a relevant Supreme Court precedent' and reaches an opposite result." *Simmons v. Epps*, 654 F.3d 526, 534 (5th Cir. 2011) (quoting *Williams v. Taylor*, 529 U.S. 362; 405 (2000)) (internal

quotation marks omitted). "[A]n unreasonable application of federal law is different from an incorrect application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

"The state court makes an unreasonable application of clearly established federal law if the state court (1) identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts; or (2) either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Simmons*, at 534 (quoting *Williams*, at 407) (internal quotation marks omitted).

Additionally, the AEDPA requires that federal law be "clearly established" "as articulated by the Supreme Court." *Woodfox v. Cain*, 609 F.3d 774, 800 n. 14 (5th Cir. 2010). "[A] decision by ... [the Fifth Circuit] ... or one of our sister circuits, even if compelling and well-reasoned, cannot satisfy the clearly established federal law requirement under § 2254(d)(1)." *Salazar v. Dretke*, 419 F.3d 384, 399 (5th Cir. 2005).

"Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington*, 562 U.S. at 102–03 (internal quotation marks omitted).

Furthermore, a federal court may not review a state court's determination of state law issues. *Thompson v. Thaler*, 432 Fed. App'x 376, 379 (5th Cir. 2011); *McCarthy v. Thaler*, 482 Fed. App'x 898, 903 (5th Cir. 2012). "Under § 2254, federal habeas courts sit to review state court misapplications of *federal* law. A federal court lacks authority to rule that a state court incorrectly interpreted its own law." *Charles v. Thaler*, 629 F.3d 494, 500– 01 (5th Cir. 2011) (emphasis original). "It is not our function as a federal appellate court in a habeas proceeding to review a state's interpretation of its own law, and we defer to the state courts interpretation of the Texas ... statute." *Schaetzle v. Cockrell*, 343 F.3d 440, 449 (5th Cir. 2003) (quoting *Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995)).

B. Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a petitioner must demonstrate: (1) that his counsel's performance was objectively unreasonable, rendering it deficient; and (2) that

the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 689–94 (1984). To merit relief, the petitioner must meet both prongs. *Id.* In contrast, "a court need not address both prongs of the conjunctive Strickland standard, but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test." *Amos v. Scott*, 61 F.3d 333, 348 (5th Cir. 1995).

To satisfy the first prong, the petitioner must establish that counsel's performance was deficient. "[T]he proper measure of attorney performance is reasonableness under prevailing professional norms." *U.S. v. Molina–Uribe*, 429 F.3d 514, 519 (5th Cir. 2005). Courts will not "audit decisions that are within the bounds of professional prudence." *Id.* at 518. To warrant relief, because of ineffective assistance of counsel, counsel's performance must be so deficient that it "renders the result of the ... proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

Even if counsel's performance was deficient, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test ... and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Strickland*, 466 U.S. at 693 (internal citation omitted). A petitioner must establish that the error prejudiced the outcome of his trial. A petitioner establishes prejudice where he proves "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. To merit relief, the petitioner must show an error that undermines confidence in the reliability of the verdict. *Id.*

Furthermore, establishing that "a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 562 U.S. at 105. "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is *any reasonable argument* that counsel satisfied Strickland's deferential standard." *Id.* (emphasis added).

Thus, the question is whether the state court was unreasonable in its resolution of the issue presented, not whether the state court may have been wrong.

"[R]eview of the state court's resolution of ... [an] ineffective-assistance-of-counsel claim is doubly deferential ...since the question is whether the state court's application of the *Strickland* standard was unreasonable." *Druery v. Thaler*, 647 F.3d 535, 539 (5th Cir. 2011) (internal quotations and citations omitted). In order to succeed on a § 2254 habeas claim based on ineffective assistance of counsel, "a state prisoner 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 fairminded disagreement." *Id.*

Furthermore, a defendant is entitled to effective assistance of counsel on direct appeal. *Lombard v. Lynaugh*, 868 F.2d 1475, 1479 (5th Cir.1989). "Where an attorney failed to adequately brief an issue on direct appeal, appellant must show initially that the appeal would have had, with reasonable probability, a different outcome if the attorney adequately addressed the issue." *U.S. v. Dovalina*, 262 F.3d 472, 474–75 (5th Cir. 2001).

III. Analysis

In analyzing Puente's claims, a basic premise is that allegations by *pro se* litigants must be afforded liberal construction to ensure that their claims are not unfairly dismissed, because of their unfamiliarity with the law. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). That latitude, however, "does not exempt a party from compliance with relevant rules of procedural and substantive law." *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981). In this case, even allowing for the latitude due a *pro se* litigant, Puente's claims are meritless and should be denied.

Puente has raised two claims of ineffective assistance of appellate counsel and three claims of ineffective assistance of trial counsel. The Court will address each of these in turn.

A. Ineffective Assistance of Appellate Counsel

Puente alleges that appellate counsel was ineffective for (1) not raising the issue of an incomplete record based on the lack of written findings on the motion to suppress, and

(2) for not raising the issue of standing in challenging the suppression issue. Each of these claims is meritless.

As to the claim of not raising the issue of the completeness of the record, this claim turns on an issue of state law and is unreviewable by this Court. Under Texas procedure, a defendant is entitled to a new trial if a significant portion of the record has been lost or destroyed, is necessary to resolution of the appeal and cannot be replaced or re-created. TEX. R. APP. PROC. 34(f). Puente alleges that appellate counsel was ineffective for not invoking this rule as to the missing written findings of fact and conclusions of law as to the suppression hearing.

At the outset, the Court begins by noting that, in the § 2254 context, it must determine whether the last state court decision unreasonably applied Supreme Court precedent or was based upon an unreasonable application of the facts. 28 U.S.C. § 2254(d). In this case, the last state court decision was the Court of Criminal Appeals decision, which denied Puente's habeas petition application, without a written order based on the trial court's findings and its own independent review of the record.

Because the Court of Criminal Appeals "independent review" does not precisely lay out why it denied the petition, the Court must "gather the arguments and theories that could support the state court's ultimate decision and ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with Supreme Court precedent." *Thomas v. Vannoy*, 898 F.3d 561, 568-69 (5th Cir. 2018) (cleaned up). Thus, the Court can consider whether there are any arguments or theories that support the denial of the petition.

In order to resolve this issue, the Court of Criminal Appeals would have to resolve the issue of whether Puente would have been entitled to relief under state law if appellate counsel had raised the issue of the missing record. This Court must defer to the state court's determination that Puente would not have been entitled to relief. *Soliz v. Davis*, 750 Fed. App'x 282, 293 (5th Cir. 2018) (citing *Young v. Dretke*, 356 F.3d 616, 628 (5th Cir. 2004)). As such, this claim should be denied.

As to the claim that appellate counsel failed to raise the issue of standing in challenging the trial court's denial of the suppression motion, this claim should be denied. Even if counsel was deficient for failing to raise the argument, Puente was not prejudiced by counsel's failure. The state appellate court, on direct appeal, found that Puente had forfeited the issue of standing by not raising it on appeal. But it also noted "it is well settled that a non-overnight guest, such as Puente, has no reasonable expectation of privacy in a residence that he does not own or have a possessory interest." *Puente*, 2021 WL 2461173, at *7 n. 7. Thus, the state court was noting that even if the issue had been raised on appeal, it would have affirmed the trial court's finding that Puente lacked standing to raise the issue.

Furthermore, Puente has not shown that the state court's finding that he lacked standing was contrary to Supreme Court precedent or binding federal law. As such, the state court's decision was not unreasonable, and Puente is not entitled to relief. This claim should be denied.

B. Ineffective Assistance of Trial Counsel

Puente raises three claims of ineffective assistance of trial counsel: (1) trial counsel was ineffective for not seeking to sever the continuous sexual abuse of a child charge from the child pornography charges; (2) trial counsel was ineffective for failing to move to quash the indictment as to the continuous sexual abuse of a child charge because the introduction of the claims of the 8 year old were made "to prejudice Puente" and bolster the allegations made by the 13 year old; and (3) trial counsel was ineffective for failing to raise the issue that the prosecution acted unethically by charging Puente with "almost every available 'sex act' within the purview" of the continuous sexual abuse of a child charge. Dkt. No. 20. Each of these claims are meritless.

As to the claim that counsel was ineffective for failing to move to sever the continuous sexual abuse charge from the child pornography charges, this claim does not implicate clearly established federal law. As the Fifth Circuit has recognized, there have been no Supreme Court cases which clearly hold that when the State charges a defendant with multiple crimes of an "incendiary nature," that "the Constitution requires two separate

trial[s] to avoid jury prejudice." *Roberson v. Stephens*, 614 Fed. App'x 124, 134 (5th Cir. 2015). As such, the Texas court's decision that Puente's counsel was not ineffective for failing to seek separate trials was not "contrary to or an unreasonable application of clearly established Federal law, as interpreted by the Supreme Court." *Id.* at 135. Accordingly, Puente is not entitled to relief on this claim.

As to the claim that trial counsel should have moved to quash the indictment because the continuous sexual abuse of a child charge because the introduction of the claims of the 8 year old were made "to prejudice Puente" and bolster the allegations made by the 13 year old, this claim is meritless. A person commits the act of continuous sexual abuse of a child if "during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims." TEX. PENAL CODE § 21.02(b)(1). The indictment alleged that Puente touched the genitals of the 8 year old as part of the continuous sexual abuse of both nieces. Dkt. No. 17-1, p. 6. At trial, the 8 year old testified that a shadowy figure came into her bed at night and touched her genitals and she knew that Puente was the one who did it because the other adults in the house were asleep. Dkt. No. 17-1, pp. 522-24. "A victim's testimony is legally sufficient to support a conviction." *Johnson v. State*, 2007 WL 60775, at *4 (Tex. App. Jan. 10, 2007). Any motion to suppress the indictment would have been meritless and counsel is not required to raise meritless objections. *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994). This claim should be denied.

As to the claim that trial counsel was ineffective for not raising the issue that the prosecution acted unethically by charging Puente with "almost every available 'sex act' within the purview" of the continuous sexual abuse of a child charge, this claim is meritless. The Court views this as a claim that Puente was prejudiced by the indictment listing sex crimes against the 12 year old victim that were not proven at trial. The indictment did charge with several possible acts of sexual abuse of the 12 year old victim: touching her genitals with his hand, causing her sexual organ to contact his sexual organ, causing her anus to contact his sexual organ, causing her mouth to touch his sexual organ, causing her sexual organ to touch his mouth, and inducing her to engage in a sexual performance by

taking pornographic pictures of her. Dkt. No. 17-1, pp. 5-6. These allegations were "alternative methods, or the 'manner and means,' of committing the element of two or more acts of sexual abuse." *Fulmer v. State*, 401 S.W.3d 305, 312 (Tex. App. 2013) (internal quotations omitted). Thus, the varying sexual assault allegations within the complaint were "merely evidentiary facts" in support of the contention that Puente committed two more acts of sexual abuse over a 30 day period. *Id.* Puente was not prejudiced by the inclusion of several allegations of sexual assault within the indictment. "When alternative manners and means of committing an offense are submitted to a jury, it is appropriate for the jury to return a general verdict of guilty if the evidence supports a conviction under any one of them." *Navarro v. State*, 535 S.W.3d 162, 165 (Tex. App. 2017). The Supreme Court has held that "[a]s long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment," a defendant's rights are not violated "by the fact that the indictment alleges more crimes or other means of committing the same crime." *U.S. v. Miller*, 471 U.S. 130, 136 (1985). Thus, the state court did not act contrary to controlling Supreme Court precedent in denying this claim. Puente is not entitled to relief.

IV. Recommendation

It is recommended that the petition for writ of habeas corpus filed by Luis Fernando Puente be denied as meritless. Dkt. No. 1.

A. Certificate of Appealability

Unless a circuit justice or judge issues a Certificate of Appealability ("COA"), a petitioner may not appeal the denial of a § 2254 motion to the Court of Appeals. 28 U.S.C. § 2253(c)(1)(A). A petitioner may receive a COA only if he makes a "substantial showing of the denial of a constitutional right." § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To satisfy this standard, a petitioner must demonstrate that jurists of reason could disagree with the court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further. *Id.* at 327; *Moreno v. Dretke*, 450 F.3d 158, 163 (5th Cir. 2006).

"Importantly, in determining this issue, we view the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Druery v. Thaler*, 647 F.3d 535, 538 (5th Cir. 2011) (internal quotations omitted) (citing *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000)). The district court must rule upon a certificate of appealability when it "enters a final order adverse to the applicant." Rule 11, Rules Governing § 2254 Petitions.

After reviewing Puente's § 2254 motion and the applicable Fifth Circuit precedent, the Court is confident that no outstanding issue would be debatable among jurists of reason. Although Puente's § 2254 motion raises issues that the Court has carefully considered, he fails to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Accordingly, it is recommended that a COA should be denied.

B. Notice to Parties

The parties have fourteen (14) days from the date of being served with a copy of this Report and Recommendation in which to file written objections, if any, with the United States District Judge. 28 U.S.C. § 636(b)(1). A party filing objections must specifically identify the factual or legal findings to which objections are being made. The District Judge is not required to consider frivolous, conclusive, or general objections. *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

If any party fails to timely object to any factual or legal findings in this Report and Recommendation, the District Judge is not required to conduct a *de novo* review of the record before adopting those findings. If the District Judge chooses to adopt such findings without conducting a *de novo* review of the record, the parties may not attack those findings on appeal, except upon grounds of plain error. *Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 248 (5th Cir. 2017).

Signed on August 1, 2023.

Karen Betancourt

Karen Betancourt
United States Magistrate Judge