

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT CARMELL - PETITIONER

VS.

LORIE DAVIS, DIRECTOR - RESPONDENT

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

PETITIONER CARMELL'S FIRST
MOTION FOR EXTENSION OF TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI

SCOTT CARMELL
#777548 - COFFIELD UNIT
2661 FM 2054
TENNESSEE COLONY, TEXAS 75884-5000

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TO THE HONORABLE JUSTICES:

Petitioner Carmell requests this Court to grant this Motion for Extension of Time to File a Petition for a Writ of Certiorari. The present deadline for filing is June 18, 2018. He is proceeding pro se and is requesting a 30-day extension, up to and including July 18, 2018, for the following reasons.

I.
JURISDICTION

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

II.
HISTORY

On December 22, 2017, the United States Court of Appeal for the Fifth Circuit denied Petitioner 28 U.S.C. §2254 habeas corpus relief. The judgment was received 11 days later. With only three days remaining of the 14 days allowed to file a Motion for Rehearing, Petitioner requested a time extension. This was denied. He then requested a time extension to file an out-of-time Motion for Rehearing. This was granted. His request for rehearing and reconsideration was denied on March 20, 2018. The

present deadline for filing a petition for a writ of certiorari is June 18, 2018.

III.

INCARCERATION

Petitioner Carmell is currently incarcerated in the Texas Department of Criminal Justice, Coffield Unit, and does not have the benefit of legal counsel nor the research tools and skills of a professional attorney.

IV.

PRISON LAW LIBRARY

The Coffield law library is very inadequate and limited in regard to research materials and access to them.

A. Materials. The case books/reporter volumes on the library shelves are limited to the following:

- Federal Reporter 2d, 710-999
- Federal Reporter 3d, 1-538
- Federal Supplement, 694-999
- Federal Supplement 2d, 1-565
- Southwestern Reporter 2d, 757-999
- Southwestern Reporter 3d, 1-253
- Supreme Court Reporter, 97A-128

The library does not have the 1) Supreme Court Digest, 2) Supreme Court Words and Phrases, 3) Supreme Court Table of Cases, 4) Federal Appendix, 5) Etc. This makes it very difficult and slow to do research.

To receive a case not available on the book shelf an Intra-Loan request is submitted. If it is within the parameters of the Intra-Loans, it will be made available generally between one to three days following the request. If a case is Shepardized, it too will take one to three days to receive the print-out of case citations. From this list newer cases will take another one to three days to receive once they are ordered. There is a maximum of three Intra-Loan and/or three Shepard's requests per day. To put it succinctly, it is questionable if this library complies with this Court's holding in regard to being an adequate law library in Lewis v. Casey, 116 S.Ct. 2174, 2182 (1996).

B. Lockdown and Restricted Access. The prison library is not accessible during lockdowns and access to legal materials is severely limited.

Coffield went on lockdown March 28, 2018 — 26 days ago. The end of it cannot be predicted. This is a significant circumstance that is impeding Petitioner from researching and preparing his certiorari petition.

On top of the limitations in Section A above, during lockdown a person can receive only three items (e.g., cases, statutes, Shepard's lists) three times a week. Petitioner has therefore ^{been} limited to accomplishing in the last four weeks what he would normally accomplish in one week in the law library. Example: It took over a week to receive the list of Reporter volumes on the library bookshelves noted above.

V. WRITING

In addition to the matters above, not only is without the assistance of an attorney, he does not have access to a typewriter, computer, or copy service. He must laboriously handwrite his petition and copies.

VI. FIRST REQUEST

This is Petitioner's first request for an extension to file a petition for a writ of certiorari. It is not designed to harass the Respondent nor to unnecessarily delay these proceedings. It is not anticipated that the Respondent will object. No further extensions are anticipated.

VII. DOCUMENTS

Petitioner does not have the documents that are required for the petition's appendices. He is waiting to receive ordering and pricing information from lower courts. Further, he must rely on the assistance of a "free-world" friend in getting the documents and is currently trying to get this coordinated, which is very slow via the mail.

RELIEF REQUESTED

For the foregoing reasons and good cause Petitioner respectfully requests that this Motion for Extension of Time be granted, up to and including Monday June 18, 2018.

Respectfully submitted,

Scott Carmell

~~Scott~~ Scott Carmell

DECLARATION

I declare under penalty of perjury that the foregoing is true and correct and that this motion was placed in the prison mail system on April 22, 2018.

Executed on April 22, 2018.

Scott Carmell
Scott Carmell

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Motion for Extension of Time was served by placing it in the prison mailing system for outside mailing in the United States mail, first-class postage prepaid, on the 22nd day of April, 2018, addressed to:

Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, TX 78711

Scott Carmell
Scott Carmell

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-40103
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

December 22, 2017

Lyle W. Cayce
Clerk

SCOTT LESLIE CARMELL,

Petitioner—Appellant,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:13-CV-681

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:*

Scott Leslie Carmell, Texas prisoner # 777548, was convicted of 15 counts of sexual offenses against his stepdaughter that included eight counts of indecency with a child, five counts of sexual assault, and two counts of aggravated sexual assault. He was sentenced to 13 concurrent 20-year terms of imprisonment on the indecency and sexual assault convictions, and he was

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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sentenced to two terms of life imprisonment for the aggravated sexual assault convictions. Carmell's convictions and sentences were affirmed on direct appeal, *Carmell v. State*, 963 S.W.2d 833, 834-35 (Tex. App.—Fort Worth 1998) (per curiam) (*Carmell I*), but the case was remanded by the Supreme Court on certain counts. *Carmell v. Texas*, 529 U.S. 513, 516-53 (2000) (*Carmell II*). On appeal after remand, his convictions and sentences were again affirmed. *Carmell v. State*, 26 S.W.3d 726, 728 (Tex. App.—Fort Worth 2000) (per curiam) (*Carmell III*).

On his initial 28 U.S.C. § 2254 application, Carmell was granted relief in the form of an out-of-time appeal. *Carmell v. Quarterman*, 292 F. App'x 317, 330 (5th Cir. 2008) (per curiam) (*Carmell IV*). His conviction and sentence were again affirmed by the state appellate court. *Carmell v. State*, 331 S.W.3d 450, 455-56 (Tex. App.—Fort Worth 2010) (*Carmell V*).

Carmell then filed the instant § 2254 application. The district court denied relief, but a certificate of appealability was granted on Carmell's claims of ineffective assistance of appellate counsel and his related claim that the district court erred in denying his discovery request.

We “review the district court's findings of fact for clear error and review its conclusions of law *de novo*, applying the same standard of review to the state court's decision as the district court.” *Ortiz v. Quarterman*, 504 F.3d 492, 496 (5th Cir. 2007). “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.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation marks and citation omitted).

Carmell argues that appellate counsel was ineffective. Specifically, he contends that counsel failed to challenge the lack of jurisdiction in the trial court, the excessiveness of his life sentences, the alleged perjury of the victim,

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the withholding of impeachment evidence by the prosecution, and the cumulative error that affected the trial. He also argues that appellate counsel was deficient for failing to argue that trial counsel was ineffective. Carmell asserts that counsel should have argued on appeal that trial counsel was ineffective for failing to investigate and interview witnesses, failing to preserve a vagueness challenge to Texas Penal Code section 22.021, failing to inform the court that Carmell was eligible to be tried under a second degree statute, failing to object to the introduction of a misdemeanor conviction during the penalty phase, and failing to challenge the trial court's jurisdiction.

To establish ineffective assistance of counsel, a defendant must show that counsel performed deficiently and that he was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* standard applies to allegations of ineffective assistance of appellate counsel. *Amador v. Quarterman*, 458 F.3d 397, 411 (5th Cir. 2006). To establish that appellate counsel's performance was deficient, the applicant must show that counsel was objectively unreasonable in failing to find arguable issues to appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). If the petitioner makes such a showing, he must establish actual prejudice by demonstrating a "reasonable probability" that he would have prevailed on appeal but for counsel's deficient performance. *Id.* Review of the state court's application of the *Strickland* standard is "doubly" deferential when § 2254(d) applies, as it does in this case. *See Richter*, 562 U.S. at 105.

Carmell fails to show that the state court's ruling denying relief on his claims of ineffective assistance of appellate counsel "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Accordingly, the state court's decision that appellate counsel was

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not ineffective was not contrary to or an unreasonable application of clearly established federal law, and the district court did not err in denying Carmell § 2254 relief. *See* § 2254(d)(1).

Regarding Carmell's assertion that the district court erred in denying his discovery request, his argument that the requested documents could support his claims is speculative. *See Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000). Moreover, "federal review of a state prisoner's habeas claim is limited to the record that was before the state court that adjudicated the claim on the merits." *Rabe v. Thaler*, 649 F.3d 305, 308-09 (5th Cir. 2011) (internal quotation marks and citation omitted). Thus, Carmell fails to show that the district court abused its discretion in denying his discovery request. *See Clark v. Johnson*, 202 F.3d 760, 765-66 (5th Cir. 2000).

The judgment of the district court is AFFIRMED. Carmell's motion for summary judgment is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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SCOTT LESLIE CARMELL,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

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

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:

- (✓) The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
- () The Motion for Reconsideration is DENIED and 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 also DENIED.

- () A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE