UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10140
Summary Calendar

JUAN PENA,

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director of
Texas Department of Criminal
Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(1:92 CV 075 C)

(August 10, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Juan Pena challenges the district court's dismissal of his § 2254 petition. We affirm.

I.

A Texas jury found Pena guilty of the 1986 murder of Ramon Lopez and assessed punishment at 60 years imprisonment, and the state Court of Appeals affirmed. The Court of Criminal Appeals

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[1] 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

denied Pena's two state habeas applications without written orders.

Pena petitioned for a federal writ of habeas corpus. Following an appeal to this court and a remand to the district court, Pena filed a revised petition. The state answered. The magistrate judge recommended that relief be denied. Over Pena's objections, the district court adopted the magistrate judge's report and denied the petition. The district court granted CPC. Pena raises a number of issues in this appeal which we will discuss below.

II.

As to each issue, Pena must show a federal constitutional violation and prejudice. 28 U.S.C. § 2254(a); **Carter v. Lynaugh**, 826 F.2d 408, 409 (5th Cir. 1987), **cert. denied**, 485 U.S. 938 (1988). Errors of state law and procedure are not cognizable unless they resulted in the violation of a federal constitutional right. **Bridge v. Lynaugh**, 838 F.2d 770, 772 (5th Cir. 1988)

A. Motion for New Trial

Pena argues that the trial court should have granted his motion for new trial that asserted the discovery of new evidence. He says that the new evidence would have exonerated him. A review of the facts is necessary to understand this argument.

On December 6, 1986, Pena was at a bar with Trinidad B. Fuentes, Jr. Among approximately 200 other customers was Fuentes's former wife, Dorothy Flores, who was in the company of Ramon Lopez. Lopez confronted Fuentes about comments that Fuentes had made about Lopez and Flores. A fist fight ensued.

Pena testified that Lopez had a knife. Numerous eye-witnesses testified that he did not. Pena testified that, because he believed that Fuentes's life was in danger, he shot Lopez, killing him. The customers panicked. Fuentes exited the rear of the bar; Pena went out the front.

Fuentes testified that he was stabbed during the altercation with Lopez. One eye-witness, Patsy Medina Salas, testified that, though she did not see a stabbing, she did see Fuentes bleeding as he exited the bar. Three eye-witnesses testified that they saw no wounds or injuries on Fuentes as he left the bar.

Salas also testified that, after the killing, she saw a knife by Lopez's body. A knife, which later vanished, was found under the right armpit of the body. An investigating police officer testified that, had Lopez been stabbing Fuentes at the time of the shooting, the knife could not have landed where it did. Other eye-witnesses testified that the body had not been moved after it fell to the floor.

The alleged new evidence that was the basis for the motion for new trial was a statement that Cindy Cuellar, who had been present at the bar at the time of the killing, made to defense counsel during jury deliberations. Before trial, she had told counsel that she had not seen the fight and had nothing relevant to offer. She did not testify. During deliberations, however, she told counsel that Flores, who was Fuentes's former wife and Lopez's companion, reached Lopez's body before anyone else did. The body was lying on

its side and Flores flipped the body onto its back, said Cuellar.[2] None of the called witnesses testified that Flores went to Lopez's body.

Pena argued in the state Court of Appeals that the motion for new trial should have been granted because the newly discovered evidence defeated the premise of the officer's conclusion that Lopez's knife could not have landed under his armpit if he had been stabbing someone with it when he was shot. The state Court of Appeals recited that Pena and Fuentes gave one account of the altercation and other witnesses gave another. The jury apparently believed the others. That court also observed that the new evidence was no more than impeachment of the officer's conclusion. The state appellate court determined that denial of the motion was not an abuse of discretion because the new evidence would probably not cause a different result in a new trial.

The state Court of Appeals also stated that "because no testimony was offered or heard and the affidavits attached to the motion for new trial were not introduced into evidence at the hearing, nothing is preserved for review." In the instant appeal, the state argues that federal review is procedurally barred because

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[2] Pena alleges for the first time in his reply brief that, in addition to Cuellar's testimony, he now has obtained sworn statements from three other persons who saw Lopez attempting to attack Fuentes with a knife. This court, however, does not consider allegations made for the first time in a reply brief, even when the appellant is pro se. **Knighten v. Commissioner**, 702 F.2d 59, 60 & n.1 (5th Cir.), **cert. denied**, 464 U.S. 897 (1983). Additionally, Pena has not provided those sworn statements to either this court or the district court. Moreover, as discussed later, review of the denial of the motion for new trial is procedurally barred.

the state court held that Pena had not preserved the issue. The state made the same argument in the district court.

The principle of procedural bar applies when the last reasoned state court opinion addressing the claim explicitly rejects it on the ground of procedural default. **Ylst v. Nunnemaker**, 501 U.S. 797, ___, 111 S. Ct. 2590, 2592-94, 115 L. Ed. 2d 706 (1991). The principle also applies when that court finds a procedural default but proceeds to address the merits in the alternative. **Sawyers v. Collins**, 986 F.2d 1493, 1499 (5th Cir.), **cert. denied**, 113 S. Ct. 2405 (1993).

In the instant case, the last reasoned state court opinion explicitly relied on both grounds -- the merits and procedural default -- to affirm Pena's conviction. Under **Sawyers**, therefore, the procedural bar applies. Even in the face of the bar, a federal court may consider the merits if Pena makes a showing of cause and prejudice for the procedural default or a showing that failure to address the merits would result in a complete miscarriage of justice. **Young v. Herring**, 938 F.2d 543, 546 (5th Cir. 1991) (en banc), **cert. denied**, 112 S. Ct. 1485 (1992). Pena has attempted to make no such showing and this claim is therefore procedurally barred.

B. Jury Selection

Pena asserts that the magistrate judge correctly stated that the facts show a constitutional error in the selection of his jury. Pena then states that he was denied relief because the error was

not properly preserved, which was counsel's error. He then argues that counsel was ineffective.

The magistrate judge, however, made no determinations like that which Pena describes. As to his claim that Hispanics were under-represented on the venire panel, the magistrate judge stated, "Pena has pled no facts which would demonstrate there is the remotest possibility of Hispanics being excluded from the jury venire panel selection process."

We agree with the magistrate's conclusion. Moreover, we find no indication from the record that Hispanics were under-represented or intentionally excluded.

Pena's appellate argument is planted in his spurious explanation of the magistrate judge's report. He presents no **Batson** issue for review. **Batson v. Kentucky**, 476 U.S. 79, 97, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). If the issue were to be construed as an ineffectiveness of counsel issue, Pena has identified no prejudice.

C. Voir Dire Statements

In a paragraph that Pena denominates as his third issue, he states that he complained about the prosecutor's voir dire remarks on failure to testify, extraneous offenses, and parole laws. He complains that the magistrate judge recommended denial of relief without citation to authority "even after the Magistrate admitted that the record is incomplete on this complaint." Pena asserts that relief should not have been denied without the development of additional facts. That is the entirety of Pena's argument.

The magistrate judge determined that the prosecutor had not commented on a failure to testify or on extraneous offenses. The magistrate judge also determined that the prosecutor mentioned parole only in response to a juror's question without any suggestion about the effect of parole laws on any particular sentence. The magistrate judge did note that the jury instruction on parole was not in the record. The magistrate judge rejected the argument as having no factual or legal basis.

Pena's short paragraph presents little argument. Nevertheless, the transcript shows that the prosecutor went to considerable lengths to explain to the jurors the implications of Pena's not testifying. He properly explained that the state has the burden of proof and that the jurors may draw no inference from Pena's silence if he chooses not to testify.

The extraneous offense to which Pena is referring is a charge of carrying a weapon on a licensed premises. On voir dire, the prosecutor did refer to that charge. The indictment charged Pena with that offense, and he was on trial for it along with the murder charge. Later in the trial, the state abandoned that charge. At the beginning of trial, the offense was hardly extraneous.

During voir dire, the prosecutor discussed the range of possible punishments with the jury. A panel member asked the prosecutor about parole. The prosecutor responded that he and the jury would have no control over parole and that he could say no more about it. Prior to Pena's trial, which was held in March 1988, the Court of Criminal Appeals had held unconstitutional the

state statute providing for consideration of parole. **Rose v. State**, 752 S.W.2d 529 (Tex. Crim. App. 1987) (en banc). After Pena's trial, Texas amended its constitution to permit the instruction that **Rose** condemned. **See Madison v. State**, 825 S.W.2d 202, 207 (Tex. Ct. App. 1992). Pena has not explained how the prosecutor's response was improper.

D. Extraneous Offenses

Pena asserts that evidence of two extraneous offenses -- flight to Mexico and carrying a handgun on licensed premises -- should not have been admitted. To receive federal habeas relief on a claim that state evidentiary law has been violated, a petitioner must show that the erroneous admission of evidence is "material in the sense of a crucial, critical, highly significant factor." **Bailey v. Procunier**, 744 F.2d 1166, 1169 (5th Cir. 1984) (internal quotations not indicated).

Pena did flee to Mexico after the killing. He testified that he did. The state asked him about the flight, giving no indication that the flight was an offense. The state may properly present evidence of flight to show guilty knowledge. **Whittington v. Estelle**, 704 F.2d 1418, 1425 (5th Cir.), **cert. denied**, 464 U.S. 983 (1983).

Pena admitted that he shot Lopez in the bar. The indictment charged Pena with carrying a weapon on licensed premises. Later in the trial, the state abandoned that charge. The state may put on evidence proving a count that it later abandons. **Callins v. State**, 780 S.W.2d 176, 183 (Tex. Crim. App. 1986) (en banc), **cert. denied**,

497 U.S. 1011 (1990). Pena has identified no erroneous admission. Even if he had, he has not show how it affected the verdict.

E. Sufficiency of the Evidence

Pena argues on appeal that the evidence was insufficient because the evidence at trial varied from the offense as charged in the indictment. In the district court, however, Pena claimed that the evidence was insufficient for two different reasons. First, he claimed that the doctor who testified about the autopsy of Lopez was not the same doctor who performed the autopsy. Second, he claimed that the state failed to disprove his theory that he shot Lopez in defense of Fuentes.

The alleged variance between the indictment and the proof is raised for the first time on appeal. This court does not consider an issue so raised. **United States v. Garcia-Pillado**, 898 F.2d 36, 39 (5th Cir. 1990).

Pena does not argue on appeal anything about the autopsy testimony or disproving his theory. Issues not raised on appeal are abandoned. **Hobbs v. Blackburn**, 752 F.2d 1079, 1083 (5th Cir.), **cert. denied**, 474 U.S. 838 (1985).

The only commonality between the claim in the petition and the argument on appeal is that the evidence was insufficient. Were the issue properly presented, review would look to "whether, after viewing the evidence in the light most favorable to the prosecution, **any** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.

2d 560 (1979). A federal court looks to substantive state law for the elements of an offense. **Alexander v. McCotter**, 775 F.2d 595, 598 (5th Cir. 1985). It is "the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." **Jackson**, 443 U.S. at 319.

The Texas murder statute provided, "A person commits an offense if he . . . intentionally or knowingly causes the death of an individual . . . ." Tex. Penal Code Ann. § 19.02(a)(1) (West 1974). Pena admitted that he intentionally caused Lopez's death. The jury disbelieved his defense that he shot Lopez to protect Fuentes. That does not render the evidence insufficient. A jury is entitled to believe some witnesses and disbelieve others. **Jackson**, 443 U.S. at 319.

F. Jury Argument

Pena makes reference to what he says is improper jury argument. He adopts the magistrate judge's report but with different conclusions. He alludes to prosecutorial comments about (1) an aggravated assault in Fort Worth, (2) forgery, (3) Lopez having been shot "`in cold blood,'" (4) Pena "`roam[ing] the streets killing at random,'" and (5) "dividing the 5 to 99 year potential sentence into groupings."

Federal habeas review of a state prosecutor's closing argument looks to whether the prosecutor's comments so infected the trial with unfairness as to deprive the defendant of due process. **Edwards v. Scroggy**, 849 F.2d 204, 210 (5th Cir. 1988), **cert.**

denied, 489 U.S. 1059 (1989). The petitioner bears the burden of showing either that the prosecutor persistently exhibited pronounced misconduct or that the trial evidence was so insubstantial that, without the prosecutor's improper comments, the verdict would have been different. **Id**.

The prosecutor told the jury at the punishment phase that Pena had previously been convicted of aggravated assault, for which he received a probated sentence. The prosecutor said:

> Juan Pena does not deserve mercy at this stage. Back in 1980, he was given a second chance. He was assessed ten years probation for aggravated assault. And did he learn anything from having been given that second chance? No. He did not. He went out and murdered Ramon Lopez.

That prior conviction was in evidence.

The prosecutor did refer to the killing as being cold-blooded and did say that Pena should not be allowed to "roam the streets again, killing at random." A prosecutor may make a metaphorical comment on the evidence. **Long v. State**, 823 S.W.2d 259, 267-68 (Tex. Crim. App. 1991), **cert. denied**, 112 S. Ct. 3042 (1992).

At the punishment phase, the prosecutor told the jurors that they could think of the possible punishments in four categories, to-wit, "Life, of course, being the highest punishment that you could assess. Sixty to ninety-nine years being the high end; and thirty to fifty-nine years being the mid-range; and five to twenty-nine years being the low end of that scale." Pena has not shown how this comment or any of the foregoing comments is improper.

G. Jury Charge

In asserting that the jury charge was erroneous, Pena merely adopts the magistrate judge's report and states his belief that a different result should obtain. Appellants, even those proceeding pro se, may not merely adopt previously filed legal and factual arguments in their appellate briefs. **See** Fed. R. App. P. 28(a)(4); **Yohey v. Collins**, 985 F.2d 222, 224-25 (5th Cir. 1993). Even if this were sufficient, nothing in the magistrate's report supports relief on this claim.

H. Indictment

Attempting to adopt his habeas petition and the magistrate judge's report by reference, except for the conclusion of the latter, Pena states that two direct criminal appeals heard in other circuits show that his indictment gave him improper notice. A defect in a state indictment is not a ground for habeas relief unless the indictment was so defective that the convicting court had no jurisdiction. **Neal v. Texas**, 870 F.2d 312, 316 (5th Cir. 1989). Where the highest court of the state has held, expressly or implicitly, that the indictment was sufficient under state law, the inquiry on federal habeas petition is at an end. **Alexander v. McCotter**, 775 F.2d 595, 598-99 (5th Cir. 1988). When the Texas Court of Criminal Appeals denies a writ of habeas corpus sought on the ground that the indictment was insufficient, that court implicitly holds the indictment sufficient. **Id**. at 599.

Pena presented this issue in his second state application for habeas relief. The Court of Criminal Appeals denied the

application without written order. A federal court inquires no further.

I. Ineffective Assistance of Counsel

Pena alleges that trial counsel was ineffective for not telling him that the state had made an offer of a plea bargain. He says that he first learned of the offer when counsel mentioned it during closing argument. He says that he should have had a federal court hearing on the question.

To demonstrate ineffectiveness of counsel, Pena must establish that counsel's performance fell below an objective standard of reasonable competence and that he was prejudiced by his counsel's deficient performance. **Lockhart v. Fretwell**, ___ U.S. ___, 113 S. Ct. 838, 842, 122 L. Ed. 2d 180 (1993). Judicial scrutiny of counsel's performance must be highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The petitioner must affirmatively plead the actual resulting prejudice. **Hill v. Lockhart**, 474 U.S. 52, 60, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Pena must demonstrate prejudice by showing that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. **Fretwell**, 113 S. Ct. at 844. The Supreme Court provided, "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient

prejudice, which we expect will often be so, that course should be followed." **Strickland**, 466 U.S. at 697.

The prosecutor concluded his opening statement at the punishment phase by urging the jury to assess life imprisonment. The last line of the statement asked the jury to return a life sentence. **Id**. at 538. When Pena's counsel stood, his first remark was:

> I don't know why it is that most of the time, it seems the prosecutors feel like when they go to trial when they have made the defense an offer, that the defense chooses not to accept, that they go to trial, and get a conviction, they feel like for some reason or another they have to ask for the maximum punishment that the law allows.

Pena concludes solely from that remark that the state made a plea offer and that counsel refused it without consulting him. This is insufficient to raise an inference that the state offered to recommend a sentence of less than sixty years, that counsel did not communicate the offer to Pena or that Pena would have accepted such an offer.

A habeas petitioner's conclusional allegations on a critical issue are insufficient to raise a constitutional issue. **Koch v. Puckett**, 907 F.2d 524, 530 (5th Cir. 1990). Pena has not met his burden to obtain relief on this or any of the foregoing issues. As Pena has raised no constitutional issue, a hearing was not necessary. **See Joseph v. Butler**, 838 F.2d 786, 788 (5th Cir. 1988).

AFFIRMED.