No. _____

In the Supreme Court of the United States

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION, PETITIONER

v.

NELSON GONGORA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

JONATHAN F. MITCHELL
Solicitor General

ANDREW S. OLDHAM
Deputy Solicitor General

JAMES P. SULLIVAN
Assistant Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
James.Sullivan@
texasattorneygeneral.gov
(512) 936-1700

CAPITAL CASE

QUESTION PRESENTED

Whether a federal court that bases its harmless-error decision on the "grave doubt" rule of *O'Neal* v. *McAninch*, 513 U.S. 432 (1995), can condemn a state court's harmless-error decision as "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," *Harrington* v. *Richter*, 131 S. Ct. 770, 786-787 (2011), such that 28 U.S.C. 2254(d) will not bar federal habeas relief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, Statutes, and Rules:

Miscellaneous:

In the Supreme Court of the United States

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION, PETITIONER

v.

NELSON GONGORA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner William Stephens, Director of the Texas Department of Criminal Justice's Correctional Institutions Division ("the Director"), respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit (Pet. App. 1a-68a) is reported at 710 F.3d 267. Separate opinions concerning the denial of rehearing en banc (Pet. App. 94a-128a) are reported at 726 F.3d 701. The opinion of the district court (Pet. App. 69a-93a) is reported at 498 F. Supp. 2d 919.

JURISDICTION

The court of appeals entered its judgment on February 27, 2013. A petition for rehearing en banc was denied on August 13, 2013. Pet. App. 94a-95a.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2254(d) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (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.

28 U.S.C. 2254(d).

STATEMENT

1. On April 7, 2001, Delfino Sierra was fatally shot during a robbery perpetrated by gang members who happened upon him while driving in a van. *Gongora* v. *State*, 2006 WL 234987, at *1 (Tex. Crim. App. Feb. 1, 2006). Juan Vargas, the van's driver, eventually identified respondent Nelson Gongora as the shooter. *Ibid.* Gongora confessed to participating in the robbery, though he claimed not to know who had pulled the trigger. *Ibid.* In March 2003, following a jury trial in the 371st Judicial District

Court of Tarrant County, Texas, Gongora was convicted of capital murder and sentenced to death for his role in Sierra's killing. *Ibid.*

On direct appeal to the Texas Court of Criminal Appeals ("CCA"), Gongora claimed that prosecutorial comments upon his failure to testify violated the Fifth Amendment, as interpreted by *Griffin* v. *California*, 380 U.S. 609 (1965), and incorporated by the Fourteenth Amendment. See *Gongora*, 2006 WL 234987, at *7-*10; see also Pet. App. 14a-19a, 37a-46a (reproducing prosecutorial comments). Noting that the trial court had sustained Gongora's objections to the prosecutorial comments and delivered curative jury instructions, the CCA rejected the *Griffin* claim on harmless-error grounds:

> On this record, the prosecutor's comments were not so blatant that they rendered the instructions to disregard ineffective. Thus, the judge reasonably concluded that the instructions to disregard effectively removed any prejudice caused by the prosecutor's comments.

Gongora, 2006 WL 234987, at *10.

This Court denied certiorari. *Gongora* v. *Texas*, 549 U.S. 860 (2006) (mem.). Efforts to secure state habeas relief were unsuccessful. *Ex parte Gongora*, 2006 WL 3308713 (Tex. Crim. App. Nov. 15, 2006) (per curiam).

2. Gongora next sought federal habeas relief under 28 U.S.C. 2254 in the United States District Court for the Northern District of Texas, invoking jurisdiction per 28 U.S.C. 1331. Having failed to convince the CCA of the merit of his *Griffin* claim,

Gongora urged the same claim (along with several others) in his federal habeas application. See Pet. App. 74a, 80a-81a. The Director argued that federal habeas relief was precluded by 28 U.S.C. 2254(d) and the harmless-error doctrine.

The district court rejected the *Griffin* claim as harmless error under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993). Pet. App. 80a-84a. In so holding, the district court highlighted the trial court's curative jury instructions, and observed that "there is no evidence, substantial or otherwise, of a nexus between the prosecutor's improper remarks during argument and the jury's decisions." *Id.* at 83a-84a.

3. Gongora filed a notice of appeal on August 8, 2007. Following oral argument in 2008, a panel of the Fifth Circuit issued a certificate of appealability ("COA") on the *Griffin* claim.[1] In his ensuing merits brief, the Director again invoked Section 2254(d), and defended the district court's harmless-error conclusion. The Fifth Circuit heard oral argument a second time in 2009. Years passed without a decision. See Pet. App. 37a (Owen, J., dissenting) ("We * * * heard arguments a second time, only then reaching the merits * * * , and our consideration of those questions has been lengthy."); *id.* at 119a (Smith, J., dissenting from denial of rehearing en

---

[1] The COA also encompassed a punishment-phase claim. *Gongora* v. *Quarterman*, No. 07-70031, 2008 WL 4656992, at *1 (5th Cir. Oct. 22, 2008) (per curiam) (granting COA on "whether [Gongora] could be sentenced to death based on the jury's finding that he was able to anticipate that death might result from his participation in the robbery in light of the Supreme Court's decision in *Tison* v. *Arizona*, 481 U.S. 137 (1987)").

banc) ("Some 5½ years after receiving Gongora's appeal, and 3½ years after oral argument, a sharply-divided panel of this court disagreed with both the [CCA] and the district court.").

Finally, on February 27, 2013, a divided panel of the Fifth Circuit reversed the district court's judgment and granted Gongora's federal habeas application as to his *Griffin* claim. Pet. App. 34a. In a per curiam opinion joined by Chief Judge Stewart and Judge Higginbotham, the majority held that Section 2254(d) did not foreclose relief, *id.* at 21a, 23a n.35; that the prosecutorial comments worked a *Griffin* violation, *id.* at 21a-22a; and that this error was not harmless under *Brecht*, *id.* at 22a-34a. The majority based its harmless-error decision on the "grave doubt" rule of *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). Pet. App. 34a ("Because the record here leaves us 'in grave doubt as to the harmlessness of [the] error,' Gongora is entitled to relief." (alteration in original) (quoting *O'Neal*, 513 U.S. at 437)).

Judge Owen dissented, arguing that the *Griffin* error was harmless under *Brecht* given the curative instructions and the overwhelming evidence of guilt. Pet. App. 35a-53a.

4. The Director filed a petition for rehearing en banc, arguing that this grant of federal habeas relief in the teeth of the harmless-error doctrine violated Section 2254(d), as construed in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), and *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) (per curiam). Almost five months later, the Fifth Circuit denied rehearing en banc by a six-to-nine vote. Pet. App. 94a-95a.

In a separate opinion respecting the denial of rehearing en banc, Judge Higginbotham explained that the grant of Gongora's federal habeas application "was no watery eyed decision," but was instead a reflection of Judge Higginbotham's belief that "the binary choice of life or death tolerates no mediating, graduating scale of consequences for slippage in protecting rights constitutionally secured to persons whose life the State would take." Pet. App. 96a. Chief Judge Stewart, the other member of the majority, did not join Judge Higginbotham's separate opinion. See *ibid.*

Judge Smith dissented from the denial of rehearing en banc. Pet. App. 116a. Writing for himself and Judges Jolly, Jones, Clement, and Owen, Judge Smith condemned the Fifth Circuit panel for "substitut[ing] its judgment for that of the state courts"; explained that granting federal habeas relief violated Section 2254(d) and *Brecht*; and all but invited the Director to seek summary reversal in this Court. See *id.* at 116a, 120a-128a. Judge Elrod declined to join Judge Smith's dissent but provided a sixth vote for rehearing en banc. See *id.* at 95a, 116a, 127a n.15.

5. After six years with Gongora's appeal, the Fifth Circuit suddenly changed pace by issuing its mandate forthwith upon the denial of rehearing en banc. Pet. App. 95a. The Fifth Circuit refused to recall and stay its mandate pending certiorari. *Gongora* v. *Thaler*, No. 07-70031 (5th Cir. Aug. 21, 2013). The Director's application to recall and stay the mandate pending certiorari was denied by this Court upon referral by Justice Scalia. *Stephens* v. *Gongora*, No. 13A243 (U.S. Sept. 20, 2013) (mem.).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's grant of federal habeas relief violates 28 U.S.C. 2254(d), as construed in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), and *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) (per curiam). *Harrington* held that if a federal habeas court can imagine any reasonable basis for a state court's decision to reject a claim on the merits, then the relitigation bar of Section 2254(d) forecloses relief. And *Mitchell* held that if a state court is not unreasonable in rejecting a claim under the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), then federal habeas relief is likewise precluded by Section 2254(d).

Taken together, these holdings make this a straightforward case. Cf. Pet. App. 121a (Smith, J., dissenting from denial of rehearing en banc) ("Here the AEDPA inquiry [under Section 2254(d)] is easy * * * ."). The CCA could have rejected Gongora's *Griffin* claim on the reasonable ground that the error was harmless beyond a reasonable doubt under *Chapman*. As the Fifth Circuit dissent argued, albeit under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), the challenged prosecutorial comments were harmless in light of the trial court's curative instructions and the overwhelming evidence that Gongora was guilty of capital murder under Texas's law of parties.

The Fifth Circuit did not explain why such a harmless-error disposition by the CCA would have been not only wrong but unreasonable. Nor could the Fifth Circuit provide a satisfactory explanation, given its shilly-shally reliance upon the "grave doubt" rule of *O'Neal* v. *McAninch*, 513 U.S. 432

(1995). When a federal court is that uncertain about harmlessness, it is hardly in a position to condemn a state court's harmless-error decision as "so lacking in justification that there [would be] an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 786-787.

The Director therefore seeks either summary reversal of the Fifth Circuit's "flagrant grant of relief that contravenes the principles of habeas review unambiguously articulated by the Supreme Court," Pet. App. 127a-128a (Smith, J., dissenting from denial of rehearing en banc), or else a hold pending this Court's decision in *White* v. *Woodall*, 133 S. Ct. 2886 (2013) (No. 12-794).

The stakes are especially high here because the prospects for retrial have dimmed due to the languid handling of this case in the court below. After taking more than half a decade to arrive at its equivocal position of grave doubt, the Fifth Circuit declared that "Gongora will be released from custody unless within six months of the mandate of this court he is again brought to trial or the case is otherwise terminated by plea or other disposition under state law." Pet. App. 34a. It has been over a decade since a Texas jury convicted Gongora of capital murder. There is a real risk that the grant of federal habeas relief will "cost society the right to punish" Gongora and "reward [him] with complete freedom from prosecution," because "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle* v. *Isaac*, 456 U.S. 107, 127-128 (1982); see also Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on*

Criminal Judgments, 38 U. Chi. L. Rev. 142, 146-148 (1970). Indeed, the Tarrant County District Attorney has advised that Juan Vargas, who was a witness for the State at trial, is now dead. See Pet. App. 127a (Smith, J., dissenting from denial of rehearing en banc).[2]

A. Section 2254(d) Precludes Federal Habeas Relief Because The CCA Could Have Reasonably Rejected Gongora's *Griffin* Claim On Harmless-Error Grounds

1. The relitigation bar of Section 2254(d) ordinarily leaves federal courts powerless to grant a state prisoner's habeas application on a claim that has already been adjudicated on the merits by a state court. *Harrington* v. *Richter*, 131 S. Ct. 770, 785-787 (2011). Gongora's *Griffin* claim was "adjudicated on the merits" by the CCA within the meaning of Section 2254(d), so there is no doubt that the provision applies. See Pet. App. 9a-11a. The only question is whether Gongora can avail himself of one of the three enumerated "exceptions to § 2254(d)'s relitigation bar." *Harrington*, 131 S. Ct. at 785.

---

[2] On the subject of high stakes, Gongora may oppose this State-on-top petition in a capital case on the ground that "death is different." *E.g.*, *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion). He will not necessarily suffer the punishment of death if this petition succeeds, however, because a COA was issued as to a punishment-phase claim that the Fifth Circuit has not yet reached. See Pet. App. 9a; see also *id.* at 36a-37a, 53a-68a (Owen, J., dissenting) (reaching and rejecting this claim).

In the space of a few sentences, the Fifth Circuit determined that Gongora should have the benefit of Section 2254(d)(1)'s "unreasonable application" exception. See Pet. App. 21a ("To the extent that the CCA reached a contrary conclusion, it unreasonably applied the clearly established federal law of *Griffin* and its progeny."); *id.* at 23a n.35 ("[T]he CCA could not have reasonably determined that the error in this case was harmless beyond a reasonable doubt."); see also *id.* at 112a (Higginbotham, J., respecting the denial of rehearing en banc) (sandwiching another sentence about Section 2254(d) between a lengthy factual discussion and a pair of diagrams).

This aspect of the opinion below mirrors the Ninth Circuit opinion condemned in *Harrington*:

> Here it is not apparent how the [Ninth Circuit's] analysis would have been any different without AEDPA. The [Ninth Circuit] explicitly conducted a *de novo* review; and after finding a *Strickland* violation, it declared, without further explanation, that the "state court's decision to the contrary constituted an unreasonable application of *Strickland*." AEDPA demands more. Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. The opinion of the [Ninth Circuit] all but ignored the only question that matters under § 2254(d)(1).

Harrington, 131 S. Ct. at 786 (citations and internal quotation marks omitted), *rev'g Richter* v. *Hickman*, 578 F.3d 944 (9th Cir. 2009) (en banc).

2. Had it taken AEDPA seriously, the Fifth Circuit would have recognized that its grant of federal habeas relief contravenes Section 2254(d). In deciding whether Gongora can get the benefit of Section 2254(d)(1)'s "unreasonable application" exception to the relitigation bar, the Fifth Circuit should have "determine[d] what arguments or theories supported or * * * could have supported[] the state court's decision"—taking care not to "overlook[] arguments that would otherwise justify the state court's result"—and then "ask[ed] whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington*, 131 S. Ct. at 784, 786; see also *Burt* v. *Titlow*, No. 12-414, slip op. at 6 (U.S. Nov. 5, 2013) (" 'If this standard is difficult to meet'—and it is—'that is because it was meant to be.' " (quoting *Harrington*, 131 S. Ct. at 786)).

Harrington thus establishes that a prisoner's entitlement to federal habeas relief does not depend on the quality of the state court's reasoning process, but on the quality of his underlying claim. A prisoner who invokes the "unreasonable application" exception bears the burden of "showing there was no reasonable basis for the state court to deny relief"—he must contend with what the state court *could have* said against his claim, rather than what it *did* say. *Harrington*, 131 S. Ct. at 784.

Mitchell v. *Esparza*, 540 U.S. 12 (2003) (per curiam), identified the harmless-error doctrine as

one of the potentially reasonable bases for a state court to reject a prisoner's claim on the merits. The Court there held that Section 2254(d) precluded federal habeas relief as to a claim because the state court had not been unreasonable in rejecting it under the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). See *Mitchell*, 540 U.S. at 17-19. The *Mitchell* Court explained its summary reversal of the Sixth Circuit as follows: "We may not grant [a] habeas petition * * * if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Id.* at 18.

Harrington and *Mitchell* combine to make short work of this case because the CCA could have reasonably rejected Gongora's *Griffin* claim as harmless error. As Judge Owen's dissent ably explained, "the curative and cautionary jury instructions at Gongora's trial," along with the "overwhelming [evidence] that, at the very least, Gongora was guilty as a party to capital murder," provide a reasonable basis to believe that any *Griffin* error in this case was harmless. See Pet. App. 35a-36a, 49a-53a (Owen, J., dissenting). The Texas trial judge used the "presumptively effective" and "powerful tool[]" of curative instructions to protect Gongora's Fifth Amendment rights, *id.* at 50a-51a, and the CCA found that those instructions "effectively removed any prejudice caused by the prosecutor's comments," *Gongora* v. *State*, 2006 WL 234987, at *10 (Tex. Crim. App. Feb. 1, 2006). Moreover, Gongora's written confession fully

inculpated him in the capital murder without regard to whether he actually pulled the trigger, so the prosecutor's supposedly unconstitutional attempt to identify Gongora as the shooter was superfluous. See Pet. App. 35a-36a, 51a-52a (Owen, J., dissenting) (explaining Texas's law of parties).

Although Judge Owen put forth the curative instructions and the overwhelming evidence to establish harmless error under *Brecht*, those same factors have elsewhere sufficed to show that comments upon a defendant's failure to testify yielded harmless error under *Chapman*. See, *e.g.*, *United States* v. *Hasting*, 461 U.S. 499, 510-512 (1983); *United States* v. *White*, 444 F.2d 1274, 1278 (5th Cir. 1971). The CCA could have reasonably concluded, based on Judge Owen's twin factors, that the *Griffin* error in this case was "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. Such a conclusion would be reasonable, if not correct, so Section 2254(d) precludes federal habeas relief.

The Fifth Circuit made no real attempt to explain why this harmless-error approach by the state court is "so lacking in justification that there [would be] an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 786-787. And any effort to do so would have failed because the Fifth Circuit based its own harmless-error conclusion on the "grave doubt" rule of *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). Pet. App. 34a ("Because the record here leaves us 'in grave doubt as to the harmlessness of [the] error,' Gongora is entitled to relief." (alteration in original) (quoting *O'Neal*, 513 U.S. at 437)). This means that the federal judges who

granted habeas relief were "uncertain" and "in virtual equipoise as to the harmlessness of the error" under *Brecht*, because they deemed "the record [to be] so evenly balanced" that they could say no more than that Gongora was "*quite possibly* being held in custody in violation of the Constitution." *O'Neal*, 513 U.S. at 435, 437, 442 (internal quotation marks omitted); see also *id.* at 442 ("We also are assuming that the judge's conscientious answer to the question, 'But, did that error have a "substantial and injurious effect or influence" on the jury's decision?' is, 'It is extremely difficult to say.' ").

In a footnote, the Fifth Circuit wrote that its "*Brecht* analysis implies[that] the CCA could not have reasonably determined that the error in this case was harmless beyond a reasonable doubt." Pet. App. 23a n.35. But if the Fifth Circuit could not bring itself to say unequivocally that Gongora's *Griffin* error was not harmless under *Brecht*, how could it plausibly declare that the CCA would be not only wrong but unreasonable to hold that error harmless under *Chapman*? "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro* v. *Landrigan*, 550 U.S. 465, 473 (2007). The Fifth Circuit's manifest uncertainty would have kept it from reaching that threshold, had it bothered to try.

The Fifth Circuit has sent an incoherent message to Texas's courts by granting habeas relief in the face

of Section 2254(d). Six federal judges[3] have confidently concluded that Gongora's *Griffin* error was harmless under *Brecht*, while two other federal judges[4] harbor grave doubt on that score. On the question of harmlessness, then, "fairminded jurists *have* disagreed," Pet. App. 121a (Smith, J., dissenting from denial of rehearing en banc)—and the few who side with Gongora have been both temporally and doctrinally indecisive. Yet somehow the state judges who rejected Gongora's *Griffin* claim would cease to be "fairminded jurists," *Harrington*, 131 S. Ct. at 786, were they to hold the same error harmless under *Chapman*. This is not the way to show respect for "the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong." *Burt* v. *Titlow*, No. 12-414, slip op. at 6 (U.S. Nov. 5, 2013).

3. In *Fry* v. *Pliler*, 551 U.S. 112, 120 (2007), the Court suggested that it "makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." See Pet. App. 23a n.35 (quoting same). The quoted sentence does not threaten the Section 2254(d) argument put forth in this petition.

The *Fry* Court carefully tempered its observation about the harmless-error hierarchy by inserting the word "when." This case reveals the wisdom of that

---

[3] This figure includes the dissenting Circuit Judges (Jolly, Jones, Smith, Clement, and Owen, JJ.) and the District Judge (McBryde, J.).

[4] This figure includes the Circuit Judges who comprised the panel majority (Stewart and Higginbotham, JJ.).

analytical hedge. It makes perfect sense to require formal application of both tests when the *Brecht* test does not subsume the AEDPA/*Chapman* test, as will be true for cases in which the *Brecht* test cannot be answered without resort to *O'Neal*'s "grave doubt" rule. With *Harrington* having tightened up Section 2254(d), moreover, it is less likely now than when *Fry* was decided that the *Brecht* test will subsume the AEDPA/*Chapman* test. Cf. *Price* v. *Thurmer*, 637 F.3d 831, 839 (7th Cir. 2011) (Posner, J.) (noting *Harrington*'s "rather unexpected vigor").

In any event, the quoted dictum from *Fry* did not overrule the holding of *Mitchell*. See Pet. App. 122a-123a (Smith, J., dissenting from denial of rehearing en banc); *Johnson* v. *Acevedo*, 572 F.3d 398, 403-404 (7th Cir. 2009) (Easterbrook, J.); *Ruelas* v. *Wolfenbarger*, 580 F.3d 403, 413 (6th Cir. 2009). Having held in *Mitchell*, 540 U.S. at 17-19, that the AEDPA/*Chapman* test can be employed to deny federal habeas relief, the Court is free to follow the same course here. To argue otherwise would be to contend "that dicta have overtaken holdings," and thus to "reverse[] the accepted hierarchy of legal authority." *United States* v. *Askew*, 529 F.3d 1119, 1148 & n.3 (D.C. Cir. 2008) (Griffith, J., concurring) (citing, *inter alia*, *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend * * * .")).

B. The Fifth Circuit's Section 2254(d) Violation Warrants Another Summary Reversal

This Court honors "AEDPA's most important provision" by summarily reversing grants of federal habeas relief that violate 28 U.S.C. 2254(d). Richard

H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1158 (6th ed. 2009). Inferior federal courts have been put on notice:

> It is a regrettable reality that some federal judges *like* to second-guess state courts. The only way this Court can ensure observance of Congress's abridgement of their habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law. We have often not shrunk from that task * * * .

Cash v. *Maxwell*, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from denial of certiorari). A court of appeals tempted to defy Section 2254(d) thus operates in the shadow of summary reversal. See, *e.g.*, *Nevada* v. *Jackson*, 133 S. Ct. 1990 (2013) (per curiam); *Marshall* v. *Rodgers*, 133 S. Ct. 1446 (2013) (per curiam); *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012) (per curiam); *Wetzel* v. *Lambert*, 132 S. Ct. 1195 (2012) (per curiam); *Hardy* v. *Cross*, 132 S. Ct. 490 (2011) (per curiam); *Bobby* v. *Dixon*, 132 S. Ct. 26 (2011) (per curiam); *Cavazos* v. *Smith*, 132 S. Ct. 2 (2011) (per curiam).

The Fifth Circuit's illegal grant of federal habeas relief in this case suggests that time may have dulled the sting of that court's summary reversal in *Thaler* v. *Haynes*, 559 U.S. 43 (2010) (per curiam). To be fair, not every member of the court below has forgotten that painful lesson: Five of the six Judges who voted for rehearing en banc noted that the need for error correction by the full Fifth Circuit followed *a fortiori* from the legitimate threat of summary reversal by this Court. See Pet. App. 126a-128a & nn.12-15 (Smith, J., joined by Jolly, Jones, Clement,

and Owen, JJ., dissenting from denial of rehearing en banc).

As explained in Part A, *supra*, the Fifth Circuit's decision is "flatly contrary to this Court's controlling precedent," *Arkansas* v. *Sullivan*, 532 U.S. 769, 771 (2001) (per curiam), making summary reversal appropriate. See Sup. Ct. R. 16.1. In the words of Judge Smith, whose summary-reversal warning ultimately went unheeded by a majority of his colleagues, the Fifth Circuit has committed "grave error" in a case "involv[ing] a question of exceptional importance" by issuing "a flagrant grant of relief that contravenes the principles of habeas review unambiguously articulated by the Supreme Court." Pet. App. 117a, 127a-128a (Smith, J., dissenting from denial of rehearing en banc).

C. Alternatively, This Petition Should Be Held For *White*

In the alternative, the Court should hold the Director's certiorari petition for *White* v. *Woodall*, 133 S. Ct. 2886 (2013) (No. 12-794). As noted by Judge Smith, the questions presented in *White* are similar to the issues in this case. See Pet. App. 124a (Smith, J., dissenting from denial of rehearing en banc) (describing *White* as "a similar case in which the Supreme Court recently granted certiorari"). There, as here, a state prisoner won federal habeas relief on Fifth Amendment grounds despite a failure to overcome Section 2254(d) and the harmless-error doctrine. In recognition of the similarities between the cases, Texas has filed an amicus brief supporting Kentucky's position in *White*. See Brief for Texas as Amicus Curiae Supporting Petitioner at 1-2, *White* v. *Woodall*, No. 12-794 (U.S. Sept. 18, 2013).

If this Court declines to hand the Fifth Circuit a summary reversal, it should at least hold this petition for *White*. As the leading treatise explains,

> Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision.

Eugene Gressman et al., *Supreme Court Practice* 276 (9th ed. 2007). Reversal of the Sixth Circuit in *White* will counsel a GVR of the Fifth Circuit in this case.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed. In the alternative, the petition for a writ of certiorari should be held pending this Court's decision in *White*, and then disposed of accordingly.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

JONATHAN F. MITCHELL
Solicitor General

ANDREW S. OLDHAM
Deputy Solicitor General

JAMES P. SULLIVAN
Assistant Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
James.Sullivan@
texasattorneygeneral.gov
(512) 936-1700

November 2013

APPENDIX A
Gongora v. *Thaler*,
710 F.3d 267 (5th Cir. 2013)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REVISED March 1, 2013
United States Court of Appeals
Fifth Circuit
F I L E D
February 27, 2013
Lyle W. Cayce
Clerk

No. 07-70031

NELSON GONGORA,

Petitioner-Appellant,

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before STEWART, Chief Judge, and HIGGINBOTHAM and OWEN, Circuit Judges.

PER CURIAM:

Nelson Gongora was convicted in Texas state court for capital murder and sentenced to death. After the state court denied habeas relief, Gongora petitioned the district court for relief under 28 U.S.C. § 2254, requesting that his conviction and sentence be set aside and a new trial ordered. The district court denied relief. We granted a certificate of appealability (COA) on two issues: (1) whether Gongora is entitled to habeas relief because the prosecutor commented during his closing argument on Gongora's failure to testify; and (2) whether, in light of the Supreme Court's holding in *Tison v. Arizona*,[1] Gongora could be sentenced to death based on a jury finding that he anticipated murder would result from his participation in robbery of the victim.[2] We find that the extraordinarily extensive comments on Gongora's failure to testify resulted in actual prejudice, and we GRANT Gongora's habeas petition and vacate his conviction.

I.

Texas charged Nelson Gongora with capital murder for the killing of Delfino Sierra during the course of a robbery. Although the indictment charged that Gongora shot Sierra, at trial, the State sought to convict Gongora either as the shooter or

---

[1] 481 U.S. 137 (1987).

[2] *Gongora v. Quarterman*, No. 07-70031, 2008 WL 4656992, at *1 (5th Cir. Oct. 22, 2008) (*Gongora IV*).

under the alternate theory that Gongora was a participant in a robbery in the course of which Sierra was murdered by one of Gongora's co-defendants, Albert Orosco. The jury heard sharply conflicting evidence regarding Gongora's role in the offense, including evidence that the shooter may have been someone other than either Gongora or Orosco.

The State's first witness, Sonia Ramos, told the jury that she was driving on the night of April 7, 2001 when she noticed three Hispanic men walking on the side of the road; the man in the middle (Sierra) had on a cowboy hat. As she turned to look toward a friend's house, she saw the man on the left shoot Sierra. She then looked back, and saw a van parked in a driveway with its reverse lights on. The man who had been on the right side of Sierra ran "like he was running towards the van," and the man who shot Sierra "kind of backed up" and "kind of looking to what he had done . . . then turned around like to go towards the van." Ramos could not see the mens' faces.

Juan Vargas was the State's next witness. Vargas also had been indicted for Sierra's murder. Vargas admitted that he was the driver of the van. Arrested about three weeks after Sierra's shooting, he gave a sworn, written statement to police identifying James Luedtke and Carlos Almanza as the two who had emerged from the van to rob Sierra and identifying Almanza as Sierra's shooter. Police interviewed him again a few weeks later. This time, Vargas identified Gongora as the shooter. He said

that it was in fact Gongora and Orosco, and not Almanza and Luedtke, who had approached Sierra. At trial, Vargas testified that he had initially lied to the police when he identified Almanza and Luedtke because he feared retaliation from Gongora. But that fear was apparently soothed by his plea agreement. Under that agreement, in exchange for pleading guilty and testifying against Gongora, Vargas would receive a twenty-three year sentence for Sierra's murder and not be prosecuted at all for a second shooting.

With plea agreement in hand, Vargas testified that on the night of April 7, 2001, he was driving his van accompanied by Gongora, Almanza, Albert Orosco, Steven Gongora ("Steven"), and Luedtke ("Guero") when they saw Sierra walking down the street and decided to rob him. Gongora, Almanza, and Vargas had all taken heroin earlier in the evening. Vargas told the jury that when he pulled over, Gongora and Orosco jumped out of the van, ran toward Sierra, and demanded his money. When Sierra began to run, Gongora shot him in the head with a .38 caliber handgun that belonged to Vargas. Vargas said he had given the gun to Gongora earlier in the night for protection. Gongora and Orosco then returned to the van. Vargas asked what Gongora did, and Gongora said "I had to do what I had to do" and told everyone to remain silent. The group then returned to Gongora's house for a cookout.

Vargas and Gongora were leaders in the criminal street gang Puro Li'l Mafia (PLM). Vargas testified

that about two and a half hours after Sierra's shooting, Almanza became a member of PLM by doing a drive-by shooting. Vargas was the driver for that shooting, and Gongora was in the van as well. Vargas testified that the shooting by Almanza was in retaliation for drive-by shootings at Gongora's house. During the shooting, Gongora stood outside the van armed with a nine-millimeter handgun. The victim of this shooting survived. Vargas admitted that he was high on heroin and intoxicated with beer at the time of both shootings and that this impaired his ability to recall how things happened.

Several months after Vargas revised his account of Sierra's shooting, police interviewed Dylan Griffith, who met with the group in Vargas's van after Sierra's shooting. At trial, Griffith, a defense witness, testified that when Vargas's van pulled up Vargas was yelling at somebody, apparently Orosco, "because they were having a conflict over something." When Orosco emerged from the van, he had a .38 in his waistband and was bragging about killing someone, saying, "I shot some wet back." Griffith asked why Orosco did that and Orosco said they had tried to rob the person. Griffith then asked what they got from the robbery and Orosco said, "Nothing. I done took his soul and his dreams. That's all I want."

After Griffith was first interviewed by the police, he got in touch with James Luedtke ("Guero") and told him the police were trying to locate "Guero." Luedtke asked what the police wanted and Griffith

said they just wanted a statement of what happened. Griffith testified that Luedtke then said, "So all I got to do is write down Albert shot him?" Griffith said, yes, if that was what happened, and Luedtke said: "I ain't—I ain't going down for it. I'll put it on whoever I got to, as long as I don't go down for it." Luedtke seemed frightened of being arrested.

At trial, Luedtke was called as a witness for the prosecution. Police officers did not talk to Luedtke until six months before trial. He was scared when he first talked to the investigator, fearing a charge of capital murder. Luedtke told police and later testified that Orosco had said "Let's get this guy," and that Gongora and Orosco then approached the man and Gongora "told him pretty much 'casa la febio,' " which, according to Luedtke, meant "Give me your money." Luedtke stated that he was in the back—in the third row—of the van when this happened, but that he was able to hear because the side windows of the van were down. Luedtke testified that he saw Gongora pull a gun, and that when Orosco and Gongora returned to the car, Gongora said "I took his dreams," apparently bragging. Gongora also said: "Nobody say nothing. Nobody seen nothing. Nobody heard nothing." Luedtke said that Gongora and Orosco were behind the victim and Gongora was on the right and Orosco on the left. The day of Sierra's shooting, Luedtke had been doing drugs (heroin and pot) and drinking.

Ramiro Enriquez, a defense witness who had been in prison with Vargas and Almanza, testified

that Almanza told him that Almanza and two others had gotten out of Vargas's van and approached Sierra, and that Almanza had done the shooting. Almanza told Enriquez that he was standing over the victim and the other two people came up and said something to the effect of "Hey, let's go, go, go."[3]

The jury also learned of Gongora's written statement, which he gave after he was arrested about two-and-a-half months after Sierra's murder. He wrote:

> We passed [Sierra] up and pulled into a little store before [Sierra] passed the railroad tracks. We did a U-turn in the parking lot and went back towards the guy was walking. . . . All we wanted to do is get a little money and go about our business. Next thing I remember, the side door opened, all of us . . . were going to get out. Then there were

---

[3] In his previous sworn written statement, Enriquez said was not sure how many people, according to Almanza, got out of the van and crossed the street toward Sierra. However, on cross-examination at trial, the prosecutor elicited that Enriquez had told the prosecutor at some point that it was Carlos and two others. Although the prosecutor phrased a series of questions that made reference to a group of three as about what Enriquez had previously told him Carlos said, he then followed up with a question: "And this is what you swear Carlos told you?" To which Enriquez responded, "Yes." On re-direct, the defense elicited that Enriquez actually still was not sure about the number of people Carlos had indicated approached Sierra.

> gunshots. I turned around and saw the guy that was wearing the cowboy hat laying on the ground. I think there was about three fast shots fired. Right after the shots, all of us jumped back in the van and we left.

Gongora stated that he did not know who fired the shots.

Both Orosco and Almanza invoked their Fifth Amendment right against self-incrimination and gave no testimony before the jury.

II.

The trial court instructed the jury that it could convict Gongora if it found the evidence established beyond a reasonable doubt that Gongora shot Sierra during the course of a robbery; *or* that Gongora entered into a conspiracy with Orosco to rob Sierra, that Orosco shot Sierra during the course of that attempted robbery, that the shooting was in furtherance of the conspiracy, and that Gongora should have anticipated the shooting. The jury found Gongora guilty, and he was ultimately sentenced to death. The CCA affirmed Gongora's conviction and sentence on direct appeal.[4] Gongora's state habeas petition was rejected by the state trial

---

[4] *Gongora v. State*, No. AP-74636, 2006 WL 234987 (Tex. Crim. App. 2006), *cert. denied*, 549 U.S. 860 (2006) (*Gongora I*).

court, and the CCA affirmed the trial court's decision.[5]

In February 2007, Gongora filed the underlying 28 U.S.C. § 2254 petition for a writ of habeas corpus in the district court, claiming that constitutional errors infected both his trial and sentencing proceedings. The district court denied relief,[6] and we granted a COA on two issues: (1) Gongora's claim that comments by the prosecutor during closing argument violated his Fifth Amendment right not to testify and resulted in actual prejudice, and (2) his claim that the imposition of the death penalty in his case would violate his right to due process of law and to be protected from cruel and unusual punishment under the Eighth and Fourteenth Amendments and *Tison v. Arizona*.[7] We ultimately do not reach the second issue.

III.

We review Gongora's habeas petition under the deferential standard of review provided in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under 28 U.S.C. § 2254(d), when a habeas claim has been adjudicated on the merits in

---

[5] *See Ex parte Gongora*, No. WR-60115-02, 2006 WL 3308713 (Tex. Crim. App. Nov. 15, 2006) (*Gongora II*).

[6] *Gongora v. Quarterman*, 498 F. Supp. 2d 919, 931 (N.D. Tex. 2007) (*Gongora III*).

[7] 481 U.S. 137 (1987).

the state courts, federal habeas relief may not be granted unless the federal habeas court finds that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[8]

A legal principle is "clearly established" only when it is embodied in a holding of the Supreme Court.[9] For purposes of § 2254(d)(1), a state court decision "involves an unreasonable application of th[e] Court's clearly established precedents if the state court applies th[e] Court's precedents to the facts in an objectively unreasonable manner."[10] The Supreme Court has repeatedly admonished that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law."[11] Thus,

---

[8] 28 U.S.C. § 2254(d)(1), (2).

[9] *Thaler v. Haynes*, 130 S. Ct. 1171, 1173 (2010).

[10] *Brown v. Payton*, 544 U.S. 133, 141 (2005) (citing *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). In contrast, a state court decision is "contrary" to clearly established Court precedent if "it applies a rule that contradicts the governing law set forth in [the Court's] cases, or if it confronts a set of facts that is materially indistinguishable from a decision of th[e] Court but reaches a different result." *Id.*

[11] *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010) (quoting *Williams*, 529 U.S. at 410).

"a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly."[12] "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."[13] Within the AEDPA framework, we review the district court's conclusions of law *de novo*.[14]

IV.

We now turn to Gongora's Fifth Amendment claim. In *Griffin v. California*, the Supreme Court held that "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[15] The Court has since clarified that comment on a defendant's silence is permissible in some instances, as where "the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his

---

[12] *Id.* (quoting *Williams*, 529 U.S. at 411).

[13] *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

[14] *Nelson v. Quarterman*, 472 F.3d 287, 293 (5th Cir. 2006) (en banc).

[15] 380 U.S. 609, 615 (1965).

counsel."[16] But the rule is unchanged that a prosecutor "may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt."[17] A *Griffin* error is subject to harmless error analysis.[18] On direct appeal, a state court cannot hold harmless a *Griffin* error unless the court is "able to declare a belief that [the violation] was harmless beyond a reasonable doubt."[19]

Our evaluation of a Fifth Amendment claim like Gongora's proceeds in two steps. First, we must decide under 28 U.S.C. § 2254(d)(1) whether fairminded jurists could disagree that a *Griffin* error occurred.[20] We must then decide whether the Fifth Amendment violation was harmless.[21] When a state court on direct appeal has determined under *Chapman* that a *Griffin* error was harmless beyond a reasonable doubt, a petitioner cannot obtain federal habeas relief based merely on a finding, per AEDPA, that no jurist could reasonably conclude that the Fifth Amendment violation was harmless beyond a reasonable doubt. Rather, applying the standard set forth by the Supreme Court in *Brecht v.*

---

[16] *United States v. Robinson*, 485 U.S. 25, 32 (1988).

[17] *Id.* at 34.

[18] *Chapman v. California*, 386 U.S. 18, 23–25 (1967).

[19] *Id.* at 24; *Fry v. Pliler*, 551 U.S. 112, 116 (2007).

[20] *See Richter*, 131 S. Ct. at 786.

[21] *See Fry*, 551 U.S. at 120.

Abrahamson,[22] the federal court must determine whether the Fifth Amendment violation "had substantial and injurious effect or influence in determining the jury's verdict."[23]

Here it appears the CCA did not apply *Chapman* and made no finding that any Fifth Amendment violation was harmless beyond a reasonable doubt. Regardless, Gongora must still clear the hurdle of *Brecht*: We "assess the prejudicial impact of [the prosecutor's comments on Gongora's silence] under the 'substantial and injurious effect' standard set forth in *Brecht*, whether or not the state appellate court recognized the error and reviewed it for harmlessness under . . . *Chapman*."[24]

---

[22] 507 U.S. 619 (1993).

[23] *Id.* at 631. In this circuit, the assessment of harmless error under *Brecht* is a mixed question of fact and law, and we thus review the district court's determination *de novo*. *See, e.g.*, *Garcia v. Quarterman*, 454 F.3d 441, 444 (5th Cir. 2006).

[24] *Fry*, 551 U.S. at 121–22. The Supreme Court has explained: "[I]t is implausible that, without saying so, AEDPA replaced the *Brecht* standard of 'actual prejudice' . . . with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable." *Id.* at 119–20 (citation omitted) (internal quotation marks omitted).

A.

During closing argument at the guilt-innocence phase of Gongora's trial, the prosecutor made the following relevant comments (emphasis added):

> [PROSECUTOR:] . . . I want to talk about the people you heard from. . . . Who did you expect us to bring to you? There's six people inside that van. When you look at it, here it is. Who would you expect for us to give to you to establish who the shooter is? Are you going to be satisfied in a case with gang members just looking at one person, even though he's telling you the exact truth, no matter what? Even if the time that he first told this story, he told the truth—he told the truth about someone he's scared to death of—this is James Luedtke. He had nothing against him. He had no crime pending. He had no reason to hide the truth. He had no reason to talk to us, but he told us the truth.
>
> You listen to people inside there. *Who else would you want to hear from, though? The shooter? We're not going to talk to that person.* We're not going to make a deal with that person. This person deserves what they get. This person right here—
>
> [Pointing to Gongora's name on a chart.]
>
> *Nelson Gongora, the shooter. That's the person on trial.* That's the person who deserves to be found guilty of capital murder.

> *Who should we go ahead and talk to? Who should we go ahead and present to you? Should we talk to the shooter?* Should we talk to—
>
> [DEFENSE COUNSEL:] Your Honor, I'm going to object. That's a comment on the failure to testify.
>
> [PROSECUTOR:] Let me make that clear. I don't mean talk to the shooter. What I mean is this. Who—

Defense counsel then asked for a ruling on the objection, and the trial court sustained it; defense counsel then asked for a curative instruction:

> [DEFENSE COUNSEL:] Could we get an instruction to the jury to disregard that comment?
>
> THE COURT: Jury will so disregard.
>
> [DEFENSE COUNSEL:] Move for mistrial, your honor.
>
> THE COURT: Denied.
>
> [PROSECUTOR:] Let me say this. And I don't want to give the wrong impression in any sort of way. We're asking, *who do you expect to take the stand? Who do you expect to hear from, right?*
>
> [DEFENSE COUNSEL:] Your Honor, I object. That's a continuation of the previous

> comments, and I, again, object to commenting on the failure to testify.

The court again sustained Gongora's objection to the prosecutor's comment, granted his request to instruct the jury to disregard the comment, and overruled his motion for a mistrial. The prosecutor continued:

> [PROSECUTOR:] I don't want—to make it clear, y'all, Defendant has a Fifth Amendment right not to testify. And, of course—and I don't want to give any wrong impression on that whatsoever. Okay?
>
> What I want to talk about is this. When you talk about the credibility of a person, I wish you—and I made a—I made a big mistake there. I'll make it very clear. *I'm not talking about, do you want to hear from him, because you can't do that.*
>
> [DEFENSE COUNSEL:] Your Honor, again, I'm going to object. It's on the same continuing subject matter. We object to comment on the failure . . . to testify.
>
> THE COURT: As to that particular statement, overruled.
>
> [PROSECUTOR:] Let me back up and tell you this. Let me define it by the roles in the car. That's what I'm trying to get at. Okay?
>
> The roles in the car are this. . . . And then you have a person inside the car who is the

Defendant's brother, right? Where is that person? We know the person was there. They could have brought that person, but you never heard from that person. And that's—

[DEFENSE COUNSEL:] Your Honor, I'm going to object as to what that person is and ask to approach the bench to make a record.

THE COURT: Counsel approach.

(At the bench, on the record:)

[DEFENSE COUNSEL:] I'll be brief.

Judge, our objection is that we issued bench warrants and subpoenas. We asked to have people brought in. They took the Fifth. And when he says "that person," that diagram is still up there showing Albert [Orosco] and everybody else, and that is an improper comment, and it's not invited.

[PROSECUTOR:] Judge, I'm trying to correct that right now to make it better in terms of I'm just talking about the roles of the persons involved.

THE COURT: All right. Sustain the objection, Counselor.

[PROSECUTOR # 2:] Excuse me. Let me make one comment for the record also.

Immediately—what [the prosecutor] was talking about there, so it's clear for the record, was that he mentioned the name "Steven

> Gongora." He mentioned the name, and he said, "The Defendant's brother." And he said, "Where is that person?"
>
> Steven Gongora is the Defendant's brother, and his name is also on the chart, and that's what he was talking about.
>
> THE COURT: All right. You need to clear it up, Counselor.
>
> [PROSECUTOR:] I will.

Defense counsel then asked if his objection was sustained. The trial court sustained the objection and, on request of defense counsel, instructed the jury to disregard the comment. The trial court then overruled appellant's motion for mistrial. The prosecutor continued:

> [THE PROSECUTOR:] Ladies and gentlemen, I want to wrap this up, because that's what I'm talking about, the confusion in the case.
>
> When I—when you're talking about the people inside the car, this is it. You have the person inside the van and, from all the testimony, established one person is the shooter. You have a person in the car who got out and could possibly have stopped the killing from ever taking place. You have a person inside the car, by the testimony, you all know was involved in another shooting later that night. You have a person in the car who was related to the Defendant. That is his brother. Right?

Then you have a person inside there who is just present. Okay?

. . .

Those are the different roles of the persons inside the car. You ask who—you know, you hear from this case, and who should—you know, how to determine the credibility. *Who do you want to hear from? Who do you expect to hear from? The person who wasn't involved at all, that had nothing at all, just present during that deal? Of course, you hear from that person.*

When you're considering and evaluating the credibility of the next person—and that's who I'm talking about in talking about who you're going to hear from. I'm talking about, when listening to Juan Vargas, there's different people who played different roles. When you consider the fact that we actually spoke to him, that's what I'm talking about. I'm not talking about who would you want to hear from, who would you expect us to call, but I meant to define it in the terms of the roles of those involved in the case. Okay?

. . .

That's what I wanted you to consider. That's what I was trying to discuss about the different roles and *who you would expect to hear from* or expect us, you know, to be looking at. That was it. Just examine their roles.

In its opinion rejecting Gongora's claims on direct appeal, the CCA admitted that "the prosecutor's actual comments tended to be inartful and often confusing," but stated that, "viewed in context, the complained-of comments appear to be the prosecutor's attempt to comment on appellant's failure to produce witnesses other than appellant, which is a permissible area of comment."[25] The CCA concluded that the record showed "the prosecutor's comments were not so blatant that they rendered the instructions to disregard ineffective" and held that "the judge reasonably concluded that the instructions to disregard effectively removed any prejudice caused by the prosecutor's comments."[26]

The federal district court reviewing Gongora's § 2254 petition found that the prosecutor's comments constituted constitutional error because the prosecutor intended to comment on Gongora's silence and that "the character of the remarks were such that the jury would necessarily construe them as comments on Gongora's silence."[27] Nonetheless, the district court found the error to be harmless, concluding that "there [was] no evidence . . . of a nexus between the prosecutor's improper remarks during argument and the jury's decisions" and

---

[25] *Gongora I*, 2006 WL 234987, at *10.

[26] *Id.*

[27] *Gongora III*, 498 F. Supp. 2d at 926.

presuming that the jury followed the cautionary and curative instructions given by the trial court.[28]

B.

1.

At the first step of our analysis, we agree with the district court that Gongora has met his burden of showing a constitutional violation. The prosecutor repeatedly referred to Gongora's failure to testify, and whatever the prosecutor's subjective intent in making the remarks, "the character of the remark[s] [was] such that the jury would naturally and necessarily construe [them] as . . . comment[s] on the defendant's silence."[29] Indeed, the state no longer maintains that the prosecutor's comments on Gongora's failure to testify did not violate the Fifth Amendment. To the extent that the CCA reached a contrary conclusion, it unreasonably applied the clearly established federal law of *Griffin* and its progeny.[30] To conclude otherwise empties all meaning of this cornerstone of rights upon which our criminal justice system rests. Its very centrality renders it a primer rule—etched in the minds of all players in a criminal case. Single episodic violations will creep in, but repeated and direct violations are

---

[28] *Id.* at 927.

[29] *Jackson v. Jackson*, 194 F.3d 641, 652 (5th Cir. 1999) (citation omitted).

[30] *See* 28 U.S.C. § 2254(d)(1).

both inexplicable and inexcusable. Certainly not excusable by ignorance or inexperience, as we will explain.

2.

At the second step, we assess the prejudicial impact of this constitutional error, applying the standard set forth in *Brecht*. We make this assessment "in light of the record as a whole."[31] As the Supreme Court has explained, the *Brecht* standard does not require the petitioner to establish that it is more likely than not that the constitutional violation resulted in actual prejudice: "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win."[32] Several factors are relevant to this inquiry, including whether the comments were "extensive," whether "an inference of guilt from silence [was] stressed to the jury as a basis for conviction," and whether "there is

---

[31] *Brecht*, 507 U.S. at 638; *see also United States v. Pierre*, 958 F.2d 1304, 1312 (5th Cir. 1992) (en banc) ("To determine the potential prejudicial effect of the statements, we must consider the context in which the prosecutor made them.").

[32] *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). The Court has "deliberately phrase[d] the issue in terms of a judge's grave doubt, instead of in terms of 'burden of proof.' " *Id.*

evidence that could have supported acquittal."[33] We also consider the effect of any cautionary or curative instruction given to the jury.[34] Considering each of these factors, we conclude that the error was not harmless under *Brecht*.[35]

a. Extent of the Comments

As the district court observed, "the prosecutor's remarks on Gongora's failure to testify were numerous and blatant."[36] Rather than a single question or incidental statement, the prosecutor

---

[33] *Anderson v. Nelson*, 390 U.S. 523, 523–24 (1968); *see also United States v. Johnston*, 127 F.3d 380, 398 (5th Cir. 1997) (considering "the magnitude of the prejudicial effect of the remark" and "the strength of the evidence of the defendant's guilt").

[34] *See Johnston*, 127 F.3d at 398 (listing "the efficacy of any cautionary instruction" as a factor to consider in assessing the harmlessness of a prosecutor's improper comments); *see also Greer v. Miller*, 483 U.S. 756, 767 n.8 (1987) (finding "no reason to believe that the jury in [the] case was incapable of obeying . . . curative instructions" given after the introduction of inadmissible evidence).

[35] Where, as here, the state appellate court made no finding under *Chapman*, the Supreme Court has suggested that it "makes no sense to require formal application of both tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." *Fry*, 551 U.S. at 120. We note, though, that as our *Brecht* analysis implies, the CCA could not have reasonably determined that the error in this case was harmless beyond a reasonable doubt.

[36] *Gongora III*, 498 F. Supp. 2d at 926.

made a series of at least five comments referring to Gongora's silence as he argued to the jury that Gongora was the shooter. In the guise of clearing up what his earlier comments meant, the prosecutor continued to make comments relating back to the fact that Gongora had not testified. The judge repeatedly cautioned the prosecutor, yet the prosecutor further highlighted the reference by persisting in his train of "who you would expect to hear from" argument. This factor weighs against a finding that the error was harmless.

b. Inference of Guilt Stressed to the Jury

The prosecutor's initial comment clearly and strenuously—regardless of whether the comments were intentional or inartful—emphasized Gongora's guilt to the jury based on his failure to testify:

> You listen to people inside there. Who else would you want to hear from, though? The shooter? We're not going to talk to that person. . . . This person right here—
>
> [Pointing to Gongora's name on a chart.]
>
> Nelson Gongora, the shooter. That's the person on trial. That's the person who deserves to be found guilty of capital murder. Who should we go ahead and talk to? Who should we go ahead and present to you? Should we talk to the shooter? Should we talk to—

A principal focus of the prosecutor's closing argument, and central to the State's case, was the credibility of co-conspirators' statements that Gongora was the shooter. It appears as though the prosecutor attempted to bolster the credibility of those statements by repeatedly stressing the fact that some co-conspirators took the stand, while persistently questioning Gongora's claim of not-guilty by reference to his refusal to take the stand. The argument went to the core of the State's case and aggressively prompted the jury to infer guilt based on Gongora's failure to testify. Further, the comments came at the very end of the prosecution's closing arguments.

Examined in context, the prosecution's subsequent comments on Gongora's silence might be read, as the State and the dissent contend, as a product of a prosecutor tripping over his words as he inartfully attempted to correct his initial mistake. But their effect, coming as they did after the prosecutor's initial statement stressing an inference of guilt, was to reinforce the impression of Gongora's guilt from his failure to testify. It also matters not that the prosecutor's later comment merely recited that Gongora "has a Fifth Amendment right not to testify." As we have previously observed, a reference of this sort by the prosecutor "is far different" than a cautionary instruction about a defendant's Fifth

Amendment right not to testify given by the court.[37] Even as the prosecutor noted Gongora's Fifth Amendment right, the function of the prosecutor's comment was to "focus[] the jury's attention on the fact that the defendants did not testify."[38] While telling the jury of Gongora's right, he commented on its exercise. This translated into a clear message: Gongora's right not to testify is not a right to be free of the jury weighing the exercise of that right against him.

This factor, too, thus weighs against a finding of harmless error. The Fifth Amendment violation here did not consist of an "isolated comment," and whatever the prosecutor's subjective intent, his manifest purpose was to "strike at the jugular of the defense."[39]

c. Curative and Cautionary Instructions

While the trial court issued general cautionary instructions about the defendant's constitutional

---

[37] *Johnston*, 127 F.3d at 398.

[38] *Id.*

[39] *United States v. Griffith*, 118 F.3d 318, 325 (5th Cir. 1997) (internal quotation marks omitted) (finding that a *Griffin* violation did not affect the defendant's substantial rights where "it was an isolated comment, which did not 'strike at the jugular' of the defense, and which the jury was immediately instructed to disregard" and the "spontaneous remark [was] intended to call attention to [the defendant's] disruptive behavior during [the prosecutor's] argument, and not to imply that he was harboring guilty secrets").

right not to testify at voir dire and again immediately before closing argument,[40] the prosecutor's comments followed those instructions. Moreover, although two of the prosecutor's improper remarks were promptly followed by sustained objections and curative instructions, those instructions—telling the jury to "disregard" the comment—were perfunctory and devoid of specificity. Finally, the trial court did not sustain all of Gongora's objections to the improper remarks. Specifically, the court overruled Gongora's objection to the last of the improper comments, in which the prosecutor stated, "I'll make it very clear. I'm not talking about, do you want to hear from him, because you can't do that." While as a general rule, juries are presumed to follow instructions given by the court,[41] neither this court nor the Supreme Court has ever held that the mere fact that a curative or cautionary

---

[40] The court's instruction prior to closing argument read as follows:

> In a criminal case the law permits the Defendant to testify in his own behalf but he is not compelled to do so, and the same law provides that the fact that a defendant does not testify shall not be considered as a circumstance against him. You will, therefore, not consider the fact that the Defendant did not testify as a circumstance against him; and you will not during your deliberations allude to, comment on, or in any manner refer to the fact that the Defendant has not testified.

[41] *See Zafiro v. United States*, 506 U.S. 534, 540–41 (1993).

instruction was offered establishes harmlessness under *Brecht*.[42] Indeed, the Supreme Court has noted that "[t]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[43] Here, the efficacy of the trial court's initial cautionary instructions was diminished by the lack of a strong admonishment following the statements, the fact that the cautionary instruction preceded the problematic statements, the court's overruling of Gongora's objection to the prosecutor's final remark on his silence, and the mixed message resulting from allowing the jury to consider the comments in some respects.

d. Evidence Supporting Acquittal or Conviction

We also consider the evidence of guilt and innocence presented at trial. The prosecution maintained throughout that Gongora and Orosco had approached Sierra and that Gongora was the shooter. This theory relied on the trial testimony of

---

[42] *See, e.g.*, *Johnston*, 127 F.3d at 398.

[43] *Richardson v. Marsh*, 481 U.S. 200, 207 (1987) (quoting *Bruton v. United States*, 391 U.S. 123, 135–36 (1968)) (internal quotation marks omitted); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974) (acknowledging that "some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect").

two of Gongora's co-conspirators, Juan Vargas and James Luedtke, both of whom had credibility issues. The evidence of guilt in this case was not overwhelming, and there was substantial evidence supporting acquittal.

First, the jury had reason to question Vargas's and Luedtke's testimony that Gongora was the shooter. According to Vargas's initial, written and sworn confession (prior to any plea agreement), Carlos Almanza and James Luedtke approached Sierra and Almanza was the shooter. The statement of Vargas's wife, given to a detective, was consistent with the facts in that first confession. It was only after Vargas was re-interviewed by Detective Ortega (when he was seeking a plea bargain) that Vargas orally contradicted his initial written statement to claim that Gongora and Orosco exited the van to approach Sierra.

Dylan Griffith, with whom Luedtke had lived at the time of the offense, testified that when he met up with Luedtke and the others in Vargas's van after the shooting, Albert Orosco had a .38 in his waistband and was bragging about having killed a man, saying he took "his dreams" (the words that Luedtke attributed to Gongora). In addition, Griffith testified that Luedtke had originally asked Griffith whether he should tell police that Orosco did it, and when Griffith said Luedtke should tell the truth about whatever happened, Luedtke said he was not "going down" for it.

Moreover, while Vargas replaced Almanza and Luedtke with Gongora and Orosco in his second statement to police, he did not indicate in that statement that he had actually seen Gongora shoot Sierra. Indeed, it would have been difficult for Vargas or Luedtke to have actually seen the shooting, given their positions in the van and the van's location at the time. In addition, the diagram drawn by one of the detectives based on his interview of Vargas shows that Gongora—according to Vargas—would have been walking on the right of Sierra. Luedtke, too, placed Gongora on the right. But Sonia Ramos, the State's lead-off witness and the only independent eyewitness in the case, stated that the man walking on the left of Sierra shot him; her testimony was consistent with forensic evidence that showed a bullet had hit the back, left side of Sierra's head. Vargas's second statement to police had put Orosco on the left. The State offered no explanation of this significant difficulty, which was created by its own witnesses on direct examination.

Second, even taking into account the alternative theory offered to the jury—that Orosco and Gongora entered into a conspiracy to rob Sierra and that Orosco shot Sierra in furtherance of that conspiracy—the evidence against Gongora was far from overwhelming, for at least two reasons. First, the alternative theory not only required the jury to find that Gongora and Orosco entered into a conspiracy to rob Sierra and that Orosco shot Sierra in furtherance of the conspiracy, but also that the

shooting "should have been anticipated" by Gongora. Yet the State presented no direct evidence that Gongora should have anticipated a shooting of Sierra by Orosco and made no effort to argue that point in its closing arguments.[44] Second, there was evidence indicating that *neither* Gongora *nor* Orosco shot Sierra. Ramiro Enriquez, who had no stake in the case, testified that he was a friend of Almanza in prison and that Almanza had said he did the shooting. That testimony largely aligned with Vargas's original sworn statement in which he had said that Almanza and Luedtke had approached Sierra and that Almanza was the shooter. The tension between Vargas's testimony that he saw Gongora shoot Sierra and Vargas's indication that Gongora was on Sierra's right not only cast doubt on Vargas's claim that Gongora was the shooter, but also more generally on the credibility of Vargas's revised account of what occurred. Gongora's written statement provided to detectives asserted that he was not the shooter; it made no mention of Orosco;

---

[44] The dissent insists that "the evidence is overwhelming that, at the very last, Gongora was guilty as a party to capital murder," pointing to Gongora's written statement, in which Gongora admitted that he and others exited the van to "get a little money [from Sierra] and go about our business." But in its focus on the evidence of Gongora's participation in the conspiracy to rob Sierra, the dissent overlooks the fact that the jury could not convict Gongora unless it also determined that Gongora "should have . . . anticipated" that Sierra's murder would result from carrying out the conspiracy.

and, contrary to the CCA's summary of the evidence, it did not indicate that Gongora approached Sierra.

Finally, the notes sent out by the jury during deliberations suggest that the prosecutor's comments reflected a focus on which of the PLM members in the van had testified and which had not. One note requested Vargas's first statement to the detectives and another asked about Vargas's response to a question from defense counsel about which people were outside the van,[45] hinting that the jury questioned the credibility of Vargas's testimony.

---

[45] Specifically, Jury Note # 3 stated: "We need the original statement of Juan Vargas of April 27th and his court testimony." The trial court responded that Vargas's original statement to police was not evidence. Jury Note # 5 stated: "On Juan Vargas Statement on Mon March 24th I would like to know when the defense ask[ed] 'who was outside the van' he mention 2 people who were outside the van, what were the names he said." The court responded: "If you wish to receive the testimony, it will be necessary for you to certify that you are in dispute as to a specific statement of the witness, and you should request that part of the witness' statement on the specific point in dispute, and only on that point which is in dispute." The jury then appears to have revised the original note, crossing out "mention" and replacing it with "stated," crossing out "who" (in the phrase "who were outside the van"), crossing out "said" and replacing it with "stated," and adding: "Three jurors could not hear the response of Juan Vargas." The court then responded: "The specific question you requested was not asked. Please specify whether you are asking about a specific question or a general topic on that issue. If you wish to receive the testimony, it will be necessary for you to certify that (continued…)

* * *

In sum, the Fifth Amendment violation in this case was not "an isolated comment in a sea of evidence."[46] The violation consisted of repeated comments that began after the court issued its cautionary instruction and continued following each of the court's brief curative instructions. The physical evidence and the statement of the only non-biased eyewitness did not support the co-conspirators' testimony that Gongora was the shooter. The evidence that Gongora at least approached Sierra with Orosco to attempt a robbery was somewhat stronger. However, contrary to the state's contention during closing arguments, the

---

you are in dispute as to a specific statement of the witness, and you should request that part of the witness' statement on the specific point in dispute, and only on that point which is in dispute." The jury did not resubmit the request. The only other jury note requesting evidence or testimony was Jury Note # 1. That note requested "all evidentiary exhibits, except the bullets," "photos of any who testified that were in the van," and "the easel with all exhibits."

[46] *Cotton v. Cockrell*, 343 F.3d 746, 752 (5th Cir. 2003) (citation omitted) (internal quotation marks omitted) (finding that a comment by the prosecutor was harmless where two non-interested witnesses identified the defendant as the attacker and the defendant had admitted to an acquaintance that he had "killed a D.A."); *see also Nethery v. Collins*, 993 F.2d 1154, 1159 (5th Cir. 1993) (finding that a prosecutor's improper comment did not have a substantial and injurious effect in light of the "overwhelming evidence of guilt").

evidence was not "undisputed" that Gongora was guilty as a co-conspirator, in particular given that the State's main witness had originally identified two others as the people who had approached and killed Sierra—one of whom bragged about the killing to Ramiro Enriquez, an uninvolved party. Indeed, the jury seemed particularly concerned about Vargas's shifting statements as to who had approached Sierra. Ultimately, "when a court is 'in virtual equipoise as to the harmlessness of the error' under the *Brecht* standard, the court should 'treat the error . . . as if it affected the verdict.' "[47] Because the record here leaves us "in grave doubt as to the harmlessness of [the] error," Gongora is entitled to relief.[48]

V.

Because Gongora was denied a right to a fair trial by the prosecutor's comments in violation of his Fifth Amendment right not to testify, we REVERSE the judgment of the district court, GRANT Gongora's petition for habeas relief, and vacate his conviction. Gongora will be released from custody unless within six months of the mandate of this court he is again brought to trial or the case is otherwise terminated by plea or other disposition under state law.

---

[47] *Fry*, 551 U.S. at 121 n.3 (quoting *O'Neal*, 513 U.S. at 435).

[48] *O'Neal*, 513 U.S. at 437.

OWEN, Circuit Judge, dissenting:

The majority opinion seriously misapprehends what constitutes actual harm, and it requires the State to retry Gongora or release him even though the evidence is overwhelming that, at the very least, Gongora was guilty as a party to capital murder. The majority opinion holds that both the Texas Court of Criminal Appeals (TCCA) and the federal district court were unreasonable in denying relief to Gongora. I respectfully dissent. I cannot agree with the majority opinion's conclusion that "the extraordinarily extensive comments [by the prosecutor] on Gongora's failure to testify resulted in actual prejudice."[1] The prosecutor's comments were neither "extraordinarily extensive" nor actually prejudicial.

The prosecutor's problematic statements did not have a "substantial and injurious effect or influence in determining the jury's verdict"[2] of guilt because the jury instructions permitted the jury to convict Gongora of capital murder by finding that he entered into a conspiracy to rob the victim, Sierra, and that Gongora should have anticipated his coconspirator would shoot the victim. The evidence was overwhelming that only two men exited the van to

---

[1] *Ante* at 2.

[2] *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)) (internal quotation marks omitted).

rob the victim. Gongora admitted, in a written confession, that he intended to rob Sierra and that he exited the van. While Gongora claimed that all six occupants got out of the van to commit robbery, every other account of the attempted robbery and shooting was that only two men left the van. The prosecutor's improper comments were focused on convincing the jury that Gongora was the actual shooter, an alternative ground on which the jury could have found Gongora guilty. The prosecutor's comments about Gongora's failure to testify had little, if any, bearing on Gongora's guilt as a conspirator and responsible party in light of Gongora's own confession that he exited the van to rob Sierra.

With regard to the number and extent of the prosecutor's improper comments, considered in context, the prosecutor commented three times, at most, on Gongora's failure to testify, and these comments were themselves confusing. They were made in conjunction with the prosecutor's arguments about the credibility of two occupants of the van during the shooting who testified at Gongora's trial and on the failure of Gongora to call as a witness his brother Stephen Gongora, who was also in the van during the shooting.

An entirely separate question is whether Gongora's conviction can be upheld since the jury issues allowed the jury to find him guilty of capital murder, as an alternative ground, under Texas's "law of parties," which permits conviction of capital

murder on a finding that the defendant anticipated a human life would be taken. The majority opinion does not reach this issue. Though the jury issues may have been infirm under the Eighth Amendment, United States Supreme Court precedent that has not been expressly overruled permits Texas courts to make the finding that Gongora had the requisite mental state to satisfy the Eighth Amendment's requirements. The TCCA made that finding and upheld Gongora's conviction on direct appeal.

I would affirm the district court's judgment denying habeas relief.

I

It is apparent that this has been a difficult case for us to resolve. The fact that we ordered oral argument solely on whether a certificate of appealability (COA) was warranted is evidence of the uncertainty we had as to the merits of the issues presented. We nevertheless concluded that a COA should issue.[3] We then heard arguments a second time, only then reaching the merits of the two issues now before us, and our consideration of those questions has been lengthy.

The first of the two issues pertains to statements made by one of the prosecutors, Granger, during closing arguments. To put these statements in

---

[3] *Gongora v. Quarterman*, No. 07-70031, 2008 WL 4656992, at *1 (5th Cir. Oct. 22, 2008).

context, it is helpful to review the closing arguments in their entirety. Another prosecutor, Rousseau, began the State's closing argument. The first point that Rousseau made to the jury was that Gongora could be found guilty even if he was not the "person who pulled the trigger" and that "[t]he evidence in this case is undisputed that the man is guilty as a party. That is without a doubt." With regard to Texas's law of parties, Rousseau told the jury that because of Texas's law of parties, "the answer, is he guilty or not guilty, is an easy question. Yes, he's guilty." The prosecutor then focused on an alternate ground that could support a verdict of a guilt, which was a finding that Gongora was "the one who pulled the trigger." Rousseau said that he would spend most of his time on this issue and proceeded to discuss the evidence that indicated that Gongora shot the victim and why evidence that Albert Orosco was the shooter should be discounted.

Following Rousseau's presentation, an attorney for Gongora began the defense's closing argument. He, too, recounted the evidence, pointing out that Juan Vargas changed his initial statement in which Vargas had said that Carlos Almanza was the shooter and that James Luedtke had exited the van with Almanza. Gongora's counsel conceded to the jury that other than this recanted statement, "Dylan Griffith is the only person that says Carlos [Almanza] did it." The thrust of the argument was that there was varied testimony as to who was the shooter. The candidates included not only Gongora

but also Orosco and Almanza. Gongora's other counsel then argued, attempting to convince the jury it should not find that a robbery or attempted robbery occurred because the shooter—either Almanza or Orosco, counsel posited—changed his mind as he approached the victim and killed Sierra rather than proceeding with a robbery. The motive for the murder, counsel contended, was some sort of insult from the victim to the shooter. Counsel then discussed the credibility of various witnesses, in particular Juan Vargas's lack of credibility. Little was said to call into question Gongora's guilt as a nonshooter.

Granger then argued for the State. His first point was a reminder to the jury to "[r]emember the law of parties. The law of parties is clear." He discussed the substance of that law, contending that Gongora was guilty of capital murder under it and again asserting that "[t]he law's clear. The law's very much on our side in this case." Granger asked the jury to consider the facts, pointing to Gongora's written confession to establish conspiracy to commit robbery.

Granger then turned to the alternate theory of guilt and examined at some length the varying evidence as to who actually shot the victim. One point that Granger emphasized to the jury was that every witness, including Sonia Ramos, a disinterested person who was driving past as the murder occurred, testified that two men got out of the van to accost the victim. The only contrary evidence was Gongora's written confession, which

said that "we all" got out of the van. At a minimum, counsel asserted, the credible evidence established that Gongora was one of those two men. Granger then argued that the consistency of the accounts of what happened "establishes the credibility" of the State's witnesses.

The evidence reflects that there were six people inside the van just before the victim was killed. They were:

Juan Vargas, the driver, who testified

James Luedtke, who testified

Nelson Gongora, the defendant, who asserted the Fifth Amendment

Carlos Almanza, who asserted the Fifth Amendment

Albert Orosco, who asserted the Fifth Amendment

Steven Gongora, the defendant's brother, who was not called as a witness

The prosecutor who presented the final closing argument, Granger, talked to the jury about the two men inside the van who testified, Vargas and Luedtke, and another who was inside the van, Stephen Gongora, who did not testify and who did not assert his Fifth Amendment rights. The prosecutor said, "When [those who had exited to rob the victim] got back inside the van, then consider what was said there." It was then that the

statements at issue commenced. Granger told the following to the jury:

> Before you get there, I want to talk about the people you heard from. We're talking about Juan [Vargas] and James [Luedtke] through this entire deal. I used his first name, because, in this case, we have little brothers involved, you know, Steven Gongora, you know, Pablo Vargas. I'm using first names to keep everybody clear.
>
> Who did you expect us to bring to you? There's six people inside that van. When you look at it, here it is. Who would you expect for us to give to you to establish who the shooter is? Are you going to be satisfied in a case with gang members just looking at one person, even though he's telling you the exact truth, no matter what? Even if the time that he first told this story, he told the truth—he told the truth about someone he's scared to death of [Gongora]—this is James Luedtke. He had nothing against him. He had no crime pending. He had no reason to hide the truth. He had no reason to talk to us, but he told us the truth.
>
> You listen to people inside there. *Who else would you want to hear from, though? The shooter? We're not going to talk to that person.* We're not going to make a deal with that person. This person deserves what they get. This person right here. . . . Nelson Gongora,

> the shooter. That's the person on trial. That's the person who deserves to be found guilty of capital murder.
>
> Who should we go ahead and talk to? *Who should we go ahead and present to you?* Should we talk to the shooter? Should we talk to—

At this point, Gongora's attorney objected, "That's a comment on the failure to testify," and he requested a jury instruction to disregard the comment. He also moved for a mistrial. The trial judge sustained the objection, issued an instruction to disregard, and overruled Gongora's motion for a mistrial.

The prosecutor continued, "Let me say this. And I don't want to give the wrong impression in any sort of way. *We're asking, who do you expect to take the stand? Who do you expect to hear from, right?*" Gongora's attorney again objected, and the trial judge instructed the jury to disregard the comment. Gongora's counsel moved for a mistrial, which was denied.

The prosecutor then attempted to address his error:

> I don't want—to make it clear, y'all, Defendant has a Fifth Amendment right not to testify. And, of course—and I don't want to give any wrong impression on that whatsoever. Okay?
>
> What I want to talk about is this. When you talk about the credibility of a person, I wish

> you—and I made a—I made a big mistake there. I'll make it very clear. I'm not talking about, do you want to hear from him, because you can't do that.

Gongora's counsel again objected, but that objection was overruled "as to that particular statement." The prosecutor continued,

> Let me back up and tell you this. Let me define it by the roles in the car. That's what I'm trying to get at. Okay?
>
> The roles in the car are this. You have a person inside the car who is the shooter. You have a person inside the car who got out with the shooter. You have a person inside the car who was guilty—or, actually, may have participated in another shooting later that night. You have a person inside the car who is just sitting there who is present. And then you have a person inside the car who is the Defendant's brother, right? Where is that person? We know the person was there. They could have brought that person, but you never heard from that person. And that's—

Gongora's counsel interjected an objection, and the judge called counsel to the bench. Gongora's attorney asserted that bench warrants and subpoenas had been issued, but that "they [the witnesses other than Gongora] took the Fifth." Gongora's counsel also objected that the prosecutor had been pointing to a diagram "showing Albert [Orosco] and everybody

else" while commenting on those witnesses', not Gongora's, failure to testify. The objection was sustained.

One of the State's other prosecutors, Rousseau, then commented for the record, saying,

> Immediately—what J.D. [Granger] was talking about there, so it's clear for the record, was that he mentioned the name "Steven Gongora." He mentioned the name, and he said, "The Defendant's brother." And he said, "Where is that person?"
>
> Steven Gongora is the Defendant's brother, and his name is also on the chart, and that's what he was talking about.

The trial judge responded, "All right. You need to clear it up, Counselor." At the request of Gongora's counsel, the judge then reiterated that the objection was sustained, instructed the jury to disregard, and denied Gongora's motion for a mistrial. Granger then continued, *without any further objection by Gongora's counsel,* as follows:

> Ladies and gentlemen, I want to wrap this up, because that's what I'm talking about, the confusion in the case.
>
> When I—when you're talking about the people inside the car, this is it. You have the person inside the van and, from all the testimony, established one person is the shooter. You have a person in the car who got out and could

possibly have stopped the killing from ever taking place. You have a person inside the car, by the testimony, you all know was involved in another shooting later that night. You have a person in the car who was related to the Defendant. That is his brother. Right? Then you have a person inside there who is just present. Okay? . . . .

Those are the different roles of the persons inside the car. You ask who—you know, you hear from this case, and who should—you know, how to determine the credibility. Who do you want to hear from? Who do you expect to hear from? The person who wasn't involved at all, that had nothing at all, just present during that deal? Of course, you hear from that person.

When you're considering and evaluating the credibility of the next person—and that's who I'm talking about in talking about who you're going to hear from. I'm talking about, when listening to Juan Vargas, there's different people who played different roles. When you consider the fact that we actually spoke to him, that's what I'm talking about. I'm not talking about who would you want to hear from, who would you expect us to call, but I meant to define it in the terms of the roles of those involved in the case. Okay?

The roles that are defined in this case are abundantly clear. When you look at all the

> roles of those persons involved, the person in this case who is, you know, least culpable, besides the person who didn't do anything, is the driver, right?
>
> That's what I wanted you to consider. That's what I was trying to discuss about the different roles and who you would expect to hear from or expect us, you know, to be looking at. That was it. Just examine their roles.

I agree that the statements italicized in the above quotations were an impermissible comment on Gongora's assertion of his Fifth Amendment rights. However, other of the statements that the panel majority's opinion concludes "strenuously . . . emphasized Gongora's guilt to the jury based on his failure to testify"[4] do not clearly fall into that category. Those statements are instead the prosecutor's explanation of who he meant when he asked, "[D]o you want to hear from him[?]" The statement, "I'll make it very clear. I'm not talking about, do you want to hear from him, because you can't do that," does refer to the Gongora's exercise of his Fifth Amendment rights, but the context of the statement makes clear that the prosecutor, in asking who "do you want to hear from," was referring to Vargas, Luedtke, and Stephen Gongora, the three people in the van who did not assert their Fifth

---

[4] *Ante* at 17.

Amendment rights. Similarly, the final two statements italicized in the majority opinion referred to the occupants of the van who did not assert the Fifth Amendment. It is telling that Gongora's counsel did not make *any* objection at trial to these two arguments that the majority opinion says are among five egregious statements. In these final two statements on which the panel majority relies, the prosecutor's point, while clumsily made, was that the State called Vargas and Luedtke as witnesses. Gongora could have called, but did not call, the only other occupant of the van who did not assert the Fifth Amendment, Gongora's brother. Gongora's counsel understood the argument that the prosecutor was making in this regard and did not object.

Gongora argued in his direct appeal to the TCCA that the prosecutor's comments were unconstitutional, but the state court disagreed. The Texas court reasoned, "When viewed in context, the complained-of comments appear to be the prosecutor's attempt to comment on [Gongora's] failure to produce witnesses other than [Gongora], which is a permissible area of comment."[5] The state court acknowledged that the prosecutor's comments "tended to be inartful and often confusing, leading the trial judge to sustain appellant's objections to the

---

[5] *Gongora v. State*, No. AP-74636, 2006 WL 234987, at *10 (Tex. Crim. App. Feb. 1, 2006) (en banc).

remarks and to instruct the jury to disregard them."[6] Nevertheless, the state court concluded that the trial court "did not abuse its discretion in thereafter overruling [Gongora's] various motions for mistrial."[7] The court explained that "[o]n this record, the prosecutor's comments were not so blatant that they rendered the instructions to disregard ineffective," and the trial judge "reasonably concluded that the instructions to disregard effectively removed any prejudice caused by the prosecutor's comments."[8]

On federal habeas review, the district court "concluded that the prosecutor's remarks concerning Gongora's failure to testify amount[ed] to constitutional error."[9] But the district court ultimately held that the constitutional error was harmless. There was no "evidence in the record that [the] remarks 'had substantial and injurious effect or influence in determining the jury's verdict' as required for the granting of federal habeas relief."[10] The district court also noted that the trial judge had issued several curative and cautionary jury instructions regarding the Fifth Amendment

---

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Gongora v. Quarterman*, 498 F. Supp. 2d 919, 927 (N.D. Tex. 2007).

[10] *Id.* (quoting *Fry v. Pliler*, 551 U.S. 112, 116 (2007)).

privilege against self-incrimination.[11] Because "[j]uries are presumed to follow their instructions," the district court concluded, these instructions further mitigated the harm from the comments.[12]

II

Gongora may obtain federal habeas relief on his claim of improper prosecutorial comment only if that constitutional error was not harmless. "[I]n § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht* [*v. Abrahamson*], whether or not the state appellate court recognized the error and reviewed it for harmlessness under . . . *Chapman* [*v. California*, 386 U.S. 18 (1967)]."[13] In *Brecht*, the Supreme Court established the standard that a constitutional error is harmless unless the habeas petitioner shows that it "had substantial and injurious effect or influence in determining the jury's verdict."[14]

Gongora has not shown that the constitutional error had substantial and injurious effect or influence in determining the jury's verdict. The first

---

[11] *Id.*

[12] *Id.*

[13] *Fry*, 551 U.S. at 121–22 (citations omitted).

[14] *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

hurdle that Gongora must overcome is the effect of the curative and cautionary jury instructions at Gongora's trial. I agree with the district court that these instructions mitigated the prejudicial effect of the prosecutor's comments. The trial judge, in addition to issuing curative instructions during the prosecutor's closing argument, admonished the jurors several times that they could not and must not consider Gongora's choice not to testify as evidence of guilt. The judge issued such cautionary instructions at voir dire and again immediately before closing arguments, when it instructed the jury:

> In a criminal case the law permits the Defendant to testify in his own behalf but he is not compelled to do so, and the same law provides that the fact that a defendant does not testify shall not be considered as a circumstance against him. You will, therefore, not consider the fact that the Defendant did not testify as a circumstance against him; and you will not during your deliberations allude to, comment on, or in any manner refer to the fact that the Defendant has not testified.

Such jury instructions are "powerful tool[s] . . . to protect the [Fifth Amendment] privilege" and give the trial judge a "unique power . . . to reduce" speculation "about why a defendant stands mute in the face of a criminal accusation."[15] Absent a

---

[15] *Carter v. Kentucky*, 450 U.S. 288, 303 (1981).

showing to the contrary, we presume that the jury heeded the judge's instructions.[16] On the basis of the record, and considering the evidence of guilt and the presumptively effective jury instructions, the improper comments did not have a substantial and injurious effect or influence in determining the jury's verdict.

Gongora confessed in writing that he intended to rob the victim. He confessed in writing that he left the van to rob the victim. Although he said that everyone else in the van also exited to rob the victim, he is the sole person to give that account. The disinterested eye witness who was driving past as the shooting occurred testified that only two men were accosting the victim. In Vargas's original, subsequently withdrawn, statement to authorities as well as his later statement, he said that only two men exited the van to commit the robbery. The jury unquestionably concluded that Gongora was one of those two men and that one of them was armed with the gun that shot the victim. Gongora admitted that he left the van. The only question was who was the actual shooter. The fact that Gongora may not have

---

[16] *Zafiro v. United States*, 506 U.S. 534, 540–41 (1993); *see also Portuondo v. Agard*, 529 U.S. 61, 67 (2000) ("It is reasonable enough to expect a jury to comply with [a curative] instruction since, as we observed in *Griffin*, the inference of guilt from silence is not always 'natural or irresistible.' " (quoting *Griffin v. California*, 380 U.S. 609, 615 (1965))).

pulled the trigger did not absolve him of guilt under the charge given to the jury.

Even were the question before the jury limited to whether Gongora was the shooter, there is no actual prejudice demonstrated on the record before us. For the reasons discussed above, the trial judge's instructions were adequate.

The evidence that Gongora was not the shooter is not as strong as the majority opinion suggests. The majority opinion makes much of the testimony of Sonia Ramos, a disinterested witness who was driving past as the shooting occurred. She did now know any of the parties involved. She could say only on which side of the victim the shooter stood. The majority opinion says that Ramos's testimony conflicts with Vargas's placement of Gongora and Orosco. However, it is not at all clear from the record what left or right meant to either Vargas or Ramos in the context of Ramos driving past the scene of the murder at approximately thirty miles an hour and looking back over her shoulder from a vantage point that was different from Vargas's. More importantly, the record about what Vargas said as to the positioning of Gongora and Orosco comes from a diagram drawn by a detective based on his interview with Vargas. Notably, the original diagram, drawn contemporaneously with the interview, does not show Gongora and Orosco in distinct positions. Instead, the diagram contains arrows pointing from "(Nelson / Albert)" to two *X*s marking their position. The detective created the

diagram to aid his "own personal understanding" based on his interpretation of Vargas's recollection of the event. Vargas neither created the diagram nor testified to its accuracy at trial.

In sum, Gongora has not shown that the prosecutor's violations of the Fifth Amendment substantially influenced the jury's verdict that he was guilty of capital murder.

III

Gongora additionally argues that his sentence of capital punishment violates the Eighth Amendment, as applied to the states pursuant to the Fourteenth Amendment, based upon the Supreme Court's clearly established holdings in *Apprendi v. New Jersey*,[17] *Ring v. Arizona*,[18] and *Blakely v. Washington*,[19] which Gongora says call into question the continued vitality of *Enmund v. Florida*,[20] *Tison v. Arizona*,[21] and *Cabana v. Bullock*.[22] Gongora contends that the "anti-parties" charge as used in Texas is unconstitutional because the jury was never required

---

[17] 530 U.S. 466 (2000).

[18] 536 U.S. 584 (2002).

[19] 542 U.S. 296 (2004).

[20] 458 U.S. 782 (1982).

[21] 481 U.S. 137 (1987).

[22] 474 U.S. 376 (1986), *overruled in part by Pope v. Illinois*, 481 U.S. 497 (1987).

to find that he committed capital murder either by his own acts or by his substantial participation in the robbery of the victim with at least reckless indifference to the life of the victim. The jury instructions at the conclusion of the guilt/innocence phase of the trial permitted the jury to find Gongora guilty of capital murder if it found that the murder of the victim during the conspiracy to rob him was an offense that should have been anticipated.[23] During the sentencing phase, the questions submitted permitted the jury to find that Gongora either intended to kill the victim or anticipated that a human life would be taken.[24]

The majority opinion did not reach this issue because of its disposition of the Fifth Amendment question. I nevertheless would deny habeas relief in

---

[23] The jury instructions in this case stated, in pertinent part, as follows:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, then all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy. Robbery is a felony.

[24] The issues submitted to the jury at the sentencing phase included "[w]hether the Defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken."

this case because unless and until the Supreme Court overrules its existing precedent, state courts, including state appellate courts, are permitted to make the finding that the defendant had the mental state required to satisfy the Eighth Amendment's requirements.[25]

Under Texas law, it is a capital crime to commit murder in the course of attempted robbery.[26] One who did not actually commit the murder may also be convicted of capital murder under Texas law based on the law of parties. By statute, a defendant who did not kill the victim and who did not intend for the murder to occur may nevertheless be convicted of a capital offense if, in an attempt to carry out a conspiracy to commit a felony, the murder "was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy."[27] The

---

[25] *See Hopkins v. Reeves*, 524 U.S. 88, 100 (1998); *Cabana*, 474 U.S. at 392.

[26] The Texas Penal Code provides as follows:

> (a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and: . . .
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnaping, burglary, robbery . . . .

Tex. Penal Code Ann. § 19.03(a)(2).

[27] Tex. Penal Code Ann. § 7.02(b).

instructions to the jury in this case permitted the jury to convict Gongora under these statutory provisions.

Pursuant to Texas's capital-sentencing scheme, after the jury found Gongora guilty of capital murder, it was required to answer three special issues to determine whether he was eligible for the death penalty.[28] Special issue number two asked the

---

[28] Article 37.071 of the Texas Code of Criminal Procedure provides that the issues submitted to the jury shall include the following:

> (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken. . . .
>
> [And if the answers to these questions are in the affirmative:]
>
> [(3)] Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

Tex. Code Crim. Proc. Ann. art. 37.071(b), (e)(1).

jury to answer the following question: "Do you find from the evidence beyond a reasonable doubt that the Defendant actually caused the death of Delfino Sierra or did not actually cause the death of Delfino Sierra, but intended to kill Delfino Sierra or another or anticipated that a human life would be taken?" Gongora contends that this special issue, combined with the law-of-parties instruction at the guilt/innocence phase of his trial, permitted the jury to sentence him to death on a finding of culpability no greater than that he anticipated a life would be taken, a level of culpability too low to comport with the requirements of *Enmund* and *Tison*.

The Supreme Court's decisions in *Enmund* and *Tison* both address the degree of responsibility the Eighth Amendment requires for the imposition of capital punishment after felony-murder convictions. In *Enmund*, the Supreme Court held that the death penalty cannot be imposed upon a defendant who, though involved in a felony, did not kill, attempt to kill, intend that a killing take place, or anticipate that lethal force would be used.[29] In *Tison*, the Supreme Court qualified *Enmund* by holding that "major participation in the felony committed, combined with reckless indifference to human life, is

---

[29] *See Cabana*, 474 U.S. at 386 ("*Enmund* . . . imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death."); *see also Enmund v. Florida*, 458 U.S. 782, 798 (1982).

sufficient to satisfy the *Enmund* culpability requirement."[30]

The Supreme Court has also held that the findings mandated by *Enmund* and *Tison* need not be made during trial proceedings.[31] The Supreme Court expressly held that "the Eighth Amendment does not require that a jury make the findings required by *Enmund*."[32] The death penalty may be imposed if "the requisite findings are made in an adequate proceeding before *some* appropriate tribunal—be it an appellate court, a trial judge, or a jury."[33] This holding was reaffirmed in *Hopkins v. Reeves*.[34]

When a federal habeas court reviews a claim that the death penalty has been imposed without the findings mandated by *Enmund* and *Tison*,

> the court must examine the entire course of the state-court proceedings against the

---

[30] *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

[31] *See Hopkins v. Reeves*, 524 U.S. 88, 100 (1998) ("*Tison* and *Enmund* do not affect the showing that a State must make at a defendant's *trial* for felony murder, so long as their requirement is satisfied at some point thereafter.").

[32] *Cabana*, 474 U.S. at 392.

[33] *Id.* (emphasis added).

[34] *Reeves*, 524 U.S. at 100 (emphasizing that *Cabana* "held that a State could comply with *Enmund*'s requirement at sentencing or even on appeal").

> defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made. If it has, the finding must be presumed correct . . . , and unless the habeas petitioner can bear the heavy burden of overcoming the presumption, the court is obliged to hold that the Eighth Amendment as interpreted in *Enmund* is not offended by the death sentence.[35]

In this case, the TCCA made the requisite finding on direct appeal, stating, "The testimony in the instant case showed that [Gongora] himself exited the van and shot the victim. Thus, he was a major participant in an offense who possessed 'reckless indifference' towards the murder."[36] As a result, the TCCA rejected Gongora's claim that his death sentence violated the Eighth Amendment.[37]

Pursuant to *Cabana*, the TCCA was permitted to make the requisite *Tison* finding that Gongora was a major participant in the robbery who possessed

---

[35] *Cabana*, 474 U.S. at 387–88 (citation omitted).

[36] *Gongora v. State*, No. AP-74636, 2006 WL 234987, at *12 (Tex. Crim. App. Feb. 1, 2006) (en banc).

[37] *See id.* ("Considering the evidence, the fact that the jury was authorized by the charge to convict appellant as a party does not make Article 37.071, section 2(b)(2) unconstitutional as applied to appellant in this case.").

reckless indifference towards the murder.[38] The TCCA made that finding here, and Gongora's argument that the TCCA unreasonably ignored evidence he believes to be in his favor is not sufficient to overcome the presumption of correctness accorded to the state court's findings.[39] Under *Cabana*, Gongora's death sentence does not violate the Eighth Amendment.

Gongora contends, however, that the Supreme Court's decisions in *Ring v. Arizona*[40] and *Apprendi v. New Jersey*[41] clearly established that only a jury, and not a judge, may make the findings mandated by *Enmund* and *Tison*. I do not agree. The Supreme Court has admonished federal courts time and again to construe its holdings narrowly for purposes of federal habeas review, and the Supreme Court "has held on numerous occasions that it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely

---

[38] *See Cabana*, 474 U.S. at 387.

[39] *See* 28 U.S.C. § 2254(e)(1).

[40] 536 U.S. 584 (2002).

[41] 530 U.S. 466 (2000).

established by [the Supreme Court]."[42]

The *Enmund*, *Tison*, and *Cabana* line of cases makes clear that the Eighth Amendment is "a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury."[43] The Supreme Court's decision in *Cabana* explained at some length that its "ruling in *Enmund* does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury."[44] This bears repeating. The limitations that the *Enmund* decision found to be imposed by the Eighth Amendment do not add elements to a state's statutory elements of a capital offense. The opinion in *Cabana* makes the following observations at various junctures:

> *Enmund* "does not affect the state's definition of any substantive offense, even a capital offense." *Enmund* holds only that the principles of proportionality embodied in the

---

[42] *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (internal quotation marks omitted); *see also Wright v. Van Patten*, 552 U.S. 120, 125–26 (2008) (per curiam) (rejecting petitioner's claim under § 2254(d)(1) because "[n]o decision of this Court . . . squarely addresses the issue in this case" and "[b]ecause our cases give no clear answer to the question presented"); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (rejecting petitioner's claim "[g]iven the lack of holdings from this Court" on the rule urged).

[43] *Cabana*, 474 U.S. at 386.

[44] *Id.* at 385.

> Eighth Amendment bar imposition of the death penalty upon a class of persons who may nonetheless be guilty of the crime of capital murder as defined by state law: that is, the class of murderers who did not themselves kill, attempt to kill, or intend to kill.[45]
>
> * * *
>
> We are unable to understand Justice BLACKMUN's statement that we have failed to grasp "the distinction . . . between defining an offense and being entitled to execute a defendant." As stated in the text, we recognize that there is a class of persons whom the State may define as having committed capital murder but whom the State may not permissibly execute. The point we are making, however, is that while the Eighth Amendment prohibits the execution of such defendants, it does not supply a new element of the crime of capital murder that must be found by the jury; hence, such cases as *Cole v. Arkansas*, which hold that the inadequacy of a jury's findings on the issue of guilt or innocence may not be corrected by an appellate court, are inapposite.[46]
>
> * * *

---

[45] *Id.* (citations omitted).

[46] *Id.* at 385 n.3.

> [T]he decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal defendant's constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate court is fully competent to make.[47]
>
> * * *
>
> *Enmund* . . . imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death. Nonetheless, the rule remains a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury.
>
> Indeed, *Enmund* does not impose *any* particular form of procedure upon the States. The Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund* for such punishment. If a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite

---

[47] *Id.* at 386.

> culpability; by the same token, if a person sentenced to death lacks the requisite culpability, the Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence. At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution. The State has considerable freedom to structure its capital sentencing system as it sees fit, for "[a]s the Court has several times made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme."[48]

If a state were to require in a statute the minimum requirements set forth in *Enmund* and *Tison* as an element of an offense or as a sentencing factor that could increase the severity of a sentence, then the Sixth Amendment, through the Fourteenth Amendment, would require a jury to find the requisite facts. That is the teaching of the decisions subsequent to *Cabana* on which Gongora relies.

The actual *holdings* in *Apprendi* and *Ring* were that when a *state statute* permits punishment to be increased based on the existence of particular facts, a jury must make the factual findings. Although the

---

[48] *Id.* at 386–87 (quoting *Spaziano v. Florida*, 468 U.S. 447, 464 (1984)).

rationale of *Apprendi* and *Ring* calls into question the reasoning in *Enmund*, *Tison*, and *Cabana*, those cases have not been overruled. Nor are the actual *holdings* in *Apprendi* and *Ring* in conflict with the holdings in *Enmund*, *Tison*, and *Cabana*.

In *Apprendi*, a *state statute* set the maximum penalty for possession of a firearm for unlawful purposes at ten years.[49] However, another *statute* permitted a judge to impose an "extended term" of imprisonment if the judge found that the defendant had acted to intimidate a person or a group because of race or other enumerated characteristics or beliefs.[50] The Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed *statutory* maximum must be submitted to a jury, and proved beyond a reasonable doubt."[51] That decision did not consider whether requirements imposed by the Eighth Amendment beyond the *statutory* elements of the offense or *statutory* sentencing enhancements must be found by a jury.

The Supreme Court's decision in *Ring* extended this principle to the capital-punishment context and

---

[49] *Apprendi v. New Jersey*, 530 U.S. 466, 468 (2000).

[50] *Id.* at 468–69.

[51] *Id.* at 490 (emphasis added).

overruled *Walton v. Arizona*[52] in part.[53] In so doing however, the Supreme Court discussed the state court's *Enmund* findings,[54] specifically citing *Enmund* and *Tison*, but it did not hold that state courts can no longer make such Eighth Amendment findings. The only state court findings at issue in *Ring* were the trial judge's finding of one *statutory* aggravating factor, which was that the offense was committed in "an especially heinous, cruel or depraved manner."[55] In framing the issue that was actually decided, the *Ring* opinion observed that based on the jury's findings alone, only a life sentence could have been imposed under state law.[56] A death sentence could be imposed under the

---

[52] 497 U.S. 639 (1990).

[53] *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (citing *Walton*, 497 U.S. 639).

[54] *Id.* at 594 ("Because Ring was convicted of felony murder, not premeditated murder, the judge recognized that Ring was eligible for the death penalty only if he was Magoch's actual killer or if he was 'a major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life.' "); *id.* (explaining that the trial judge "concluded that Ring 'is the one who shot and killed Mr. Magoch' " and that "[t]he judge also found that Ring was a major participant in the robbery and that armed robbery 'is unquestionably a crime which carries with it a grave risk of death.' ").

[55] *Id.* at 595 (internal quotation marks omitted).

[56] *Id.* at 597.

Arizona statute at issue only if "at least one aggravating factor is found."[57] The Supreme Court's actual holding is limited to the issue decided, which was "whether that aggravating factor may be found by the judge, *as Arizona law specifies,* or whether the Sixth Amendment's jury trial guarantee . . . requires that the aggravating factor determination be entrusted to the jury."[58] The Court did not address whether the *Enmund* findings must be made by a jury. The Supreme Court overruled *Walton* only to the extent that *Walton* held that *statutorily* required aggravating factors could be found by a state judge or appellate court.[59]

Neither *Ring* nor *Apprendi*—nor any other decision of the Supreme Court—has explicitly overruled *Cabana*'s holding that a trial judge or appellate court may make the Eighth Amendment findings mandated by *Enmund* and *Tison*. The Supreme Court has repeatedly "reaffirm[ed] that '[i]f a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly

---

[57] *Id.* (internal quotation marks omitted).

[58] *Id.* (emphasis added).

[59] *See id.* at 598–99, 609; *id.* at 609 ("[W]e overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.").

controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions.' "[60] Whether the Supreme Court will continue to adhere to the reasoning and holdings of *Enmund*, *Tison*, and *Cabana* is highly questionable. However, because no clearly established holding of the Supreme Court overruled *Cabana*'s holding that an appellate court may make the findings mandated by *Enmund* and *Tison*, Gongora's second claim must fail.

* * *

In conclusion, I would deny Gongora's application for a writ of habeas corpus because neither of his claims satisfy the requirements for a grant of the writ.

---

[60] *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (second alteration in original) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").

APPENDIX B
Gongora v. *Quarterman*,
498 F. Supp. 2d 919 (N.D. Tex. 2007)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FILED
JUL 30 2007
CLERK, U.S. DISTRICT COURT
By _____
DEPUTY

NELSON GONGORA,	§	
Petitioner,	§	
	§	
vs.	§	
	§	
NATHANIEL QUARTERMAN,	§	NO. 4:06-CV-836-A
Director, Texas Department of	§	
Criminal Justice, Institutional	§	
Division,	§	
Respondent.	§	

MEMORANDUM OPINION and ORDER

Came on for consideration the petition for writ of habeas corpus ("petition")[1] filed by Nelson Gongora

[1] While the undersigned recognizes that 28 U.S.C. § 2254 contemplates the filing of an "application" for writ of habeas corpus, the practice of the Northern District of Texas has long been instead to use the term "petition." Consistent with this now ingrained practice, the undersigned refers to Gongora's application under 28 U.S.C. § 2254 for writ of habeas corpus as the "petition" and uses the term "petitioner" in lieu of "applicant."

("Gongora"), an inmate in the Texas Department of Criminal Justice, Institutional Division, who is under sentence of death. The court has determined that the petition should be denied for the reasons set forth in this memorandum opinion and order.

I.

Procedural History

On March 27, 2003, Gongora was convicted of capital murder in the 371st Judicial District of Tarrant County, Texas, Judge James R. Wilson presiding. Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071, §§ 2(b) and (e), Judge Wilson sentenced Gongora to death. *See* 4 CR[2] at 941–42. The Texas Court of Criminal Appeals affirmed his conviction on February 1, 2006, in an unpublished opinion. *See Gongora v. State*, No. 74-636, 2006 WL 234987 (Tex. Crim. App. Feb. 1, 2006). The Supreme Court subsequently denied his petition for writ of certiorari. *See Gongora v. Texas*, ___ U.S. ___, 127 S. Ct. 142 (2006).

Gongora initiated state-habeas proceedings in the convicting court. On September 25, 2006, the trial

---

[2] A copy of Gongora's state-court records was forwarded to the court on December 15, 2006. The "CR" reference is to the clerk's record of the documents filed in the case. The "RR" reference is to the court reporter's record of the transcribed, state-trial proceedings. Where available, citations to both "CR" and "RR" are preceded by volume number and followed by the relevant page number(s). The "SH" reference is to the records of Gongora's state-habeas proceeding. Citations to "SH" are followed by the relevant page number(s).

court entered findings of fact and conclusions of law recommending that state-habeas relief be denied. *See Ex parte Moore,* No. 60, 115–02; SH at 52–57. By an unpublished order, the Texas Court of Criminal Appeals adopted those findings and conclusions and denied habeas relief on November 15, 2006. *See Ex parte Moore,* No. 60, 115–02 (Tex. Crim. App. 2006). The instant federal-habeas proceeding ensued.

II.

Underlying Facts

The Court of Criminal Appeals offered the following brief summary of the trial evidence:

> On the night of April 7, 2001, Juan Vargas was driving his van accompanied by [Gongora], Carlos Almanza, Albert Orosco, Steven Gongora, and James Luedtke when they saw Delfino Sierra walking down the street and decided to rob him. When Vargas pulled over, [Gongora] and Orosco jumped out of the van, ran toward Sierra, and demanded his money. When Sierra began to run, [Gongora] shot him in the head with a .38 caliber handgun. [Gongora] and Orosco then returned to the van. [Gongora] told his companions that he "took [Sierra's] dreams": and did "what [he] had to do" and warned them to remain silent.[3] [Gongora] appeared to be bragging about what he had done. The group then returned to [Gongora's] house for a cookout.

---

[3] Brackets in quotations in original.

> [Gongora] and Vargas were leaders in the criminal street gang Puro Li'l Mafia ("PLM"). Approximately two hours after [Gongora] killed Sierra, Vargas drove [Gongora] and Almanza to the house of a rival gang member. Almanza, in order to become a PLM member, shot into the house in retaliation for drive-by shootings that had occurred at [Gongora's] house. During the shooting, [Gongora] stood outside the van armed with a nine-millimeter handgun. The victim of this shooting survived.
>
> Several days later, an anonymous phone call helped establish that Vargas and Maria Morales owned the suspect van. Vargas was arrested on April 27, and gave a written statement to police naming Almanza as Sierra's killer. On May 9, Vargas met with Detective Carlos Ortega to correct the falsehoods in his first statement and identified [Gongora] as the shooter. Vargas explained that he had initially lied because he feared retaliation from [Gongora].
>
> On June 19, after he was arrested pursuant to a warrant, [Gongora] waived his rights and gave a voluntary signed statement. In his statement, [Gongora] admitted getting out of the van with others to rob Sierra. Then he heard shots and saw the man lying on the ground, but claimed not to know who fired the shots.

See Gongora, No. 74-636, 2006 WL 234987, at *4.

III.

Scope of Review

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Under AEDPA, the ability of federal courts to grant habeas relief to state prisoners is narrowly circumscribed:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (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.

AEDPA, § 104(3) (codified at 28 U.S.C. § 2254(d)). AEDPA further provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the

> burden of rebutting the presumption of correctness by clear and convincing evidence.

AEDPA § 104(4) (codified at 28 U.S.C. § 2254(e)(1)).

Having reviewed the petition, the response, the record, and applicable authorities, the court finds that none of Gongora's grounds has merit.

IV.

Grounds for Relief

Gongora urges five grounds in support of his petition. They are, in Gongora's language, as follows:

First Ground:

> [Gongora] is being denied due process of law and is being subjected to cruel and unusual punishment in violation of the Eight[h] and Fourteenth Amendments by being subjected to the death penalty because he was able to anticipate that death might result from his participation in the robbery.

Gongora Pet. at 22–23.

Second Ground:

> [Gongora] is being denied due process of law and his rights under the Fifth, Sixth, and Fourteenth Amendments when the prosecution commented upon his failure to testify several times in closing arguments.

Id. at 34.

Third Ground:

> [Gongora] is being denied due process of law and his rights under the Fifth, Sixth, and

> Fourteenth Amendments when the trial court refused to allow him to confront and impeach the major witness against him, Juan Vargas, with his tearful statements to his wife on the night of the shooting that Carlos Almanza had shot the man for no reason.

Id. at 60.

Fourth Ground:

> [Gongora] was denied due process of law and his rights under the Fifth, Sixth, and Fourteenth Amendments when the prosecutorial misconduct deprived [him] of two critical mitigation witnesses.

Id. at 66.

Fifth Ground:

> [Gongora] was denied due process of law and his rights under the Fifth, Sixth, and Fourteenth Amendments when the indictment under which he was charged failed to allege that [he] would be held as a party and specifically as a co-conspirator.

Id. at 70.

V.

Discussion

A. *First Ground: The claim that the death penalty as to Gongora is unconstitutional, because it is premised only on his being able to anticipate that death might result from his participation in the robbery.*

As his first ground, Gongora contends that his death sentence is unconstitutional, because the jury,

both at the guilt/innocence phase and the punishment phase, made no finding of culpability in the death of Delfino Sierra greater than that he "anticipated" that a life would be taken during the course of the robbery in which he participated. While there was evidence that Gongora was, in fact, the shooter, there was other evidence suggesting that someone else—Albert Orosco—was the shooter. Consequently, respondent does not dispute that the jury could have found Gongora guilty of capital murder and sentenced him to death based solely on its conclusion that Gongora "anticipated" that the death of a person could result from a robbery in which he participated.[4]

---

[4] The jury charge on this issue at the guilt/innocence phase was as follows:

> Now, therefore, if you believe from the evidence beyond a reasonable doubt, that the Defendant, Nelson Gongora, ... did ... intentionally cause the death of an individual, Delfino Sierra, by shooting Delfino Sierra with a deadly weapon, to-wit; a firearm, and that said Defendant was ... in the course of committing or attempting to commit the offense of robbery, of Delfino Sierra, or if you find and believe from the evidence beyond a reasonable doubt, that the Defendant, Nelson Gongora, entered into a conspiracy with Albert Orosco to commit the felony offense of robbery of Delfino Sierra and that ... in the attempt to carry out this conspiracy, Albert Orosco did then and there intentionally cause the death of an individual, Delfino Sierra, by shooting Delfino Sierra with a deadly weapon, to-wit: a firearm, and that such offense was a felony committed in furtherance of the unlawful purpose to commit robbery of Delfino Sierra **and was an offense that should have been anticipated by the Defendant as a result of carrying out the conspiracy, then you will find the Defendant guilty of**

(continued…)

Gongora's claim of constitutional error here is two-fold. First, he complains that jury instructions permitting conviction of capital murder and a sentence of death based on mere anticipation of a murder fails to meet the requirements set forth in the Supreme Court holdings of *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987), both of which, in turn, concern the moral culpability necessary for the imposition of the death penalty. Second, he complains that, on appeal, the Texas Court of Criminal Appeals erred by attempting to satisfy the moral-culpability element by its finding that the evidence showed that Gongora was the actual shooter. *See Gongora*, No. 74-636, 2006 WL 234987, at *12. According to Gongora, a finding of the Texas Court of Criminal Appeals cannot supply the missing element, because, under current Supreme Court jurisprudence, only the jury, and not a judge, may find the facts necessary to elevate his sentence to death. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002).

---

capital murder, though he may have no intent to commit capital murder, as charged in the Indictment.

See 3 CR at 882 (emphasis added).

During the punishment phase, the jury was also charged with the following special issue: "Whether Defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another **or anticipated that a human life would be taken.**" *See* 4 CR at 924 (emphasis added).

Because the court finds Gongora's first complaint to be without merit, it need not reach his second. The jury instructions at issue simply do not run afoul of the Supreme Court's holdings in *Enmund* or *Tison*. In *Enmund,* the Supreme Court held that the death penalty could not be imposed on a party who "aids and abets a felony in the course of which murder is committed by others but who does not himself intend to kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund*, 458 U.S. at 797. Unlike here, in *Enmund*, the record supported "no more than the inference that [the capital defendant] was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape." *Id.* at 788. Under those circumstances, the Supreme Court found that the defendant did not possess a sufficiently culpable mental state to warrant a death sentence. *Id.* at 798. In *Tison,* however, the Supreme Court clarified that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *See Tison*, 481 U.S. at 158.

Gongora's conclusory assertion to the contrary, a jury finding that Gongora anticipated the death of a person meets, if not surpasses, the moral-culpability threshold of "reckless indifference to human life" under *Tison.* Aside from the fact that this conclusion is supported by plain logic, the very case Gongora most heavily relies upon says, in effect, the same thing. *See Foster v. Quarterman*, 466 F.3d 359 (5th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2099 (2007).

In *Foster,* the district court had granted the capital defendant conditional habeas relief, because the jury had not made "both" requisite *Tison* findings. *Foster*, 466 F.3d at 369. The finding, however, that the district court concluded was missing had to do with the level of the defendant's "participation in the felony committed"[5] and not with whether the defendant had acted with "reckless indifference to human life." *Id.* As to the latter, the district court held that "the jury had made the reckless-indifference finding" pursuant to jury instructions that were virtually identical to those at issue here.[6] *Id.* The Fifth Circuit approved of that holding, saying:

> [A]s the district court held, Foster obviously displayed reckless indifference to human life. The jury found as much when it answered the earlier described special issue in the affirmative (the jury could not answer that issue in the affirmative unless it found, at a minimum, [that] Foster anticipated a life would be taken).

Foster, 466 F.3d at 370.

---

[5] Notably, though Gongora quotes both parts of the *Tison* holding, Gongora does not argue constitutional error based on the "major participation" prong of *Tison*.

[6] One of the special issues on the imposition of the death penalty in *Foster* asked the jury whether it " 'found from the evidence beyond a reasonable doubt that Kenneth Foster **actually caused** the decedent's death, or that he **intended to kill** the deceased or another, **or that he anticipated that a human life would be taken.**' " *Foster*, 466 F.3d at 368–69 (emphasis in original).

Just as in *Foster,* the instructions provided to Gongora's jury meet the reckless-indifferent requirement of *Tison*. Because the jury made this requisite finding, Gongora's argument that the Texas Court of Criminal Appeals failed to properly address the issue is irrelevant; and, Gongora's objection to that court acting as fact-finder in violation of *Apprendi* and *Ring* is rendered moot.[7] Gongora's first ground is without merit.

B. *Second Ground: The prosecution's comments on Gongora's failure to testify.*

Next, Gongora complains that, during the prosecutor's argument at the end of the guilt-innocence phase of the trial, the prosecutor repeatedly violated Gongora's constitutional rights by commenting on his failure to testify. The legal basis for the complaint is the principle plainly stated by the Supreme Court that "the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *See Griffin v. California*, 380 U.S. 609, 615 (1965); *see also United States v. Fierro*, 38

---

[7] In *Foster,* the Fifth Circuit reversed the district court's holding that *Apprendi* and *Ring* required the jury to have found that the defendant was a major participant in the felony. The Fifth Circuit held that *Apprendi* and *Ring* did not apply retroactively to Foster's case. *See Foster*, 466 F.3d at 369. Assuming they apply here, *Apprendi* and *Ring* are satisfied, because the jury made the finding that promotes the element of which Gongora complains.

F.3d 761, 771 (5th Cir. 1994). For a constitutional error to occur, "the prosecutor's manifest intent in making the remark must have been to comment on the defendant's silence, or the character of the remark must have been such that the jury would necessarily construe it as a comment on the defendant's silence." *See Jackson v. Johnson*, 194 F.3d 641, 652 (5th Cir. 1999). If a constitutional error has occurred, this court must then assess whether it was harmless. *See Fry v. Pliler*, ___ U.S. ___, 127 S. Ct. 2321, 2325 (2007). In a federal habeas proceeding, an error is deemed harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* (citations omitted).

In his petition, Gongora repeats verbatim the relevant portions of the prosecutor's argument at the conclusion of the evidence at the guilt-innocence stage of the trial. *See* Gongora's Pet. at 36–45, 51–55, and 57. Having thoroughly reviewed the prosecutor's remarks, the court concludes that the prosecutor did, in fact, intend to comment on Gongora's silence. *Jackson*, 194 F.3d at 652. The court further concludes that the character of the remarks were such that the jury would necessarily construe them as comments on Gongora's silence. *Id.*

Indeed, the prosecutor's remarks on Gongora's failure to testify were numerous and blatant.[8] A few

---

[8] Notably, respondent does not argue that Gongora failed to preserve this issue. Among other things, Gongora made numerous objections at trial, two of which were sustained, and he unsuccessfully moved for mistrial. *See* 40 RR 101–03.

excerpts suffice to illustrate:

> You listen to people inside there. Who also would you want to hear from, though? The shooter? We're not going to talk to that person . . .
>
> Nelson Gongora, the shooter. That's the person on trial. That's the person who deserves to be found guilty of capital murder. Who should we go ahead and talk to? Who should we go ahead and present to you? Should we talk to the shooter?

See 40 RR at 101–102. The prosecutor's purported efforts to fix his error only provided him with another opportunity to comment on Gongora's silence:

> I don't want—to make it clear, y'all, Defendant has a Fifth Amendment right not to testify. And, of course—I don't want to give you any wrong impression on that whatsoever. What I want to talk to you about is this. When you talk about the credibility of a person, I wish you—and I made a—I made a big mistake there. I'll make it very clear. I'm talking about, do you want to hear from him, because you can't do that.

Id. at 103. The remarks speak for themselves.

Having concluded that the prosecutor's remarks concerning Gongora's failure to testify amount to constitutional error, the court must next assess whether the error was harmless. Although the court is extremely disappointed in the prosecutor's

remarks, the court simply cannot find any evidence in the record that his remarks "had substantial and injurious effect or influence in determining the jury's verdict" as required for the granting of federal habeas relief. *See Fry*, 127 S. Ct. at 2325. As to harm, Gongora only argues in conclusory fashion that the jury struggled in reaching its verdict, because the state's case against him was weak. *See* Gongora's Pet. at 57–59; Gongora's Reply to Resp't's Answer at 24–25. Even if this were true, there is no evidence, substantial or otherwise, of a nexus between the prosecutor's improper remarks during argument and the jury's decisions.

Moreover, in addition to the absence of the requisite proof, the trial court instructed the jury to disregard a remark concerning Gongora's failure to testify that was made by the prosecutor during argument. *See* 40 RR at 102. Also, directly before the prosecutor made the arguments about which Gongora complains, the trial court instructed the jury as follows:

> In a criminal case the law permits the Defendant to testify in his own behalf but he is not compelled to do so, and the same law provides that the fact that a defendant does not testify shall not be considered as a circumstance against him. You will, therefore, not consider the fact that the Defendant did not testify as a circumstance against him; and you will not during your deliberations allude to, comment on, or in any manner refer to the fact that the Defendant has not testified.

Court's Charge, 3 CR at 882. Then, after the prosecutor's remarks of which Gongora complains,

the trial court gave the jury the following additional instruction in advance of the jury's deliberation on punishment:

> You are instructed that our law provides that a defendant may testify in his own behalf if he chooses to do so. This, however, is a right accorded to a defendant, and in the event he chooses not to testify, that fact cannot be taken as a circumstance against him. In this case, the Defendant has chosen not to testify and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against him.

Court Ct.'s Charge, 4 CR at 925–26. Juries are presumed to follow their instructions. *See, e.g.*, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Gongora's second ground is without merit.

C. *Third Ground: The alleged refusal to allow Gongora to confront and impeach Juan Vargas with his alleged statements to his wife on the night of the shooting.*

At trial, Juan Vargas ("Vargas"), who had been with Gongora the night of the shooting, identified Gongora as the shooter. Gongora complains that the trial court wrongly refused to allow him to confront and impeach Vargas with his alleged tearful statements to his wife on the night of the shooting that Carlos Almanza, and not Gongora, had shot the victim. He complains his rights of due process as well as his rights under the Fifth, Sixth, and Fourteenth Amendments were violated.

Respondent responds that this ground is unexhausted and procedurally defaulted. *See* Resp't's Answer at 20–26. After thoroughly reviewing the briefing, both before this court and to the state courts, the court is inclined to agree. Respondent engages in the unavoidably tedious analysis as to why this ground has not been exhausted and why it is now procedurally defaulted. *Id.* The court feels no compulsion or desire to repeat that factual and legal analysis here.

Suffice it to say that there is a serious question as to whether Gongora fairly presented this ground to the state court.[9] To the extent he did, the Texas Court of Criminal Appeals declined to address it as inadequately briefed, which in and of itself would seem to indicate that the ground was, in fact, not fairly presented to the state courts. *See Gongora*, No. 74-636, 2006 WL 234987, at *4. Further telling is Gongora's seeming concession that this ground is not properly before the court. In response to respondent's numerous arguments, Gongora recites boilerplate law on the right to confrontation without any attempt to tie such law into the facts presented here. *See* Gongora's Reply to Resp't's Answer at 26–27. His only specific response is: "As the State notes on page 21 of their brief, the issue regarding the presentation of the Confrontation Clause issue was briefed and addressed by the Texas Court of

---

[9] *See Martinez v. Johnson*, 255 F.3d 229, 238 (5th Cir. 2001) ("The law is well established that a state prisoner seeking to raise claims in a federal petition for habeas corpus ordinarily must first present those claims to the state court and must exhaust state remedies") (citing 28 U.S.C. § 2254(b)).

Criminal Appeals." *Id.* at 26 (citing Respt's Resp. at 21 n.7). Respondent's brief, however, says no such thing.

Had Gongora had a legitimate response to respondent's arguments, he surely would have made one. The court concludes that ground three is unexhausted. Because the state courts would, in turn, now find ground three procedurally barred for failing to raise it there initially, this claim is deemed defaulted for purposes of federal habeas review as well. *See, e.g.*, *Gray v. Netherland*, 518 U.S. 152, 161–62 (1996).[10]

Even if properly before the court, this ground would still fail. "A state court's evidentiary rulings present cognizable habeas claims only if they run afoul of a specific constitutional right or render the petitioner's trial fundamentally unfair." *See Johnson v. Puckett*, 176 F.3d 809, 820 (5th Cir. 1999) (citation omitted). Gongora has not met this standard for the simple reason that his counsel, without any interference from the trial court, did, in fact, attempt to impeach Vargas with the contradicting statements Vargas made to his wife the night of the shooting. *See* 37 at RR 150–158.

To the extent that Gongora expands this ground to include his counsel's examination of Vargas's wife regarding what Vargas told her the night of the shooting, it still fails. Gongora's counsel was free to,

---

[10] Notably, while failure to preserve error in state court can be excused if a petitioner can demonstrate cause or prejudice for his default in the state proceedings, Gongora makes no effort to do so here. *See Gray*, 518 U.S. at 162.

and did, question her about the statements her husband made that night, but she refused to testify, invoking the Fifth Amendment and the husband/wife privilege. *See* 39 RR at 22–38. Gongora has not persuaded this court that the trial court erred in permitting her to assert those privileges.

Finally, in the event that Gongora is complaining that the trial court should have admitted independent evidence of Vargas's prior inconsistent statements to his wife, this complaint is equally baseless. The only other evidence consisted of a detective's notes of what Vargas's wife told him Vargas said to her the night of the shooting. The prosecutor objected to the admission of the notes as hearsay, and the court sustained that objection. *See* 38 RR at 135–142. Gongora offers no legal authority that the trial court erred in this ruling.

Because Gongora has failed to demonstrate that any trial-court ruling concerning Vargas's prior inconsistent statements to his wife either ran afoul of a specific constitutional right or otherwise rendered his trial fundamentally unfair, Gongora has not stated a cognizable habeas claim. *See Johnson*, 176 F.3d at 820. The third ground is without merit.

D. *Fourth Ground: Claimed prosecutorial misconduct deprived Gongora of two critical mitigation witnesses.*

Immediately prior to being called as witnesses for Gongora during the punishment phase of trial, Gongora's two sisters were arrested on warrants alleging that they had threatened a co-defendant's family members who had been watching the proceedings. The prosecution informed the trial

judge of the arrest warrants prior to the start of trial the morning of their arrest, but asked that defense counsel not be told out of fear that they would inform Gongora, who then might interfere with the ongoing investigation of his sisters. 41 RR at 62–63. After trial resumed, the trial judge sent the jury out twice, both times during cross examinations being conducted by defense counsel, so that the officers could effectuate the arrests of Gongora's sisters at the courthouse, but outside the presence of the jury. *Id.* at 56–62. Both sisters subsequently invoked their right to remain silent and refused to testify as witnesses for Gongora. Gongora claims that he was denied due process and his rights under the Fifth, Sixth, and Fourteenth Amendments were violated when this alleged prosecutorial misconduct deprived him of these two mitigation witnesses.

In habeas corpus proceedings, prosecutorial misconduct during a state criminal trial is reviewed to determine whether it so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See, e.g.*, *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000) (citations omitted); *Greer v. Miller*, 483 U.S. 756, 765 (1987). Improper conduct by a state prosecutor is not of constitutional magnitude and will not warrant federal habeas corpus relief unless the conduct is so prejudicial that it rendered the trial fundamentally unfair. *See, e.g.*, *Barrientes*, 221 F.3d at 753; *Darden v. Wainwright*, 477 U.S. 168, 180–81 (1986); *Dowthitt v. Johnson*, 230 F.3d 733, 755 (5th Cir. 2000). A trial is fundamentally unfair if there is a reasonable probability that the verdict might have been different had the trial been properly conducted.

Barrientes, 221 F.3d at 753 (citations omitted).

As an initial matter, the court is not persuaded that prosecutorial misconduct occurred with respect to these two witnesses. Although the arrests perhaps could have been accomplished in a manner less disruptive to the defense, in the end the threatening conduct of the witnesses themselves, which conduct ultimately resulted in their both being criminally convicted, caused this unfortunate situation. Further, that the arrests were made outside of the presence of the jury negated any possibility that the jury could be prejudiced by the mere fact of the arrests.

As to the substantive loss of their testimony, Gongora's sisters purportedly were to testify generally on "family social-economics, family work stability, the practical effects of residential mobility, substance abuse within the household, general family/home environment, and [Gongora's] peers." *See* Gongora's Pet. at 67; 49 RR at Exs. 19–20. Even assuming the existence of prosecutorial misconduct, had this evidence been presented, there is no "reasonable probability that the verdict might have been different," *see Barrientes*, 221 F.3d at 753, because, as detailed below, this evidence was largely duplicative of the testimony of, *inter alia,* Basilisa Gongora, Gongora's mother, and Mary Ann Cuestas, Gongora's wife.

Specifically, Gongora's mother painted a detailed picture of Gongora's difficult childhood—how he had witnessed the murder of his father at age ten, and how, thereafter, she, now a single mother, was forced to move their large family again and again to poorer and poorer neighborhoods including public housing.

Gongora's wife spoke about how she had a baby out of wedlock at age fifteen and how Gongora accepted the baby as his own. She told how their relationship began when he was only fourteen and she was only sixteen and of his being a good and kind father to the four children they have together. Notably, two of the children, a set of twins, were born prematurely and have medical problems. She spoke of how he worked hard to support his family, sometimes walking six miles on foot to get home from work and how, though they were poor, Gongora was nonetheless generous in giving money to friends who might need money for one of their children. *See* 44 RR 140–240.

In short, the court concurs with the Texas Court of Criminal Appeals that Gongora was not deprived of the mitigation evidence of which he complains here, but rather was merely denied the ability to present it in the precise manner that he wished. *See Gongora*, No. 74-636, 2006 WL 234987, at *5. Gongora cites to no legal authority,[11] and the court is

---

[11] The only case cited by Gongora does not involve the ability to present evidence in a certain way and, moreover, is wholly distinguishable from the facts here. *See Lee v. Kemna*, 534 U.S. 362 (2002). Far from involving the loss of duplicative witness testimony, in *Lee,* the defendant's sole defense was that he was in another state with his family at the time of the murder. On the day they were to testify, however, all of the family members who were to testify in support of defendant's alibi inexplicably vanished from the courthouse, and the trial court denied defendant's motion for an overnight continuance. *Id.* at 365–370. Under these unique circumstances, the Supreme Court concluded that the case fell "within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim." *Id.* at 381.

otherwise unaware of any, that his not being able to present his mitigation evidence in the exact way he desired rises to the level of a constitutional violation. The fourth ground is without merit.[12]

E. *Fifth Ground: The indictment under which he was charged failed to allege that his participation as a party or co-conspirator.*

Finally, Gongora claims the denial of due process and the violation of his rights under the Fifth, Sixth, and Fourteenth Amendments, because the indictment under which he was charged failed to allege his participation as a party or co-conspirator[13] yet the jury was instructed on these issues. *See* Gongora's Pet. at 71–75. This ground is readily disposed of as without merit.

Indeed, Gongora readily concedes that the Texas Court of Criminal Appeals has specifically held that

---

[12] In cursory fashion, Gongora requests an evidentiary hearing to supplement the record on both the substance of his sister's would-be testimony and the disposition of the criminal charges against them. *See* Gongora's Pet. at 67, 75. He claims that "an evidentiary hearing would show that the charges were reduced to misdemeanors some time after Mr. Gongora was sentenced to death." *Id.* at 67. The court need not hold an evidentiary hearing where, as here, the court is satisfied that it has sufficient facts before it to make an informed decision on the merits of a claim. *See McDonald v. Johnson*, 139 F.3d 1056, 1060 (5th Cir. 1998). Gongora's request for an evidentiary hearing on this ground is thus properly denied.

[13] The indictment contains two counts that together allege that Gongora murdered Delfino Sierra with a firearm while in the course of committing a felony and placed Delfino in fear of imminent bodily injury or death. *See* 1 CR at 3.

notice in the indictment under the circumstances of this case is not required. *See* Gongoara's Pet. at 72 (citing *Montoya v. State*, 810 S.W.2d 160, 164–65 (Tex. Crim. App. 1989), *rev'd in part on other grounds*, *Montoya v. Scott*, 65 F.3d 405 (5th Cir. 1995)). Here, the court's charge to the jury did not instruct it to consider whether Gongora was guilty of the separate offense of conspiracy as set out in Section 15.02 of the Texas Penal Code. Rather, the court's charge merely instructed the jury under Texas's "law of the parties" statute as codified in Section 7.02(b) of the Texas Penal Code. The instruction was:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of carrying out of the conspiracy.

See Tex. Penal Code § 7.02(b); *see also* Court's Charge, 3 CR at 881.

Under Texas law, "[i]t is well accepted that the law of the parties may be applied to a case even though no such allegation is contained in the indictment." *See Montoya*, 810 S.W.2d at 165; *see also Vodochodsky v. State*, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005) ("It is well settled, and [defendant] does not contest the rule, that the law of the parties need not be pled in the indictment.") (citations omitted). Notably, in the subsequent habeas proceeding involving *Montoya,* the Fifth Circuit

expressly held that Texas's "'law of the parties'" may support a conviction for capital murder, and one "is not entitled to habeas relief based on [a] trial court's § 7.02(b) instruction." *See Montoya*, 65 F.3d at 415 (citations omitted). Moreover, respondent is correct in his assertion that this ground must fail under the settled principle that it is not a federal-habeas-corpus court's function to review a state's interpretation of its own law as Gongora asks the court to do here. *See Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995). The fifth ground is without merit.

VI.

Order

For the reasons discussed herein,

The court ORDERS that Gongora's petition be, and is hereby, denied.

SIGNED July 30, 2006.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX C
Gongora v. *Thaler*,
726 F.3d 701 (5th Cir. 2013)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
F I L E D
August 13, 2013
Lyle W. Cayce
Clerk

No. 07-70031

NELSON GONGORA,

Petitioner-Appellant,

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

Before HIGGINBOTHAM, STEWART, and OWEN, Circuit Judges.

PER CURIAM:

The court having been polled at the request of one of the members of the court and a majority of the

judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

Voting for en banc rehearing were: Judge E. Grady Jolly, Judge Edith H. Jones, Judge Jerry E. Smith, Judge Edith B. Clement, Judge Priscilla R. Owen, and Judge Jennifer W. Elrod. Voting against en banc rehearing were: Chief Judge Carl E. Stewart, Judge Carolyn D. King, Judge W. Eugene Davis, Judge James L. Dennis, Judge Edward C. Prado, Judge Leslie H. Southwick, Judge Catharina Haynes, Judge James E. Graves, and Judge Stephen A. Higginson.

Upon the filing of this order, the clerk shall issue the mandate forthwith. *See* FED. R. APP. P. 41(b).

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

PATRICK E. HIGGINBOTHAM, Circuit Judge, respecting the denial of rehearing en banc:

I write here to explain my reasons for opposing en banc rehearing. The relevant legal principles in this case are settled and challenged only in their application. That this is a capital case sounds no greater call for studied and evenhanded application than ought always be at hand. At the same time and as I will insist, the binary choice of life or death tolerates no mediating, graduating scale of consequences for slippage in protecting rights constitutionally secured to persons whose life the State would take. Ours was no watery eyed decision. When a prosecutor with a close case repeatedly asks the jury to do what it must not—infer the accused's guilt from his insistence that the state prove its case without his testimony—the conviction cannot stand.

I.

Facts matter—at every level. And the events at trial must be mastered to give to grandly stated constitutional norms their content, meaning, and force. To these eyes, the undisputed record of what occurred at this trial permits no answer in service of the constitutional principle at issue but the one we gave. The question is not whether the jury *could* have convicted Gongora of capital murder absent the error; rather, it is whether the admissible evidence of Gongora's guilt presented the State with a difficult case, and whether the comments on silence closed the evidentiary gap. The prosecutor persisted in asking the jury to infer Gongora's guilt from his not taking the stand. Such a blatant violation of a primer rule of criminal trials by a felony prosecutor from a major metropolitan city is no accident. It is in

the heat of trial with close cases that able counsel sometimes give way to the frustration of being denied an opportunity to shore their case. Viewed objectively, the effort was to enhance the opportunity for conviction. Whatever other post hoc speculation may be offered, it cannot erase the record—of the arguments made and the evidence presented of Gongora's participation in the robbery and death of Delfino Sierra.

The responsive path of the law here reflects the power of prosecutorial comment. Our jurisprudence long tolerated comment on a defendant's silence, persuaded that the Fifth Amendment was adopted only to forbid a defendant's coerced testimony. But the very force of these prosecutorial comments came to be viewed in pragmatic terms as being coercive in fact, not to be turned by anemic, routinized instructions to disregard. Alluding to this history here is only to remind that the effectiveness of such comments has not changed—and that their temptation for a prosecutor with a less-than-compelling case remains great. So an effort to save a verdict tainted by such violations with contentions that the State's case was overwhelming at least demands close scrutiny of the facts. I resolve no facts. I only recount the versions competing for the jury's verdict, leaving them to reject with their own voice the view that there were none that offered succor to the defendant. There were, and I will describe them.

II.

The State's theory was that six men in a van spotted Delfino Sierra walking on Northside Drive in Fort Worth, Texas, that two of the men approached

Delfino Sierra, that one was the shooter, and that the other was the accomplice. After sorting and re-sorting this deck of six, the State rested its capital case against Gongora upon its ability to persuade the jury that he was one of those two men—specifically, the shooter. Gongora admitted, in a pre-indictment statement to police investigators introduced into evidence at trial, that he was in the van when the men spotted Sierra walking and that "we wanted to . . . get a little money." He did not admit that he was one of the two men who approached Sierra. Rather, his account of events, accepted as true and understood together with Juan Vargas's initial sworn statement to police, can lead to no other conclusion than that Gongora *remained in the van* after Vargas, the van driver, dropped off the shooter and his accomplice in a parking lot across the street and to the east of the intersection where Sierra was shot.[1]

Gongora recounted that "we passed [Sierra on Northside Drive] . . . and pulled into the little store before you pass the railroad tracks," that "*we did a U-turn* in the parking lot and went back towards where [Sierra] was walking," that "next thing I remember the side door opened, all of us *were going to get out then there were gunshots*," that "I turned around and saw the guy that was wearing the cowboy hat laying on the ground," and that "[r]ight after the shots all of us jumped back in the van and

---

[1] To assist the reader, I attach in an appendix my own diagrams of Vargas's two competing accounts of the crime, drawn from the undisputed testimony and Defense Exhibit 15 (introduced into evidence at trial without objection by the prosecution).

we left."[2] For his part, Vargas—an indicted co-conspirator who testified under plea as the State's star witness—insisted in his initial, pre-plea statement that he stopped at the "little store" on Northside Drive before the railroad tracks; that Carlos Almanza (the shooter) and James Luedtke (the accomplice) *jumped out in the store's parking lot and crossed Northside Drive on foot* toward Sierra; and that Vargas did a U-turn in the parking lot, drove back toward Sierra, and stopped in a driveway

---

[2] Gongora's full statement, which was taken by police detective Carlos A. Ortega on the morning of June 19, 2001, read:

> Me, Carlos, Albert, and Little Wero got in Juan's van and we all took off to my house. We came up 28th and then took a right to 25th and headed to Main St. Then we went down Main St. and turned on Northside Dr. When we made the turn we saw this guy walking by himself on the right side of the street if you are going towards I–35. I'm not sure what he was wearing but I remember he was wearing a cowboy hat. We passed him up and *pulled into the little store before you pass the railroad tracks. We did a U-turn in the parking lot and went back towards where the guy was walking.* All we wanted to do is get a little money and go about our business. *Next thing I remember the side door opened, all of us were going to get out then there were gunshots, I turned around and saw the guy that was wearing the cowboy hat laying on the ground.* I think there was about three fast shots fired. *Right after the shots all of us jumped back in the van and we left.* . . . Q. This deal here was this suppose [sic] to go down the way it did? A. No, we were just suppose [sic] to get some money and don't do anything stupid. *Q. Who got down with the gun? A. I don't know.*
>
> (Emphasis added.)

on Calhoun Street.[3] The only part of Vargas's story that changed at trial was the identity of the two men who jumped out of the van and walked across the street—this, after extensive plea negotiations between Vargas, his lawyer, and both prosecutors. The prosecution presented Vargas's trial version of the respective routes of the van and its six passengers as undisputed fact—a characterization that is accurate, *except for the identity of the two assailants.* The store, the driveway, and Vargas's route are all clearly depicted in Defense Exhibit 15, an oversized map of the crime scene drawn by a detective in open court based on the Vargas accounts and the account of the only neutral eyewitness, Sonia Ramos. The exhibit was admitted into evidence without objection by the prosecution.[4]

---

[3] Though Vargas's initial statement to police was introduced for the record only, Vargas clearly and repeatedly testified at trial that the shooter and his accomplice got out in the parking lot and crossed the street on foot. *See* 37 RR 106–109, 124–125. Moreover, the jury heard—from Vargas, the police detective, and the prosecution itself—that the only aspect of Vargas's story that changed was the identity of the two men who jumped out in the parking lot and assailed Sierra. *See, e.g.,* 37 RR 135–137, 38 RR 151–52. The record reflects that this characterization of Vargas's initial statement is accurate.

[4] The record is replete with examples of the prosecution's reliance on Vargas's account as set forth in Defense Exhibit 15, but I ought provide at least one example:

> [Prosecutor:] Now, the rest of the chart, though—the rest of this chart—the details never changed, did they, from [Vargas's] first statement and second statement, correct?
>
> [Detective:] Correct.

(continued…)

Putting Gongora's account together with Vargas's initial statement and accepting both as true, Gongora *must* have remained in the van after Vargas dropped off Almanza and Luedtke in the parking lot and until the van arrived in the driveway on Calhoun Street south-east of Sierra and his two assailants. In this version of events, Gongora's statement that "all of us were going to get out then there were gunshots" refers to Gongora and the remaining three men in the van. Indeed, the apparent absence of any time gap between the moment when Gongora was "going to get out" of the van and the "gunshots" not only maps perfectly onto Vargas's testimony that he heard the shots shortly after he pulled into the driveway, but makes sense only if the shooter and the accomplice, who had to walk for some distance to cross the street and intercept Sierra (and whom Ramos spotted walking with Sierra for some time) were already long since out of the van. And the fact that Gongora had to "turn[] around" to see "[Sierra] laying on the ground"

[Prosecutor:] All of this, the passing the victim, pulling into the gas station, doing a U-turn and, ultimately, picking up the shooters, that all remained exactly the same, right?

[Detective:] Correct.

[Prosecutor:] The only difference was the identity of the people who got out to do the robbing, right?

[Detective:] Correct.

[Defense:] Could you identify which chart you've just—

[Prosecutor:] Yeah. I'm talking about Defendant's Exhibit 15.

38 RR 151–52.

is consistent with the location of the van at the time of the shooting (in the driveway) as well as Vargas's testimony that he could see the shooting from the van. Finally, both of Vargas's accounts had the shooter jumping out of the front passenger seat, whereas Gongora noted only that "the side door opened." It bears reminding that Gongora gave his statement without the benefit of counsel—before the criminal complaint was filed and the grand jury returned an indictment.

At best, Gongora admits that he briefly exited the van *after* Vargas looped the van back toward Sierra and temporarily stalled out his engine in the driveway on Calhoun Street. Gongora stated that "all of us *were going to get out then there were gunshots*" and that "I *turned around* and saw the guy that was wearing the cowboy hat laying on the ground." By this language, Gongora was still in the van or about to get out when he heard the gunshots. With that in mind, the jury could have reasonably concluded that Gongora's statement that "all of us jumped back in the van" refers to the fact that the two men who accosted Sierra got back into the van (*i.e.*, "everyone was back inside"). This point was not lost on the defense, which reminded the jury that "if you read the statement, he never got out of the van . . . that's one version you can take from this." Or, Gongora could have been referring to himself and the remaining passengers—after all, in Vargas's accounts, the shooter and accomplice did not reenter the van until it pulled back out of the driveway onto

Calhoun Street.[5] What is certain is that Gongora did not, as suggested by the CCA, admit that he was one of the two men who approached Sierra—an admission that would have directly contradicted his insistence that he did not know "who got down with the gun."[6] And the jury heard sharply diverging accounts of the identity of the shooter and his accomplice—two from Vargas, the State's key witness.

In Vargas's initial sworn statement to police, Carlos Almanza and James Luedtke ("Guero"/ "Wero") jumped out of the van in the parking lot and walked across the street toward Sierra. Almanza was the shooter, and the other three men in the van were left unmentioned. This account was corroborated by Vargas's wife as well as by Almanza's former cell mate Ramiro Enriquez, who had no stake in the case and testified that Almanza

---

[5] That Gongora was the "only" person in the van to give an account that suggested that more than two people got out of the van at some point does not travel against the narrative line that I am lifting from the record. It would not have been lost on the jury that Vargas and Luedtke had an incentive to downplay their own level of participation in the crime: admitting any overt act in furtherance of the robbery could serve to inculpate them as parties. And the remaining men in the van—Orosco, Almanza, and Steven Gongora—all refused to testify.

[6] This is no appellate finding, but a recitation by the CCA of what the jury might have concluded, viewing the evidence in the light most favorable to the prosecution.

admitted to the killing in prison.[7] According to Enriquez, Almanza gave an account in which Vargas parked his van across the street from Sierra and Almanza got out of the van "with some of his homeboys (I'm not sure how many)," crossed the street toward Sierra, said "what's up" in Spanish, shot Sierra in the back of his head, stood over his body, and, finally, got picked up by Vargas—an account that closely resembles Sonia Ramos's eyewitness account, Vargas's initial statement, and

---

[7] The corroboration by Vargas's wife requires some explanation. As the CCA observed on direct review:

> [Vargas's wife Maria] Morales [gave a sworn statement to police] that on a night around the time of the offense, Vargas came home crying. Although he would not initially tell her the reason, Vargas eventually explained that he and some others had been in the van when they saw a man (apparently referring to Sierra) that [Carlos] Almanza claimed owed him money. When they stopped the van, Almanza killed the man for no reason.

Gongora v. State, 2006 WL 234987, at *4 (Tex. Crim. App. 2006). However, Gongora's jury only heard a police detective testify that Morales's statement was "consistent with" Vargas's initial account, that the detective had "interviewed her independently," that he "didn't interject anything as to who I had spoken to or anything else like that," and that he "allowed her to tell me what she knew and without any other guidance or pushing or anything like that." The trial court refused to allow Gongora to introduce Morales's full statement or cross-examine her. Gongora raised the issue on direct appeal, but the CCA flatly concluded that "even if the trial court abused its discretion . . . , [Gongora] was not harmed by this error." *Id.* Three judges dissented, concluding that the error warranted a new trial. *See id.* at *15. Gongora did not raise the issue before our panel.

Luedtke's trial testimony.[8] The prosecution's ballistics expert could not rule out the possibility that the bullets recovered from Sierra's body came from the same gun that Almanza used in a second, non-fatal shooting later that night.

The State's case against Gongora did not exist until Vargas, the driver, made one critical change to his story, substituting Gongora for Almanza and Albert Orosco for Luedtke as the two men who walked across the street.[9] That was Vargas's proffer to the prosecution, conditioned, as the jury was well aware, on his receipt of a 23-year sentence instead of a trial for capital murder. With this exculpation, Luedtke, of course, followed with the same account, clearing himself from the risk of capital charges and

---

[8] Of course, Luedtke testified that *Gongora,* not Almanza, was the shooter who spoke to Sierra and stood over his dead body—but only after Vargas cut Luedtke loose with the plea agreement, substituting Gongora for Almanza and Orosco for Luedtke.

[9] Gongora's trial counsel made sure that this point was not lost on the jury. *See, e.g.*, 40 RR 69–70 ("I do want you to notice one thing about the State's presentation. It hinges on Juan Vargas. . . . Did he tell a police officer the truth the first time he came in contact? . . . That's when he said that Carlos [Almanza] and Guero [(James Luedtke)] did this. Carlos did the shooting. Doesn't have a lawyer then. It's just him and the cops. . . . And now, no, it's not Carlos and Guero. No. It's got to be Albert [Orosco] and my client.").

giving the State a second witness.[10] Even as he took the stand, however, Luedtke gave testimony consistent with his initial role as the accomplice, offering minute details about the shooting and stating that he heard the shooter utter specific words to Sierra ("casa la febio")[11] when the jury could have very reasonably concluded, based on common sense and Vargas's testimony that the shots rang out immediately after he pulled into the driveway, that only the shooter and the accomplice would have been able to hear what passed between themselves and

---

[10] The prosecution did not deliver a coherent narrative of why Vargas initially inculpated Luedtke while "covering" for Albert Orosco. Luedtke was a card-carrying member of the Puero Li'l Mafia, of which Vargas was a leader, while Orosco had no affiliation with the gang. Police did not talk to Luedtke until six months before Gongora's trial—over a year after the shooting. Dylan Griffith, another PLM member not involved in Sierra's shooting, testified at trial that Luedtke told him "I ain't—I ain't going down for it. I'll put it on whoever I got to, as long as I don't go down for it."

[11] Luedtke testified that "casa la febio" means "give me your money" in Spanish. On cross, he acknowledged that he wasn't sure what the words meant. He insisted, however, that he heard the shooter utter those specific words.

Sierra.[12]

Sonia Ramos, the sole independent eyewitness, testified only that she spotted two men walking with Sierra about a block ahead of her as she was driving west on Northside Drive and that the man walking to Sierra's left shot him in the intersection of Northside and Calhoun. Ramos testified that she did not even notice the van until she glanced over her shoulder while turning right on the opposite corner of the next cross-street past the intersection, a block away ("I looked back, I seen the van, and then I took off"). Ramos twice stated that she did *not* see who got back into the van, nor did she indicate whether she was in a position to see anyone around the van. She noticed the van because its reverse lights were

---

[12] The defense was well aware of the problems with Luedtke's testimony and highlighted them to the jury during closing arguments:

> Guero [(Luedtke)] . . . says they were so close he could hear something that was being said. It's interesting Juan Vargas didn't hear it. He never said it. Not once. In fact, he said he couldn't hear anything . . . If he heard those words, then he was three or four or five feet away from Delfino Sierra, which makes him one of the culprits, which makes Juan Vargas'[s] first declaration that he gave to the detective correct. . . . And I want you to think about it when you go back there, because there's no way he could have heard anything from his position in that—in that van.

40 RR 76, 86–67. The jury also learned that Vargas's initial account implied that he did not see which of the two assailants (at that point, Almanza and Luedtke) did the shooting.

on,[13] suggesting that Vargas and the three passengers were already backing out into Calhoun Street (where, according to Vargas, they intercepted the shooter and the accomplice). As the State conceded during its closing argument, Ramos's placement of the shooter to Sierra's left ran headlong into Vargas's revised account, casting doubt not only on Gongora's role as the shooter, but on Vargas's revised account more generally.[14]

---

[13] The shooting occurred between 9:30 PM and 10:00 PM in April. Ramos testified that she was able to see Sierra and his two assailants walking because the street was well lit. She also testified that there was some oncoming traffic.

[14] Ramos testified that she first spotted Sierra flanked by two men about a block ahead of her, with all three men walking west on Northside Drive (in her driving direction). Ramos insisted that the shooter walked to the *left* of Sierra; that the other man walked to Sierra's right; and that none of the men changed their relative positions before the shooting. There was no confusion as to what Ramos meant by "left" and "right," as she repeatedly testified that the three men were walking on the left side of the street (recall that Ramos and the men were moving in the same direction, so that her left was their left). Moreover, her testimony was consistent with forensic evidence that a bullet hit the back, left side of Sierra's head. Vargas, however, placed Gongora to Sierra's *right,* again relative to Sierra's walking direction. And though the detective's intake sketch of the crime scene (not in evidence) does not clearly reflect Vargas's placement of Gongora and Orosco, the panel's focus was on the defense's unobjected-to Exhibit 15. The exhibit, a map, clearly placed Gongora to Sierra's right and Orosco to Sierra's left; moreover, the detective who drew it insisted that it reflected Vargas's account of the men's respective positions—in the teeth of sharp questioning by the prosecution.

This was the posture of the State's case-in-chief when the prosecutor repeatedly reminded the jury, in the face of sustained objections and in a closing rebuttal that could not be answered by the defense, that *Gongora*—unlike, say, James Luedtke—failed to testify to explain his "role" in Sierra's robbery and shooting. That the prosecutor unrelentingly pounded on Gongora's silence—first directly and later by implication—cannot seriously be disputed.[15] And understood in the context of the narratives competing for the jury's verdict, the effect of these comments was deadly. After all, "[w]ho do you expect to hear from? The person who wasn't involved at all, that had nothing at all, just present during that deal? Of course you hear from that person." (Left unstated was the reality that those who *did* testify were heard from only after their exculpation through the plea deal struck with Vargas.)

It is no answer that there was sufficient evidence to convict Gongora as a party to capital murder even if he remained in the van after the shooter and the

---

[15] *See Gongora v. Thaler*, 710 F.3d 267, 275–80 (5th Cir. 2013); *see also id.* at 287 (Owen, J., dissenting) ("I agree [with the panel majority] that the [initial] statements . . . were an impermissible comment on Gongora's assertion of his Fifth Amendment rights."); *Gongora v. Quarterman*, 498 F. Supp. 2d 919, 929 (N.D. Tex. 2007) ("Having thoroughly reviewed the prosecutor's remarks, the court concludes that the prosecutor did, in fact, intend to comment on Gongora's silence. The court further concludes that the character of the remarks were such that the jury would necessarily construe them as comments on Gongora's silence."). During oral argument, the State conceded that the comments were clearly improper. And the *prosecutor himself* characterized his initial comments as a "big mistake."

accomplice jumped out and headed toward Sierra.[16] *Brecht* focuses not on the sufficiency of the evidence sustaining the conviction, but on actual prejudice to the jury's verdict.[17] Here, the prosecution itself repeatedly emphasized that the six van-inhabitants' respective "roles" in Sierra's robbery and murder were critical to gauging their culpability. And as reflected in the jury instructions, the State's law-of-the-parties theory was narrow, hinging on the notion that Gongora was either the shooter or the accomplice. The prosecution knew that its case rested on the testimony that it had plea bargained for—and that there was significant evidence in the record to support either of Vargas's diverging accounts. And it perceived, correctly, that reasonable

---

[16] Had the State attempted to convict Gongora on the basis of his agreement to the conspiracy and mere presence in the van, it would have had a difficult time explaining its 23-year plea deal with Juan Vargas. Vargas, the van driver, was arguably nearly as culpable as the accomplice, admitting not only that he joined the conspiracy to rob Sierra, but that he played a critical role in carrying out the robbery, dropping off and picked up the two assailants. The State's solution was to argue that whereas Vargas was merely "technically" guilty of capital murder under the law of the parties, Gongora was "a stone-cold killer," meaning that "the only sane verdict in this case is guilty as charged."

[17] *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995) ("The [*Brecht*] inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.") (quoting *Kotteakos v. United States*, 328 U.S. 750, 764–65 (1946)).

doubts remained. It is in this context that the comments on Gongora's silence took their toll.

I am keenly aware of the Supreme Court's strong enforcement of AEDPA and the principles of federalism in which the Act is grounded—a command anticipated in and subsumed by *Brecht*.[18] I remain convinced that the prosecutor's unrelenting Fifth Amendment violations here infected every

---

[18] *Fry v. Pliler*, 551 U.S. 112, 117–18 (2007) ("In *Brecht* . . . we considered whether the *Chapman* standard of review applies on collateral review of a state-court criminal judgment under 28 U.S.C. § 2254. Citing concerns about finality, comity, and federalism, we rejected the *Chapman* standard in favor of the more forgiving standard of review applied to nonconstitutional errors on direct appeal from federal convictions."); *id.* at 119–20 ("It is implausible that, without saying so, AEDPA replaced the *Brecht* standard of 'actual prejudice' with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable."); *see also Burbank v. Cain*, 535 F.3d 350, 356–57 (5th Cir. 2008) ("Although the District Court set forth certain provisions of the [AEDPA] as the governing standard of review, it actually applied the standard of review that the Supreme Court set forth in *Brecht* . . . . Indeed, the Supreme Court recently explained [in *Fry*] that the *Brecht* standard subsumes the standards announced in AEDPA."); *Ayala v. Wong*, 693 F.3d 945, 961 & n.14 (9th Cir. 2012) (same); *Wiggins v. Boyette*, 635 F.3d 116, 121 (4th Cir. 2011) (same); *Wood v. Ercole*, 644 F.3d 83, 94 (2d Cir. 2011) (same); *Ruelas v. Wolfenbarger*, 580 F.3d 403, 412 (6th Cir. 2009) (same); *Foxworth v. St. Anand*, 570 F.3d 414, 435 (1st Cir. 2009) (same); *Bond v. Beard*, 539 F.3d 256, 275–76 (3d Cir. 2008) (same); *see also Vining v. Sec'y, Dep't of Corr.*, 610 F.3d 568, 571 (11th Cir. 2010) (applying only *Brecht*, citing *Fry*); *Welch v. Workman*, 639 F.3d 980, 992–93 (10th Cir. 2011) (same); *Jackson v. Norris*, 573 F.3d 856, 858 (8th Cir. 2009) (same).

aspect of Gongora's trial; that they had a real, substantial, and injurious effect on the jury's verdict, causing the jury to accept the State's theory that Gongora was either the shooter or the accomplice when the evidence identifying him as such came from the shifting and contradicted testimony of co-conspirators who were high on heroin and drunk at the time of the shooting, questioned their own recollection of events, changed their stories prior to trial, and testified under plea or fear of charges. It signifies that during oral argument, counsel for the State conceded that the prosecutor who handled the closing rebuttal may have become "emotional" and may have reached "the point where this guy feels like he's got to say something to establish the credibility of these accomplice witnesses."[19] Even were AEDPA/*Chapman* to govern our review, declaring the *Griffin* errors in this case "harmless beyond a reasonable doubt" would drain the right to silence of all meaning. Such a conclusion cannot, by any stretch of language, be characterized as fairminded or reasonable.

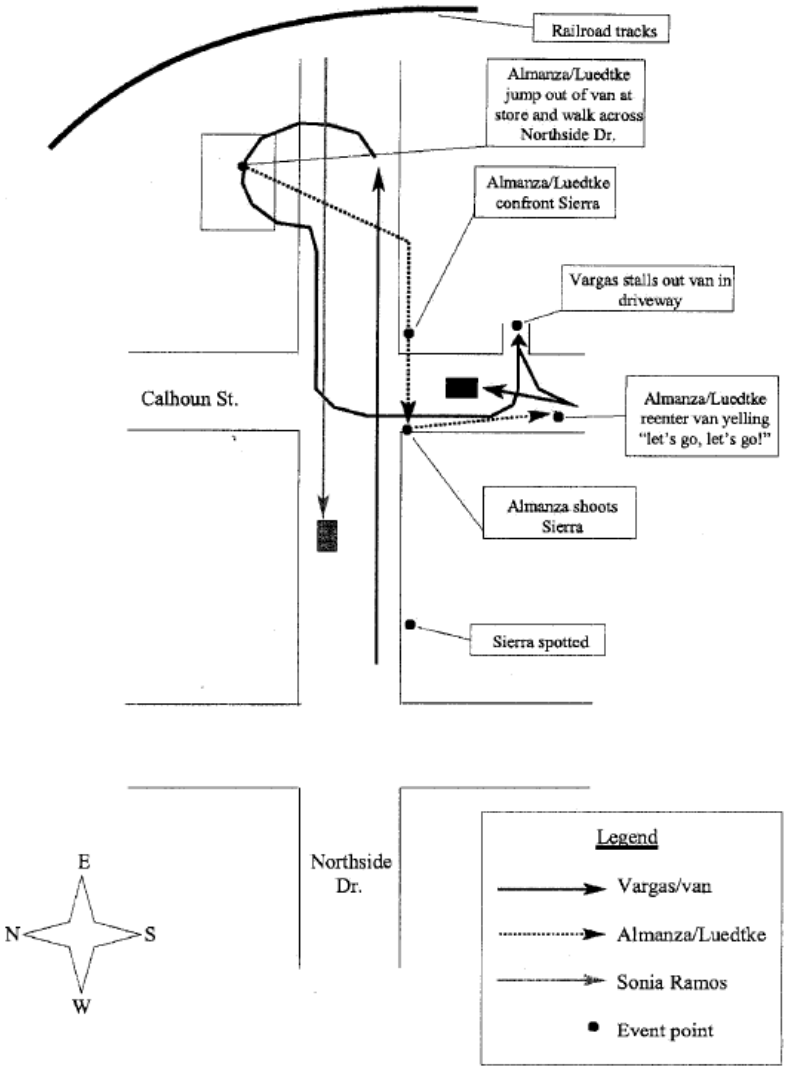
I have lifted from the record one narrative that the jury could have drawn. That another, the State's, can be drawn is no answer to the prosecutor's impermissible argument—one born of a fear that the jury would not accept that version of events as true

---

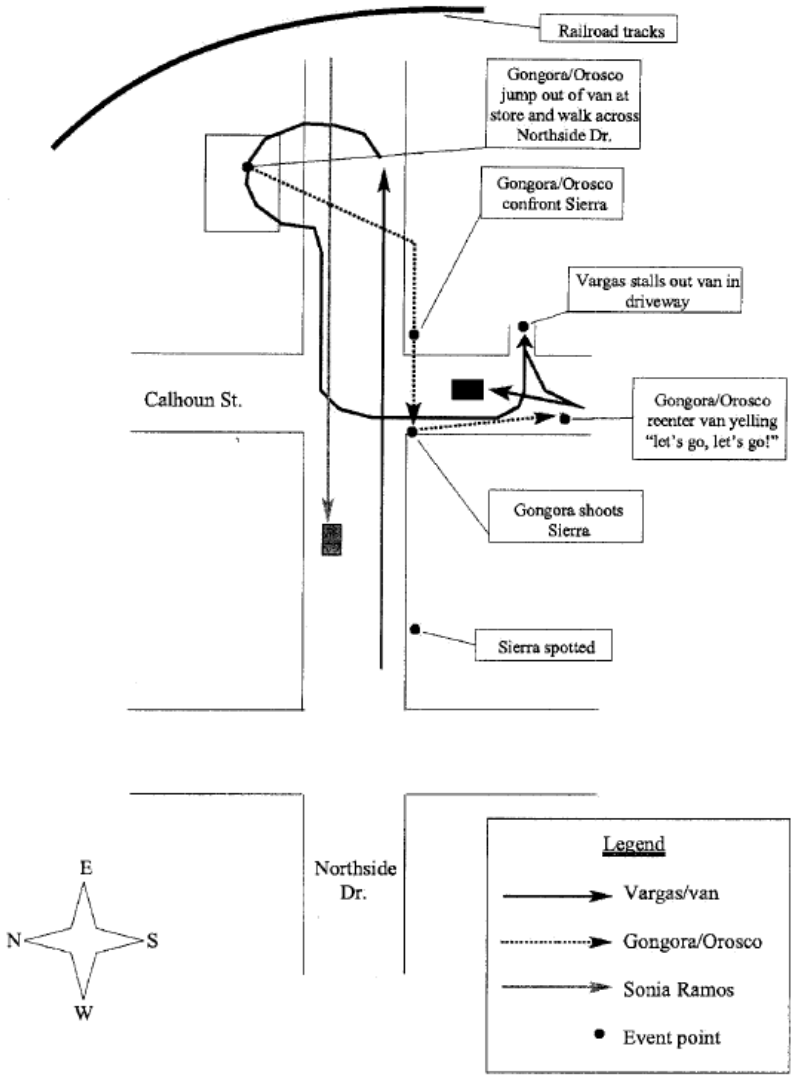
[19] The jury deliberations suggest that the prosecution had good reason to fear that its reliance on Vargas's testimony would leave reasonable doubt: the jurors requested all exhibits and sent out a number of notes—including several requests for evidence and testimony bearing on Vargas's conflicting accounts of who approached and assailed Sierra.

beyond a reasonable doubt. So, I say only that I share this felony prosecutor's doubts—grave doubts that caused him to make what he well knew was an argument that was potent, and forbidden because it is.

Appendix A: Diagram of Vargas's First Account (Not To Scale)



Appendix B: Diagram of Vargas's Second Account (Not To Scale)



JERRY E. SMITH, Circuit Judge, joined by JOLLY, JONES, CLEMENT, and OWEN, Circuit Judges, dissenting from the denial of rehearing en banc:

In disposing of habeas corpus petitions, this court is not permitted to substitute its judgment for that of the state courts.[1] But that is what this panel majority has done.[2] Although it pretends to apply

---

[1] "Habeas corpus serves as 'a guard against extreme malfunctions in the state criminal justice system, not a substitute for ordinary error correction through appeal.' " *Dorsey v. Stephens*, 720 F.3d 309, 314–15 (5th Cir. 2013) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011)).

[2] In defense of his panel majority opinion, Judge Higginbotham takes the unusual step of filing a spirited statement "respecting the denial of rehearing en banc." Responding to this dissent, he not only presents his judgment as a substitute for that of the state courts, but he additionally offers his proposed verdict for that of the state-court jury. Ignoring the double layers of deference with which we review state-court habeas rulings, Judge Higginbotham also announces the following *per se* rule: "When a prosecutor with a close case repeatedly asks the jury to do what it must not—infer the accused's guilt from his insistence that the stare prove its case without his testimony—the conviction cannot stand." Such an inflexible standard of review would contravene decades of habeas jurisprudence, not to mention caselaw on harmless error.

Although purporting to "resolve no facts," Judge Higginbotham credits some statements, disregards others, and generally approaches the case as would a fact-finder in the first instance—all before addressing the prosecutor's comments on Gongora's failure to testify. (See, for example, Judge Higginbotham's conclusion that Gongora's use of the future tense—"all of us were going to get out then there were gunshots"—definitively indicates that he had not left the van when the shots were fired, then speculating that a simultaneous statement—"all of us jumped back in the van"—

(continued…)

the strict standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), its gross misapplication of that standard evades the Supreme Court's recent habeas instructions and circumvents the comity and federalism that *Brecht* was intended to safeguard. *See id.* at 635–38. This is grave error that infects this circuit's habeas jurisprudence, so I respectfully dissent from the denial of rehearing en banc.

I.

Gongora "confessed in writing that he intended to rob the victim . . . [and] that he left the van [in which he was riding with five others] to rob the victim." *Gongora*, 710 F.3d at 289–90 (Owen, J., dissenting). Irrespective of whether Gongora was the shooter,

---

does *not* bear its plain meaning, *i.e.*, that Gongora had left the van.) Once he reaches the prosecutor's scattershot comments, Judge Higginbotham unpersuasively characterizes them an "unrelenting[] pound[ing]."

Almost entirely missing from Judge Higginbotham's thoughtful analysis of the record is precisely what Gongora must show: some meaningful nexus between the error and the verdict. Judge Higginbotham contends that the prosecutor's comments *must* have swayed the jury because, before they were made, the state's case was lacking. But Judge Higginbotham offers no explanation—beyond his *ipse dixit*—for how the prosecutor's borderline-incoherent statements—which the jury was swiftly and repeatedly instructed to disregard—"closed the evidentiary gap." *See Gongora v. Thaler*, 710 F.3d 267, 285–87 (5th Cir. 2013 (Owen, J., dissenting) (quoting the prosecutor).

Judge Higginbotham maintains that "reasonable doubts remained" *before* the prosecutor impermissibly commented on Gongora's silence. If that is so, however, it is highly unlikely that the prosecutor's error did anything to dispel them.

those facts establish his guilt under Texas's law of parties. *See id.* at 290–91 (Owen, J., dissenting). On direct appeal, Gongora claimed the prosecutor impermissibly commented on his failure to testify. The Texas Court of Criminal Appeals ("TCCA") concluded to the contrary:

> When viewed in context, the complained-of comments appear to be the prosecutor's attempt to comment on [Gongora's] failure to produce witnesses other than [himself], which is a permissible area of comment. . . . Nonetheless, the prosecutor's actual comments tended to be inartful and often confusing, leading the trial judge to sustain [Gongora's] objections to the remarks and to instruct the jury to disregard them. However, the court did not abuse its discretion in thereafter overruling [Gongora's] various motions for mistrial on this issue. On this record, the prosecutor's comments were not so blatant that they rendered the instructions to disregard ineffective. Thus, the judge reasonably concluded that the instructions to disregard effectively removed any prejudice caused by the prosecutor's comments.[3]

On collateral review, the federal district court determined that, although "the prosecutor's remarks concerning Gongora's failure to testify amount to

---

[3] *Gongora v. State*, 2006 WL 234987, at *10 (Tex. Crim. App. Feb. 1, 2006) (citation omitted), *cert. denied*, 549 U.S. 860 (2006).

constitutional error," the so-called *Griffin* error[4] was harmless absent "*any* evidence in the record that his remarks 'had substantial and injurious effect or influence in determining the jury's verdict' as required for the granting of federal habeas relief." *Gongora v. Quarterman*, 498 F. Supp. 2d 919, 927 (N.D. Tex. 2007) (citation omitted) (emphasis added). "Gongora only argues in conclusory fashion that the jury struggled in reaching its verdict, because the state's case against him was weak . . . . Even if this were true, there is *no evidence,* substantial or otherwise, of a nexus between the prosecutor's improper remarks during argument and the jury's decisions." *Id.* (citation omitted) (emphasis added).

Some 5½ years after receiving Gongora's appeal, and 3½ years after oral argument, a sharply-divided panel of this court disagreed with both the TCCA and the district court. After determining that the Fifth Amendment violation was not harmless, the majority granted the habeas petition and ordered that he "be released from custody unless within six months of the mandate of this court he is again brought to trial or the case is otherwise terminated by plea or other disposition under state law." *Gongora v. Thaler*, 710 F.3d at 283 (per curiam).

II.

In *Fry v. Pliler*, 551 U.S. 112, 120 (2007), the Court clarified that *Brecht* "provides the appropriate standard of review when constitutional error in a state-court trial is first recognized by a federal

---

[4] *See Griffin v. California*, 380 U.S. 609 (1965).

court." Under that standard—applied, to different effect, by both the panel majority and Judge Owen's dissent—an error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637 (citation and internal quotation marks omitted). Courts applying *Brecht* to determine harmlessness must bear in mind *why* it provides "the appropriate standard": *Fry* teaches that the stricter *Brecht* standard "subsumes" the "more liberal" test articulated by AEDPA, under which "a federal court may not award habeas . . . unless [a state court's] harmlessness determination itself was unreasonable." *Fry*, 551 U.S. at 119–20 (citation omitted).

In *Fry*, the Court reasoned that *Brecht* had survived the subsequent enactment of AEDPA "because the purpose of AEDPA is to 'limit[] rather than expand [] habeas relief,' and *Brecht* is the more stringent standard." *Burbank v. Cain*, 535 F.3d 350, 357 (5th Cir. 2008) (quoting *Fry*, 551 U.S. at 119). "That is to say, where an error is harmful under *Brecht*, any state court decision declaring it harmless must have unreasonably applied [clearly established federal law]. As a result, any error satisfying *Brecht* will also satisfy AEDPA's deference requirements." *Bauberger v. Haynes*, 632 F.3d 100, 104 (4th Cir. 2011) (Wilkinson, J.).

III.

Because Gongora's Fifth Amendment claim fails under AEDPA, it necessarily cannot surmount the

even stricter *Brecht* standard.[5] "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Richter*, 131 S. Ct. at 786 (internal quotation marks omitted).

> As a condition for obtaining habeas corpus from a federal court, 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. at 786–87 (emphasis added) (citation and internal quotation marks omitted).

Here the AEDPA inquiry is easy, in part because fairminded jurists *have* disagreed. In thoughtful and detailed opinions, two federal judges (the district court and Judge Owen) have concluded the error was harmless; two federal judges (comprising the panel majority) have disagreed. No amount of hyperbole (nor a resort to the less familiar *Brecht* standard) can transform a close call by the state court into an

---

[5] Although the TCCA did not specifically address the prosecutor's impermissible comments on collateral review, *see Ex parte Gongora*, 2006WL 3308713, at *1 (Tex. Crim. App. Nov. 15, 2006) (per curiam), AEDPA's relitigation bar nonetheless applies. *See Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013) ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits. . . .").

"extreme malfunction[]," *id.* at 786, especially here, where the TCCA reasonably declined to find reversible error based on garbled comments, about Gongora's failure to testify, that the jury was repeatedly instructed to disregard. In concluding otherwise, the panel majority maintains the incoherent position that, although fairminded jurists could disagree regarding harmlessness, Gongora is somehow entitled to relief under a standard that is *even stricter* than that required by AEDPA.

IV.

Measuring Gongora's claim against AEDPA illustrates just how blatantly the majority misapplied *Brecht*: Because the error was not harmful under AEDPA, it cannot be harmful under the definitionally "more stringent" *Brecht* standard. *Burbank*, 535 F.3d at 357; *see also Bauberger*, 632 F.3d at 104. Moreover, although *Fry*, 551 U.S. at 120, determined that *Brecht* provides an "appropriate standard of review," *Fry* does not bar a court from considering AEDPA. "Per that case, a habeas court remains free to, before turning to *Brecht*, inquire whether the state court's [harmlessness] analysis was reasonable. If it was reasonable, the case is over."[6]

---

[6] *Ruelas v. Wolfenbarger*, 580 F.3d 403, 413 (6th Cir. 2009). Another circuit has concluded that, where *Brecht* applies, AEDPA's " 'unreasonable application of [clearly established federal law]' standard does not survive *Fry*." *Wood v. Ercole*, 644 F.3d 83, 94 (2d Cir. 2011). That view contradicts the plain language of *Fry*, 551 U.S. at 119, which expressly *reaffirmed* the AEDPA standard as articulated by *Mitchell v. Esparza*, 540 U.S. 12 (2003).

In analyzing the interplay of AEDPA and *Brecht*, it is important to bear in mind the asymmetry inherent in *Fry*, in which the court of appeals had *denied* habeas relief under *Brecht*, and the petitioner alleged that it was error for the court not to have also evaluated his claim under AEDPA. The Supreme Court determined that Fry's claim "makes no sense," because its rejection under *Brecht* necessarily implied rejection under "the more liberal AEDPA[] standard[.]" *Id.*

In sum, *Fry* boldly stands for the proposition that a habeas court is not *required* "formal[ly] [to] appl[y]" both AEDPA and *Brecht*, because "the latter obviously subsumes the former." *Id.* Nothing in that case *precludes* a court from applying AEDPA to *deny* habeas relief or as part of a two-step analysis.[7] Even a brief consideration of AEDPA, *arguendo* or otherwise, casts the inadequacy of Gongora's Fifth Amendment claim into sharp relief.

V.

It follows that Gongora's claim fails under *Brecht*, a result that is reinforced by considering whether the prosecutor's comments "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637 (citation and internal quotation marks omitted). Because Judge Owen has persuasively analyzed Gongora's claim under *Brecht*, *see Gongora*, 710 F.3d at 289–90

---

[7] *See Ruelas*, 580 F.3d at 413; *see also Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009) (asserting that a habeas court *must* apply AEDPA before applying *Brecht*).

(Owen, J., dissenting), I offer only brief additional comments, drawn from a similar case in which the Supreme Court recently granted certiorari:

> The majority compounds its error by engaging in a form of possible-harm review that verges on a presumption of prejudice. This leniency appears both in its emphasis on dicta opining about the likelihood that juries draw adverse inferences, and in its ultimate finding of a "very real risk" of prejudice. Alas, the correct harmless-error standard does not permit such speculation, and neither does the undisputed evidence . . . .[8]

Under the "possible-harm review" conducted by the Sixth Circuit in *Woodall* and the instant panel majority—and exemplified by Judge Higginbotham's determined portrayal of key facts in the light most favorable to Gongora—"no error will ever be harmless because one can never know what led a jury to its decision and it is always possible that a jury based its decision on the alleged error in question. But that is not the standard under *Brecht* . . . ."[9] Not only did the evidence establish Gongora's guilt, but "[t]he trial judge, in addition to issuing curative instructions during the prosecutor's closing argument, admonished the jurors several times that they could not and must not consider Gongora's

---

[8] *Woodall v. Simpson*, 685 F.3d 574, 586 (6th Cir. 2012) (Cook, J., dissenting), *cert. granted sub nom. White v. Woodall*, 133 S. Ct. 2886 (2013) (No. 12-794).

[9] Brief for Petitioner, 2012 WL 6762488, at *22, *Woodall*, 2013 WL 3213542 (No. 12-794).

choice not to testify as evidence of guilt." *Gongora*, 710 F.3d at 289 (Owen, J., dissenting).

Judge Higginbotham's latest response dismisses the instructions to disregard as "anemic [and] routinized" without explaining why they—from his reading of a long-cold record—were ineffective. He further contends that finding the *Griffin* error harmless would "drain the right to silence of *all* meaning" (emphasis added). That hyperbolic assessment is difficult to square with Judge Higginbotham's observation that commenting on a defendant's silence was "long tolerated" because the Fifth Amendment was interpreted, in accordance with its plain language, "only to forbid a defendant's coerced testimony."[10]

Judge Higginbotham's response also imbues the prosecutor's confused comments with almost talismanic significance: So great was their purported effect on the jury that, to Judge Higginbotham, they "infected every aspect of Gongora's trial." By far the better inference is that, after carefully weighing the conflicting evidence—and notwithstanding the *Griffin* error, which had no discernible impact on the strength of the prosecution's case—the jury, having heeded the trial court's instructions, concluded that Gongora was one of the two men who approached the victim before he was shot. Viewed in light of the deference owed to

---

[10] *See also Salinas v. Texas*, 133 S. Ct. 2174, 2177 (2013) (Thomas, J., concurring) (internal quotation marks omitted) ("*Griffin* lacks foundation in the Constitution's text, history, or logic.").

the fact-finder and to the state courts, the record compels the conclusion that "Gongora has not shown that the prosecutor's violations of the Fifth Amendment substantially influenced the jury's verdict that he was guilty of capital murder." *Gongora*, 710 F.3d at 290 (Owen, J., dissenting).

VI.

In response to any suggestion that the panel majority's error in applying *Brecht* is not grounds for en banc review, I note that Judge Higginbotham has elsewhere opined that "[t]his is a court of error," and its refusal to consider matters en banc "leaves litigants at the mercy of panel roulette—the 'law' being the unchartered and legally indefensible view of two judges."[11] The Supreme Court itself, moreover, routinely engages in error-correction in the habeas arena.[12] Because the Court reserves summary reversal for "matter[s] of sufficient national importance,"[13] it follows that any case evading AEDPA's relitigation bar—to say nothing of

---

[11] *Huss v. Gayden*, 585 F.3d 823, 832 (5th Cir. 2009) (Higginbotham, J., dissenting from denial of rehearing en banc).

[12] *See, e.g.*, *Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (per curiam); *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013) (per curiam); *Metrish v. Lancaster*, 133 S. Ct. 1781 (2013); *Parker v. Matthews*, 132 S. Ct. 2148 (2012) (per curiam); *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012) (per curiam); *Hardy v. Cross*, 132 S. Ct. 490 (2011) (per curiam); *Bobby v. Dixon*, 132 S. Ct. 26 (2011) (per curiam); *Cavazos v. Smith*, 132 S. Ct. 2 (2011) (per curiam).

[13] *Bd. of Educ. v. McKluskey*, 458 U.S. 966, 973 (1982) (Stevens, J., dissenting).

Brecht's even more stringent standard—"involves a question of exceptional importance."[14]

By declaring the error harmful under *Brecht*, the majority implicitly brands the determination of the TCCA as worse than unreasonable and the thorough analysis of two federal judges as beyond fairminded disagreement. Adding injury to insult, the panel majority not only has vacated Gongora's conviction but has done so after several years of deliberation. The prospect of retrial has dimmed with the passage of time and the death of the prosecution's key witness. There is a real possibility that Gongora will go free, despite having confessed. The panel majority "undermines the State[']s[] interest in finality and infringes upon [its] sovereignty over criminal matters." *Brecht*, 507 U.S. at 637.

In light of the panel majority's stubborn refusal to reconsider, the en banc court should grant rehearing, deny the Fifth Amendment claim under *Brecht* and AEDPA, and return the case to the panel for expedited consideration of Gongora's Eighth Amendment claim, which the majority did not reach. *See Gongora*, 710 F.3d at 273. Instead, the en banc court, with six judges disagreeing,[15] has declined to disturb a flagrant grant of relief that contravenes the

---

[14] FED. R. APP. P. 35(a)(2). Summary reversal "usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE ch 5.12(a), at 344 (9th ed. 2007).

[15] Five of those six judges join in this dissent.

principles of habeas review unambiguously articulated by the Supreme Court. I respectfully dissent from the denial of rehearing en banc.