

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

ELOY REDD,	§	
Petitioner,	§	
	§	
vs.	§	Civil Action H-07-00912
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

**MEMORANDUM AND RECOMMENDATION**

Before the court is Redd’s 28 U.S.C. § 2254 habeas corpus petition (Dkt. 2), and Respondent Quarterman’s motion for summary judgment (Dkt. 16). For the reasons expressed below, it is recommended that respondent’s motion be granted, and Redd’s petition be dismissed with prejudice.

**Background**

On March 1, 2004, Redd was convicted in Fort Bend County Texas on three counts of aggravated sexual assault of a child younger than 14, and subsequently given a 40 year sentence due to an enhancement for a prior theft conviction. *See Redd v. State*, Nos. 14-14-00339-CR, 14-04-00340-CR, 14-04-00341-CR, 2005 WL 2875085 (Tex. App.—Houston, 2005, pet. ref’d) (not designated for publication) (affirming convictions). After relief was denied on appeal, Redd filed three petitions for discretionary review which were refused by

the Texas Court of Criminal Appeals on March 29, 2006. *Id.* Redd's first and only state application for writ of habeas corpus was also denied, without written order, by the Texas Court of Criminal Appeals on January 17, 2007.<sup>1</sup> Redd filed his current federal habeas petition on January 31, 2007 (Dkt. 2).

### **Jurisdiction**

Jurisdiction is proper in this court because Redd was convicted in the Southern District of Texas. 28 U.S.C. § 124 (b)(2). Also, Redd's petition is timely under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>2</sup> because he filed his petition within one year of the denial of his petitions for discretionary review. 28 U.S.C. § 2244(d)(1). Finally, Redd has exhausted all administrative remedies because he presented the substance of each of his current claims to the Texas Court of Criminal Appeals. 28 U.S.C. § 2254(b)(1); *Fisher v. Texas*, 169 F.3d 295, 302 (5th Cir.1999).

### **Analysis**

Redd asserts many grounds for federal habeas relief, which may be grouped under four headings: (1) ineffective assistance of trial counsel in numerous respects;<sup>3</sup> (2) ineffective

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<sup>1</sup> Records pertaining to Redd's state application are available at <http://www.cca.courts.state.tx.us/opinions/case.asp?FilingID=248364>.

<sup>2</sup> Pub.L. No. 104-132, 110 Stat. 1214 (1996).

<sup>3</sup> Specifically, Redd alleges that trial counsel: (1) did not investigate evidence suggesting that several other people could have assaulted the victim and that witnesses were lying to frame him for the acts of one or more of these individuals; (2) did not inform him that there were state-identified witnesses who knew he was being framed and whose testimony would have secured his acquittal, had he asked them to testify; (3) failed to consult a medical expert, or otherwise understand, the only physical evidence suggesting that the victim had been

assistance of his appellate counsel because he provided an incomplete record for appellate review, and inadequately briefed the trial court's errors; (3) trial court abuse of discretion in several respects;<sup>4</sup> and (4) insufficient evidence to support his conviction.

In response, Quarterman asserts that Redd has not met his burden of proof. In habeas cases, at the summary judgment stage, state court findings of fact are presumed correct unless the petitioner can rebut the presumption by "clear and convincing evidence." *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002). Further, under AEDPA, which governs this case,<sup>5</sup> habeas petitioners may not obtain habeas relief with respect to any claim that was adjudicated by the state court on the merits unless they show that the 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.

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sexually assaulted; (4) failed to obtain copies of relevant medical records and photographs of the victim; (5) failed to object and inform the trial court that the jury should not have been allowed to review videotaped interviews and testimony in the jury room, absent a disagreement between jury members regarding the substance of the testimony; (6) failed to object to the state's use of misleading evidence; (7) failed to object to the state's use of the penitentiary packet used to support enhancements to his sentence during the punishment phase; and (8) inadequately investigated and litigated the case overall.

<sup>4</sup> Redd claims that the trial court abused its discretion by: (a) allowing jurors to replay testimony during deliberation; (b) failing to abide by articles 36.28 and 38.071 of the Texas Code of Criminal Procedure; and (c) excluding evidence regarding a third party's sexual assault history and opportunity to molest the victim.

<sup>5</sup> *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (holding that AEDPA governs petitions filed after April 24, 1996).

28 U.S.C.A. § 2254 (d).<sup>6</sup>

Here, Redd has not met his threshold burden of demonstrating that the denial of his state habeas claims constituted either an unreasonable application of federal law, as determined by the Supreme Court, or an unreasonable determination of the facts in light of the evidence. More specifically, rather than showing how the Texas Court of Appeals erred, Redd merely restates the same claims he made on appeal and in his state application for writ of habeas corpus. Because Redd's federal petition raises claims which have already been adjudicated on the merits by the Texas Court of Appeals,<sup>7</sup> his failure to show how that adjudication was insufficient under AEDPA requires this court to dismiss his petition. *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991). The court specifically addresses Redd's claims as follows.

***Ineffective Assistance of Trial Counsel.*** The Supreme Court has established a two-

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<sup>6</sup> Further, where a habeas applicant requests an evidentiary hearing on a claim, as Redd has here, but has failed to develop the factual basis for that claim in state court proceedings, the court shall not hold an evidentiary hearing unless the applicant shows that:

- (A) the claim relies upon: (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
- (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (2005).

<sup>7</sup> See *Singleton v. Johnson*, 178 F. 3d 381, 384 (5th Cir. 1999) (defining requirements for a merits adjudication).

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.*

In this case, Redd has failed to show any deficiency in counsel's performance that prejudiced his case. Redd has not explained what evidence further investigation would have yielded to support his purported defense that he was framed. Redd has not shown that any favorable evidence could have been obtained from victim's medical records or from any

medical expert testimony. Similarly, Redd has no support for his conclusory statement that witnesses were available who if called would have testified favorably for him. Complaints about uncalled witnesses are not particularly compelling in habeas proceedings, “because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative.” *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978).

Redd’s contention that counsel was ineffective for failing to object to the presentation of a videotape of the victim to the jury during deliberation is also without merit. The record does not indicate that the jury viewed the videotape during deliberations, so there is no showing of prejudice in any event. Redd has also not shown that there was a viable objection to the admissibility of photographs of the house in which the assaults took place.

Finally, Redd’s claim regarding counsel’s failure to object to the enhancement of his punishment provides no ground for relief. His contention that he did not voluntarily and knowingly plead guilty to the prior crimes that were used to enhance his sentence is not a valid objection because the trial court had no jurisdiction to question the validity of five to ten-year old prior convictions that were supported by certified state records. In any event, Redd cannot show prejudice because he would have faced the same range of punishment even without the enhancement. *See* TEX. PENAL CODE ANN. §§ 12.32(a), 22.021(e).

***Ineffective Assistance of Appellate Counsel.*** The two-pronged test of *Strickland* also applies to an ineffective assistance of appellate counsel claim. In order to succeed on an

ineffective assistance of appellate counsel claim, a petitioner must show that the issues he argues should have been raised are not frivolous, and would have been successful. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel is not ineffective for failing to raise issues on appeal where the record does not show the existence of trial errors with arguable merit. *Hooks v. Roberts*, 480 F.2d 1196, 1198 (5th Cir. 1973). Appellate counsel is not required to argue every conceivable issue on appeal; counsel is required to use professional judgment to determine which nonfrivolous issues to pursue on appeal. *Jones v. Barnes*, 463 U.S. 745, 749 (1983). There is no requirement that appellate counsel consult with the client about what claims to pursue on appeal. *Hooks*, 480 F.2d at 1197.

Redd has wholly failed to explain how any of appellate counsel's alleged deficiencies impacted the outcome of his appeal.

**Trial Court Abuse of Discretion.**

In order to warrant relief, trial court errors must be so substantial as to render the trial as a whole fundamentally unfair. *Nelson v. Estelle*, 642 F.2d 903, 907 (5th Cir. 1981). Redd has not shown that the trial court in fact committed error. But even if the trial court's decisions to allow the jury to review evidence, to admit a videotape of the victim, and to refuse to admit irrelevant and hearsay testimony about other potential perpetrators of the offenses were erroneous, they did not render the trial fundamentally unfair, particularly in light of the significant evidence of guilt presented at trial.

**Insufficient Evidence.**

Redd's argument that the evidence was factually insufficient to support his conviction presents strictly matters of state law, not federal Constitutional law, and cannot support relief in a federal habeas case. *Pemberton v. Collins*, 991 F.2d 1218, 1224 (5th Cir. 1993).

**Conclusion**

For the reasons stated above, the court recommends that respondent's motion for summary judgment be granted, and Redd's petition be denied with prejudice.

The court further finds that Redd 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 February 15, 2008.

  
Stephen Wm Smith  
United States Magistrate Judge