

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

ALVA ZANE MCGRATH, JR.,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-07-2713
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Alva Zane McGrath has filed a petition for writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254. Having considered the parties' submissions and all matters of record, the court recommends that respondent's motion for summary judgment (Dkt. 16) be granted and petitioner's application be denied.

Background

McGrath was convicted by a jury on April 3, 2003 of two offenses of aggravated sexual assault of a child and two offenses of indecency with a child.¹ On April 4, 2003, the jury, based on an enhancement for a prior conviction,² sentenced him to two automatic life sentences on the aggravated sexual assault convictions, and 99 years in prison on each

¹ McGrath was convicted in cause numbers 881224, 940494, 940495, and 940496.

² McGrath was convicted of sodomy of a child, his daughter, while serving in the Air Force. He was given a dishonorable discharge and imprisoned in Fort Leavenworth, Kansas.

indecent conviction.³ The judge exercised his discretion to “stack” the sentences instead of allowing McGrath to serve them concurrently.

McGrath’s convictions were affirmed in a consolidated appeal, and his petitions for discretionary review were refused on September 14, 2005. He challenged each of his convictions in state court writ petitions filed on September 14, 2006,⁴ which were all denied without written order on findings of the trial court on June 13, 2007. McGrath filed this federal application for writ of habeas corpus on August 3, 2007.

McGrath asserts the following grounds for relief in this federal application for writ of habeas corpus:

- (1) he is “factually” innocent;
- (2) he received ineffective assistance of counsel at trial because his counsel failed to (a) perform a thorough and “conducive” investigation of this case; (b) require the state to elect an offense on which to seek a conviction; (c) object to consolidation and request severance; (d) impeach the leading witness for the state (the victim) with prior inconsistent statements; (e) challenge or object to the expertise of the investigating detective, Joseph Stevens; (f) object to hearsay testimony by the prosecutor, after closing the case-in-chief; and (g) request a special jury instruction.
- (3a) he was denied a fair trial because the trial court erred by (1) denying the defendant’s (a) motion for continuance; (b) motion to quash enhancement; (c) motion to suppress; (d) motion for new trial; (e) opportunity to reopen voir dire before seating jury; (f) opportunity to reopen voir dire before impaneling jury; (2) allowing two outcry witnesses for a single offense; (3) subjecting McGrath

³ A conviction for aggravated sexual assault of a child enhanced with a “substantially similar” sexual assault, results in an automatic life sentence. TEX. PENAL CODE § 12.42(c)(2)(B)(v).

⁴ WR-66,056-01, -02, -03, and -04.

to double jeopardy; and (4) delivering an improper jury instruction.

- (3b) he was denied a fair trial because of (a) insufficient evidence; (b) inadmissible and prejudicial evidence; (c) prosecutorial misconduct in the form of improper statements by the prosecutor in opening statements and after closing; (d) jury misconduct;
- (4) his sentences constitute cruel and unusual punishment;
- (5) his home and computer were searched in violation of the Fourth Amendment; and
- (6) he was denied a hearing in his state court writ proceedings.

Respondent does not contend that McGrath's petition is time-barred. Respondent does contend that certain of McGrath's claims are not exhausted, that many claims are procedurally defaulted, and that none of his claims have merit.

Analysis

A. AEDPA Standard of Review

McGrath's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). McGrath is not entitled to federal habeas relief on his claims that were adjudicated on the merits⁵ in state court unless the state court adjudication:

- (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.

⁵ A denial of habeas relief by the Texas Court of Criminal Appeals constitutes a ruling on the merits of the application. *In re Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997).

28 U.S.C. § 2254(d). A state court decision may be “contrary to” federal law as determined by the Supreme Court if the state court arrives at a conclusion opposite to the Supreme Court on a question of law, or if the state court “confronts a set of facts that are materially indistinguishable from a relevant Supreme Court precedent” and reaches an opposite conclusion. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

A state court decision involves an “unreasonable application” of federal law if the state court “identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. Federal habeas relief is warranted only where the state court decision is both incorrect and objectively unreasonable. *Id.* at 410-11.

The state court denied McGrath relief on all the grounds presented in his state habeas application and raised again here. McGrath has not shown that the state court’s decision was contrary to or an unreasonable application of federal law, or was based on an unreasonable determination of facts. Therefore, McGrath is not entitled to federal habeas relief on any of his claims. The court addresses specific deficiencies in his claims as follows.

B. McGrath’s Grounds for Relief

1. Cumulative Error

McGrath’s Memorandum argues in summary that his trial counsel’s and the trial court’s cumulative errors resulted in his unconstitutional convictions.⁶ McGrath did not

⁶ Memorandum in Support of Application, Dkt. 9-3 at p. 63, Dkt. 9-5 at p. 107.

allege cumulative error as a ground for relief in his writ application in this case. Nor did McGrath specifically assert cumulative error as a ground for relief in any of his state court writ applications. Such claims were not “fairly presented” to the state court, and they have not been exhausted. 28 U.S.C. § 2254(d)(2). If McGrath were to attempt to assert such claims in a state writ now, after having already pursued state writs that specifically asserted the individual errors that he now complains are unconstitutional in their cumulative effect, the writ would be dismissed for abuse of the state writ. *Ex Parte Whiteside*, 12 S.w.2d 819, 821-22 (Tex. Crim. App. 2000). Any claim for cumulative error has been procedurally defaulted and cannot be the basis for federal habeas relief. *Kittleson v. Dretke*, 426 F.3d 306, 315 (5th Cir. 2005).

2. Actual Innocence

The Supreme Court has explained that:

Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact.

Herrera v. Collins, 506 U.S. 390, 400 (1993). McGrath has not presented any newly discovered evidence of his innocence. McGrath’s innocence claim simply attacks the factual sufficiency of the evidence against him, a claim rejected by the state habeas court.⁷

⁷ McGrath’s sufficiency of the evidence argument is addressed further in section B(4) below.

3. Ineffective Assistance of Counsel

The Supreme Court has established a two-part test for determining ineffective assistance of counsel habeas claims. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish an ineffective assistance of counsel claim, a defendant must first show that his counsel's performance was "deficient." To do this, a defendant must point to specific errors "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* The court's scrutiny of counsel's performance is highly deferential; the court presumes that counsel's conduct falls within the wide range of reasonable professional assistance. *Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005).

Second, a defendant must demonstrate that his counsel's performance prejudiced his defense. *Id.* In other words, a defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.*; *see also United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999) ("the focus here is whether a reasonable probability exists that counsel's deficient performance affected the outcome and denied [the defendant] a fair trial."). In establishing an ineffective assistance of counsel claim, a defendant cannot merely present conclusory allegations. *See Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998). Rather, the defendant must allege "specific facts" to support his claim. *Id.*

Failure to Investigate. McGrath complains that his counsel failed to secure a computer expert to testify about the large amount of child pornography on his computer, and failed to secure the victim's school records to counter the allegation that her work suffered

during the period she was being assaulted.

His hypothetical and theoretical testimony about computer forensics is purely speculative and conclusory and will not support issuance of a writ. *Martin v. McCotter*, 796 F.2d 813, 819 (5th Cir. 1986); *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1984). His position is also contradicted by the record, which indicates that defendant's computer expert reviewed the computer evidence, but agreed with the state expert's analysis and therefore did not testify at trial. McGrath has not shown either that his counsel's performance was deficient in this regard, or that he was prejudiced by it.

McGrath does not provide any evidentiary support for his position that the victim's school records would counter the assertion that the victim's work suffered. In order to show prejudice based on failure to investigate, McGrath must show that the missing evidence that counsel would have discovered would have been favorable to him at trial. *See Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) (in order to show *Strickland* prejudice, petitioner must show that a missing witness's testimony would have been favorable, and that the witness would have testified at trial). Again, McGrath has not shown either that his counsel's performance was deficient in this regard, or that he was prejudiced by it.

State's Election of Offense to Prosecute. Under Texas state law, where one act of assault is alleged in an indictment, and more than one act is shown by the evidence, upon request of defense counsel made after the state rests its case in chief, the trial court must order the state to elect which act the state relies on for the indicted sexual assault. *Farr v.*

State, 140 S.W.3d 895, 898 (Tex. App.–Houston -14th Dist.] 2004), *aff'd Phillips v. State*, 193 S.W.3d 904 (Tex. Crim. App. 2006). A trial court's failure to do so is error because it violates the unanimity requirement of the Texas constitution. *Id.* at 898-901.

The unanimity requirement is a state requirement, it is not a federal constitutional requirement, and thus does not support federal habeas relief. *Hoover v. Johnson*, 193 F.3d 366, 369-70 (5th Cir. 1999). Moreover, McGrath has not shown that, had counsel requested the election, the jury likely would not have found him guilty of the elected instance of assault. In fact, the jury charge instructed the jury that in order for any instance of abuse to support of a conviction, the prosecution must have proved the occurrence beyond a reasonable doubt. McGrath has failed to show prejudice from this alleged deficiency in his trial counsel's performance.

Consolidation/Severance. McGrath had a consolidated trial on his four separate indictments. McGrath first argues that his counsel should have objected because the prosecution did not timely file a notice of its intent to consolidate 30 days prior to trial, as required by Texas Penal Code § 3.02(b). This assertion is without merit because the state timely filed its notice on February 24, 2003, 31 days in advance of his March 26, 2003 trial.

McGrath further argues that his trial counsel should have moved for severance. Pursuant to Texas Penal Code § 3.04(a), a defendant generally has a right to severance when two or more offenses have been consolidated for trial. However, § 3.04(c) contains an exception to this general rule in prosecutions for offenses, such as McGrath's, described in

§ 3.03(b)(2) (sexual assault of a minor). McGrath did not have an automatic right to severance. In a case like McGrath's, the trial court "may" order severance if the defendant would be "unfairly prejudiced" by joinder of the offenses. In other words, the trial court had discretion whether to grant severance. *Matthews v. State*, 152 S.W.3d 723, 731 (Tex. App.–Tyler 2004, no pet.). There is no presumption that joinder of cases involving sexual assault of a child is unfairly prejudicial. *See id.* (trial court could reasonably find that joinder of cases of sexual assault against different children was not unfairly prejudicial). Here, the trial court was not likely to grant severance if requested, given that severance would have required the young victim to testify in four separate trials. Moreover, had the cases been severed, there is no reason the jury in each trial would have been less likely to believe the child's testimony than was the jury in the consolidated trial. McGrath has not met his burden to prove his counsel's performance was deficient or that he was prejudiced by it due to consolidation.

Inconsistent witness statements. McGrath complains that his trial counsel did not impeach the complainant child witness regarding her partial and delayed outcries of abuse. A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it was so ill chosen that it permeates the entire trial with obvious unfairness. *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983). McGrath's trial counsel provided an affidavit to the trial court explaining her strategy in declining to aggressively impeach the child witness. She believed it was best to be

sympathetic to the child and focus on her motivation to provide false testimony. She also believed that the inconsistencies could be brought out through the testimony of others, and she examined other witnesses on the inconsistencies in the child's testimony. The record indicates that the witnesses prior inconsistent statements were in fact brought to the attention of the jury, thus there is no evidence that trial counsel's strategic decision imbued the trial with obvious unfairness. McGrath is not entitled to federal habeas relief on this ground.

Failure to Object to State's "Expert." McGrath asserts that his trial counsel was ineffective in preventing Detective Stephens of the Pasadena Police Department from offering expert testimony on computer forensics that he was not qualified to give under Texas Rule of Civil Procedure 702. McGrath argues that absent Stephens's testimony regarding the child pornography found on his computer, his sentence would have been far less severe.

McGrath's argument is without merit. McGrath's trial counsel made a motion to suppress the evidence of child pornography found on McGrath's computer about which Stephens testified, but the trial court denied the motion and overruled counsel's ongoing trial objections to Stephens's testimony. Furthermore, Stephens did not give expert testimony. He testified only as to what he saw on McGrath's computer when another detective accessed computer files, and he identified computer equipment and disks admitted into evidence as being the same ones he found at McGrath's residence. This is factual, not opinion, testimony well within the scope of what a police officer would be able to provide. Thus, trial counsel's

performance was not deficient because there was no basis for an objection to Stephens's testimony on the grounds he was not a qualified expert.

McGrath faced an automatic life sentence on each of the aggravated sexual assault of a child charges because of his prior convictions. It was the judge, not the jury, who made the decision to stack his life sentences instead of having them run concurrently. Therefore, McGrath has not shown that his counsel's failure to object to the admission of Stephens' "expert" testimony had any influence on the length of the sentence McGrath received.

Hearsay Comments by Prosecutor. McGrath contends that his counsel failed to object to the prosecutor's statement regarding the opinion of the defense computer expert as expressed to the prosecution's expert outside of court. The statement was made in a side-bar, not in front of the jury. It was not admitted into evidence for any purpose. There was no hearsay objection to be made by trial counsel. Trial counsel's affidavit submitted in the state court habeas proceeding confirmed that the statement of which McGrath complains was made outside of the presence of the jury. McGrath has not shown either that his counsel's performance was deficient in this regard or that he suffered prejudice.

Special Jury Instruction. In this allegation of ineffectiveness, McGrath reiterates his position that the consolidation of the charges against him in one trial violated his right to jury unanimity. He believes that his counsel should have requested that the jury be instructed that they must reach a unanimous decision as to each instance of alleged sexual abuse.

McGrath cannot show prejudice because there is no indication that the jurors were not

unanimous on each of the charges. The jury was instructed that each instance of abuse on which evidence was presented at trial must have been proven beyond a reasonable doubt before they could consider it in reaching their verdict on guilt/innocence. Therefore, there is no way that any juror's vote for conviction could be based on an instance that the jury did not unanimously believe was proven beyond a reasonable doubt.

4. Trial Errors

Nearly all of McGrath's numerous claims of trial error are procedurally defaulted because he did not raise them on direct appeal. The trial court in McGrath's state habeas proceeding concluded "because the applicant failed to raise on direct appeal his instant claims of trial court error and prosecutorial misconduct, the applicant is procedurally barred from raising the claim[s] in the instant proceeding. *Ex Parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998)." Where the last state court to consider a claim expressly and unambiguously based its denial of relief on state procedural default, federal habeas review is barred absent a showing of cause for the default and actual prejudice from the default. *Harris v. Reed*, 489 U.S. 255, 265 (1989); *Brewer v. Quarterman*, 466 F.3d 344, 347 (5th Cir. 2006). McGrath has shown neither cause for the default nor actual prejudice.⁸

Double Jeopardy. McGrath's double jeopardy claim is also procedurally defaulted, but for a different reason. McGrath raised his double jeopardy claim on direct appeal. The

⁸ This specific ruling applies to all of the claims listed in grounds 3(a) and 3(b) except double jeopardy, which was raised on appeal but not in his state court writs, and sufficiency of the evidence, which was raised and rejected in both his direct appeal and state habeas proceeding. Those excepted grounds are discussed below.

state appellate court ruled that McGrath had waived the claim by failing to object at trial. The state appellate court further addressed and rejected McGrath's double jeopardy claim on the merits because McGrath was convicted on four separate charges, each based on different conduct.

This court is bound by the state court's express invocation of the procedural bar. *Harris*, 489 U.S. at 264 n.10. This claim also fails on its merits. The prohibition against double jeopardy protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The state appellate court's determination that McGrath was convicted of four separate offenses is not contrary to or an unreasonable application of federal law or based on an unreasonable determination of facts.

Sufficiency of Evidence. Under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), habeas relief is appropriate "if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Schrader v. Whitley*, 904 F.2d 282, 284 (5th Cir. 1990). This court attaches "great weight" to the fact that the state court reviewed McGrath's sufficiency of the evidence claim under the appropriate standard. *Id.*

Because the jury was presented with testimony of the child victim that they clearly found credible, McGrath's assertion of insufficient evidence is without merit. *See Ruiz v. State*, 891 S.W.2d 302, 304 (Tex. App.—San Antonio 1994, pet. ref'd) (testimony of child victim alone is sufficient to support conviction in sexual abuse case). McGrath has not

rebutted the presumption of correctness of the state appellate court's ruling that a rational trier of fact could have found proof of guilt beyond a reasonable doubt based on this evidence.⁹

5. Cruel and Unusual Punishment

McGrath contends that his two life sentences and two 99-year sentences, to be served consecutively, constitute cruel and unusual punishment in violation of the Texas Rules of Criminal Procedure, the Texas Penal Code, and the Eighth Amendment to the United States Constitution.

The state court found McGrath's state law based cruel and unusual punishment claims to be procedurally defaulted because they were not adequately briefed. Thus, these claims are not subject to review by this court.¹⁰ The state court considered the merits of McGrath's Eighth Amendment claim.

The Eighth Amendment requires that a state criminal sentence be proportionate to the crime for which the defendant has been convicted. *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). Successful challenges to the proportionality of particular sentences are exceedingly rare. *Id.* McGrath was convicted of two counts of aggravated sexual assault of a child and

⁹ The state habeas court ruled that McGrath's sufficiency of evidence challenge is not cognizable in a post-conviction habeas proceeding, and further that it need not review the issue because it was raised and rejected on direct appeal. *See, e.g.,* Tr. 27 (citing *Ex parte McLain*, 869 S.W.2d 349, 350 (Tex. Crim. App. 1994), and *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984).

¹⁰ Violations of Texas statutory or constitutional law do not provide a basis for federal habeas relief. *Wright v. Quarterman*, 470 F.3d 581, 586 (5th Cir. 2006).

two counts of indecency with a child. His punishment was enhanced by a prior sodomy conviction involving his minor daughter. The trial court properly took the enhancement into account. *Id.* at 273. The state habeas court applied appropriate federal law in reviewing this claim, and its conclusion is not contrary to or an unreasonable application of or based on an unreasonable determination of the facts. Thus, McGrath is not entitled to relief on this claim.

6. Fourth Amendment Violations

McGrath was given an opportunity for full and fair litigation of his Fourth Amendment claims at the time of his trial. Trial counsel made a motion to suppress, which was overruled by the trial court. Thus, McGrath's application for federal habeas relief on such ground must be denied pursuant to the Supreme Court's ruling in *Stone v. Powell*, which holds:

[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force.

428 U.S. 465, 494-95 (1976).

7. Lack of Evidentiary Hearing in State Habeas Court

Infirmities in state writ proceedings do not state a federal constitutional violation, and thus do not state a basis for federal habeas relief. *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995); *Vail v. Procnier*, 747 F.2d 277, 277 (5th Cir. 1984).

Conclusion and Recommendation

For the reasons discussed above, the court recommends that McGrath's petition be denied. None of the challenged state court rulings have been shown to be incorrect, much less objectively unreasonable, under federal law.

The court further finds that McGrath has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on August 12, 2008.


Stephen Wm Smith
United States Magistrate Judge