

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 91-5692  
Summary Calendar

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GUILLERMO D. GONZALES,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS, Director,  
Texas Department of Criminal Justice,  
Institutional Division, ET AL.,

Respondents-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
(SA-90-CA-868)

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(September 30, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Guillermo D. Gonzales, *pro se*, challenges the district court's denial of habeas relief. We **AFFIRM**.

I.

A Texas jury convicted Gonzales of aggravated sexual assault. Gonzales' victim was his stepdaughter, Kathy Cruz. At the time of trial, she was 12. She testified that Gonzales had sexually assaulted her since she was about three years old. At sentencing,

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Gonzales admitted that he had sexually assaulted his stepdaughter. The trial judge sentenced Gonzales to 40 years in prison and levied a \$5,000 fine.

Gonzales appealed his conviction to the Texas Court of Appeals, which affirmed his conviction. He then sought state habeas relief, alleging ineffective assistance of counsel and challenging the sufficiency of the evidence supporting his conviction. His application for relief was denied without written order.

Gonzales next sought habeas relief in federal court. The district court adopted the magistrate judge's report and recommendation that it be denied.

## II.

### A.

Gonzales' contention that he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments is without merit. First, a number of Gonzales' points of error in support of this contention are raised for the first time on appeal. Second, we agree with the district court's resolution of those issues presented to it.

This court will not entertain claims in habeas proceedings that were not raised in district court. *U.S. v. Smith*, 915 F.2d 959, 964 (5th Cir. 1990); see also *Fransaw v. Lynaugh*, 810 F.2d 518, 523 (5th Cir.), cert. denied, 483 U.S. 1008 (1987). In his appellate brief, Gonzales raises, for the first time, the following points in support of his ineffective assistance of counsel claim:

the failure of his attorney both to object to the introduction of extrinsic evidence of prior sex crimes at trial, and to request a limiting instruction regarding such crimes; his attorney's solicitation of information from witnesses regarding prior sex crimes; the failure of his attorney to rebut evidence that the offense occurred on a particular date; and, the failure of his attorney to "preserve error during trial." We confine our review to those assertions made before the district court in support of the ineffective assistance of counsel claim.

To prevail on such a claim, a petitioner must meet the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). See, e.g., *Barnard v. Collins*, 958 F.2d 634, 641-42 (5th Cir. 1992), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 990 (1993). First, the petitioner must demonstrate "that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. Second, the petitioner must show "that the deficient performance prejudiced the defense." *Id.*

Deficiency of performance is proven if counsel's assistance falls "below an objective standard of reasonableness." *Id.* at 688. In scrutinizing attorney performance, a court must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Additionally, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to

the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

The second prong of the *Strickland* test -- proving that deficient performance prejudiced the petitioner -- presents an even higher hurdle to the habeas petitioner. In a case not involving a conflict of interest, a habeas petitioner must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In the specific context of a habeas challenge to a criminal conviction, the relevant inquiry "is whether there is a reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

Gonzales' first assertion in support of his ineffective assistance of counsel claim is that his attorney failed to interview certain alibi witnesses. In the petition, Gonzales asserted that a number of people present at a party could have testified as to his whereabouts when the alleged assault occurred. This assertion fails for two reasons. First, Gonzales' trial lawyer, in an affidavit submitted as part of the state habeas proceedings, stated that Gonzales never requested that she contact any of the witnesses Gonzales now argues should have been interviewed. Second, and more important, these witnesses would have testified only that Gonzales attended a party on the evening of June 11 or 12, 1986; such testimony would not have refuted the

allegation that Gonzales sexually assaulted his stepdaughter on May 3, the crime for which he was indicted.

Gonzales also argued in district court that his wife should have been called as an "alibi" witness because she would have testified that he had not sexually assaulted her daughter. We agree with the district court that there is *no evidence* to support this contention as to the May 3 assault. Gonzales' argument is also weakened by the fact that his wife told police that Gonzales had been assaulting her daughter. Admittedly, there are some hints in the record that his wife changed her mind about pressing charges against her husband after he agreed to counseling; however, the district court correctly noted that *if* the wife had taken the stand and testified in the fashion Gonzales now asserts, she would have been subject to "a veritable cornucopia of impeachment evidence." Under such circumstances, one can hardly discern professional deficiency in counsel's failure to call the wife as a witness. See **Russell v. Lynaugh**, 892 F.2d 1205, 1213 (5th Cir. 1989) (holding that failure to investigate and discover alibi and character witnesses was not deficient where there existed overwhelming evidence of a heinous crime and abundant evidence to impeach the undiscovered testimony), *cert. denied*, \_\_\_ U.S. \_\_\_, 111 S.Ct. 2909 (1991); see generally **Strickland**, 466 U.S. at 690-91 (discussing counsel's discretion to make strategic choices).

Gonzales' second contention in support of his ineffective assistance claim is that his counsel advised him to admit guilt during the sentencing phase of the trial so that his remorse might

earn him "a probated sentence". Assuming that this advice was given (there is conflicting evidence on this point), we fail to see how Gonzales was prejudiced. The admission was not heard at the guilt/innocence phase of the trial, so the admission could not have altered the guilty verdict. Also, we find no reasonable probability that had Gonzales continued denying his guilt he would have received a lesser sentence; a probability that Gonzales must prove as part of his claim. See **Strickland**, 466 U.S. at 695 (discussing prejudice requirement in context of sentencing). Gonzales also makes no allegation that the advice he allegedly received caused him to reject a plea bargain or suffer any other detriment.

Finally, Gonzales claims that his counsel was ineffective because she failed to file various "motions that would normally be appropriate." We agree with the district court that this inexplicable allegation scarcely rises to the level of establishing ineffective assistance of counsel; moreover, the district court determined as a factual matter that Gonzales' counsel filed "an extensive discovery motion".

In sum, we find no merit in Gonzales' claim of ineffective assistance of counsel.

B.

Gonzales asserts that there is a "Fatal Variance" between the allegations contained in the Texas indictment and the proof at trial. Specifically, he declares that the only proof of sexual assault at trial was medical testimony of contusions and bruises in

the victim's pelvic region that were of unknown origin and probably resulted from activity around June 12, while the indictment charged him with sexual assault on or about May 3. Essentially, Gonzales claims that there was insufficient evidence presented at trial to link him to a sexual assault on May 3.

In a habeas petition alleging insufficient evidence, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Guzman v. Lensing*, 934 F.2d 80, 82 (5th Cir. 1991) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Aggravated sexual assault in Texas is defined as the knowing or intentional penetration, by any means, of the female sexual organ of a child under 14 years of age. Tex. Penal Code Ann. §§ 22.021(a)(1)(B)(i), (a)(2)(B) (West, 1989).

There is ample evidence to support a determination that Gonzales committed aggravated sexual assault on or about May 3 as charged in the indictment. Although the victim was unable *at trial* to recall the precise dates of the alleged occurrences, her testimony at trial might well have convinced a rational trier of fact that aggravated sexual assault did occur, and that Gonzales was the perpetrator. In graphic terms, the victim testified that Gonzales took off her clothes, kissed her on her chest, penetrated her with his finger, and, finally, penetrated her with his penis and ejaculated. The victim, using dolls, demonstrated how Gonzales

had penetrated her sexual organs with his penis. At the time of the offense, the victim was 12 years of age.

As to the issue of timing, there is sufficient evidence to support a factfinder's conclusion that the sexual assault occurred on or about May 3. First, at trial, the victim testified that the assault occurred after her birthday (April 6) but before June. Second, the victim did tell a police officer on June 14 that her stepfather assaulted her "a few weeks before", and the jury heard this statement. Third, and most important, the same officer testified that the victim reported to him that the last assault occurred on May 3. A rational trier of fact could have concluded that Gonzales sexually assaulted his stepdaughter on or about May 3. Gonzales' claim of insufficient evidence is groundless.

III.

For the foregoing reasons, the district court's denial of habeas relief is

**AFFIRMED.**