IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-41227

A True Copy
Certified order issued Jan 04, 2018

Clerk, U.S. Court of Appeals, Fifth Circuit

JOHN MARTIN, SR.,

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

ORDER:

John Martin, Sr., Texas prisoner # 1268306, was convicted of aggravated sexual assault of a child and sentenced to 30 years of imprisonment. He seeks a certificate of appealability (COA) to appeal the district court's denial of a 28 U.S.C. § 2254 application he filed challenging his conviction.

Martin argues that the district court erred in denying his claims that (1) the trial court failed to investigate alleged juror misconduct; (2) the trial court violated his right to a speedy trial; (3) the evidence was insufficient to support his conviction; and (4) he was denied the effective assistance of counsel because his attorney failed to obtain an expert witness, did not adequately cross-examine the victim, did not adequately conduct voir dire, and failed to

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investigate and interview witnesses.[1] Martin does not argue that the district court erred in denying his claims that he was denied his confrontation clause rights and the right to be present during voir dire. He has abandoned any challenge he might have raised regarding those decisions. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

To obtain a COA on his remaining claims, Martin must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court denied Martin's claims on their merits, he must demonstrate that jurists of reason could disagree with the district court's resolution of his constitutional claims or could conclude the issues presented "deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks and citation omitted). Martin has not made that showing.

Accordingly, Martin's motion for a COA is DENIED. His motions for the appointment of counsel and an evidentiary hearing also are DENIED.

/s/ Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

[1] For the first time in his motion for a COA, Martin seeks relief based on cumulative error and argues that his attorney was ineffective for failing to ask the trial court to investigate his allegations of juror misconduct and failing to challenge the sufficiency of the evidence. This court will not consider those claims. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

JOHN MARTIN, SR.	§	
VS.	§	CIVIL ACTION NO. 1:08cv669
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner John Martin, Sr., an inmate confined within the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se,* filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The above-styled action was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Factual Background

Following a jury trial in the 252nd District Court of Jefferson County, Texas, petitioner was convicted of aggravated sexual assault of a child. He was sentenced to 30 years of imprisonment. The conviction was affirmed by the Texas Court of Appeals for the Ninth District. *Martin v. State*, 2007 WL 1441315 (Tex.App.–Beaumont, 2009). The Texas Court of Criminal Appeals refused a petition for discretionary review. *Martin v. State*, No. PD-0932-07.

Petitioner subsequently filed a state application for writ of habeas corpus. The Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing. *Ex parte Martin*, Appl. No. 51,191-03.

Grounds for Review

Petitioner asserts the following grounds for review: (1) he was denied the right to be present during *voir dire*; (2) the trial court failed to properly investigate juror misconduct; (3) he was denied his right to a speedy trial; (4) there was insufficient evidence to support the verdict and (5) he

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received ineffective assistance of counsel because counsel: (a) failed to call an expert witness; (b) failed to adequately cross-examine the victim; (c) failed to conduct an adequate *voir dire* examination and (d) failed to investigate and interview a witness.

Standard of Review

Title 28 U.S.C. § 2254 authorizes a district court to entertain a petition for writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment if the prisoner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). The court may not grant relief on any claim that was adjudicated in state court proceedings unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court reaches a conclusion opposite to a decision reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a materially indistinguishable set of facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). An application of clearly established federal law is unreasonable if the state court identifies the correct governing legal principle, but unreasonably applies that principle to the facts. *Id.* An unreasonable application of law differs from an incorrect application; thus, a federal habeas court may correct what it finds to be an incorrect application of law only if this application is also objectively unreasonable. *Id.* at 409-411. "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*, 131 S.Ct. 770, 786 (2011) (citation omitted). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* The Supreme Court has noted that this standard is difficult to meet "because it was meant to be." *Id.*

In addition, this court must accept as correct any factual determination made by the state courts unless the presumption of correctness is rebutted by clear and convincing evidence. 28 U.S.C.

§ 2254(e). The presumption of correctness applies to both implicit and explicit factual findings. *See Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001) ("The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact.").

Analysis

Right to Be Present During Voir Dire

Petitioner states that after prospective jurors were questioned during *voir dire*, he was taken to a room with his attorney. They discussed juror number 1, Ms. Lyon, and petitioner told counsel he did not want her to be on the jury. Before counsel could respond, the bailiff came into the room and told counsel he was needed in court. Counsel never returned to the room. Approximately 15 minutes later, the bailiff returned to the room and took petitioner to the courtroom. Petitioner complains that the jury had already been selected by the time he was returned to the courtroom. Petitioner noticed that juror number 1 was on the jury and told counsel he did not want her to be on the jury. Counsel responded by saying, "I want you to take the two years."

The Fifth and Sixth Amendments to the Constitution provide that a criminal defendant must be present at every stage of his trial, including jury impanelment. *United States v. Curtis*, 635 F.3d 704, 715 (5th Cir. 2011). "One purpose of the right to presence is to protect the defendant's exercise of his peremptory challenges, which means the defendant should be allowed to participate in the selection of a jury." *Id.* Two requirements stem from this right to presence for peremptory challenges: (1) the defendant must be present for the substantial majority of the jury selection process and (2) the defendant must be present in the courtroom at the moment when the court gives the exercise of peremptory challenges formal effect by reading into the record the list of jurors who were not struck. When these requirements are satisfied, a defendant's right to be present is not violated by a short absence during one portion of jury selection. *Id.* Accordingly, a defendant's absence from the courtroom when counsel is exercising peremptory challenges does not constitute error. *Id.* at

715.

The record reflects that petitioner was present during the *voir dire* process. The record further reflects that petitioner was present when the court announced the names of the individuals who would serve on the jury. In addition, petitioner was able to express his opinion regarding juror number 1 to counsel. As petitioner was present during the *voir dire* process and when the court gave the exercise of peremptory challenges formal effect, he has failed to demonstrate error was committed. The conclusion of the state courts on this point therefore was not contrary to, and did not constitute an unreasonable application of, clearly established law.

Juror Misconduct

Petitioner states that on the day the jury deliberated, Ms. Lyon, one of the jurors, said during deliberations that she had been a nurse for years and the testimony given by the doctor was wrong.[1] A male juror said that the medical report said otherwise. Ms. Lyon then repeatedly said that petitioner was guilty.

Petitioner states he brought these statements to the attention of the court and counsel prior to sentencing. He also provided an affidavit from Levi Goode, an inmate who heard the statements. However, the trial court refused to investigate what petitioner considers to be misconduct by Ms. Lyon. Nor did the court permit him to confront Ms. Lyon and cross-examine her about her statements.

In *Remmer v. United States*, 347 U.S. 227 (1954), the Supreme Court held that as juries in criminal cases must be free from extrinsic influences, a trial court confronted with an allegation of external tampering or contact with a juror during trial should determine the circumstances and the impact of the contact on the jury in a hearing where all interested parties may participate. However, a juror's personal experiences do not constitute external tampering or contact. *Marquez v. City of*

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[1] No physician testified at trial. This must be a reference to testimony given by the registered nurse who performed the sexual assault examination of the victim.

During *voir dire*, Ms. Lyon stated she had been a nurse for 22 years and had worked in the emergency department. She further stated she had conducted sexual assault examinations.

Albuquerque, 399 F.3d 1216, 1223 (10th Cir. 2005); *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991). "[A] juror's past experiences may be an appropriate part of the jury's deliberations." *Grotemeyer v. Hickman*, 393 F.3d 871, 879 (9th Cir. 2004). A juror's sharing of her own experience as a physician with the jury does not constitute an extrinsic influence. *Id.* at 878-79. In *Grotemeyer*, the United States Court of Appeals for the Ninth Circuit stated:

> Judges are drawn from a particularly well behaved group of people of limited experience. Fortunately, jurors are more diverse in their experiences than we are. That these experiences include the practice of medicine ... is all the more helpful. Ideally, at least someone on a jury of twelve will be able to contribute to the rest of the jury some useful understanding about whatever evidence comes up. It is probably impossible for a person who has highly relevant experience to evaluate the credibility of witnesses without that experience bearing on the evaluation.

Grotemeyer, 393 F.3d at 880.

The statements petitioner attributes to Ms. Lyon did not constitute juror misconduct. The statements did not indicate Ms. Lyon was subject to any extrinsic influence. Nor do the statements indicate Ms. Lyon made any investigation regarding the particular circumstances of petitioner's case. Instead, the statements indicate that, based on her personal experiences and professional training, Ms. Lyon disagreed with at least a portion of the testimony offered by the nurse. This did not constitute misconduct. As the statements attributed to Ms. Lyon were not improper, petitioner was not entitled to confront her and cross-examine her about the statements. The conclusion of the state courts on this issue was therefore not contrary to, and did not constitute an unreasonable application of, clearly established law.

Speedy Trial

Petitioner states he was arrested and an indictment was returned against him on December 6, 2001. However, trial did not commence until August 16, 2004, more than 32 months later. He states that two motions he filed seeking a speedy trial were improperly denied.

The Supreme Court has identified four factors that must be balanced when evaluating speedy trial claims: (1) length of the delay; (2) reason for the delay; (3) the defendant's diligence in asserting his rights and (4) prejudice to the defendant caused by the delay. *Barker v. Wingo*, 407 U.S. 514,

530 (1972).

The *Barker* analysis "eschews rigid rules and mechanical factor-counting in favor of a difficult and sensitive balancing process." *Amos v. Thornton*, 646 F.3d 199, 205 (5th Cir. 2011). On habeas review, a federal court must "give the widest of latitude to a state court's conduct of its speedy-trial analysis." *Id.* As long as there is any objectively reasonable basis on which the state court could have denied relief, the decision of the state court must be respected. *Id.*

"A defendant's speedy-trial right attaches at the time of arrest or indictment, whichever comes first." *Amos*, 646 F.3d at 206. "The bare minimum required to trigger a *Barker* analysis is one year." *Id.* If that element is met, the extent to which the delay extended beyond the minimum is examined because "the presumption that pretrial delay has prejudiced the accused intensifies over time." *Goodrum v. Quarterman*, 547 F.3d 249, 258 (5th Cr. 2008).

In this case, the delay between arrest and indictment and trial exceeded 12 months. As a result, a full *Barker* analysis must be conducted, and the first factor weighs in favor of petitioner.

Under the second *Barker* factor, the reasons for the delay are examined. The burden is on the respondent to proffer reasons to justify the delay. *Amos*, 646 F.3d at 207. "The weight assigned to a state's reasons for post-accusation delay depends on the reasons proffered." *Goodrum*, 547 F.3d at 258. "[A] deliberate delay to disadvantage the defense is heavily weighted against the state." *Id.* "[D]elays explained by valid reasons or attributable to the conduct of the defendant weigh in favor of the state." *Id.* A state may not be charged with delays caused by a defendant's counsel. *Vermont v. Brillon*, 556 U.S. 81 (2009). "[U]nexplained or negligent delays ... weigh against the state, but not heavily. *Id.*

As set forth above, the delay between arrest and indictment and trial was 32 months. There is no indication in the record that the delay was deliberately intended to disadvantage the defense. Moreover, a portion of the delay was attributable to defendant's counsel. On May 7, 2002, petitioner's counsel requested a continuance based upon emergency surgery performed on March 6. The case was reset for August 14. Accordingly, the approximately five month delay between the

date of surgery and the date of the resetting is attributable to counsel. The record indicates that the remainder of the delay was caused by the court not reaching the case and not because of delay sought by the prosecution or the defense. As the greater portion of the delay was the result of delay on the part of the court, but not the result of delay sought by the prosecution, this factor weighs against the state, but not heavily.

In considering the third *Barker* factor, courts ask whether a petitioner diligently asserted his right to a speedy trial. *Amos*, 646 F.3d at 207. A petitioner's assertion of his right "receives strong evidentiary weight, while failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.*

On September 4, 2003, approximately 22 months after indictment, petitioner filed a *pro se* motion asking that the charge against him be dismissed for lack of a speedy trial. On December 17, 2003, petitioner filed a *pro se* application for writ of habeas corpus seeking dismissal of the charge for lack of a speedy trial. However, an assertion that charges be dismissed based upon a speedy trial violation is not a value protected under *Barker*. *Cowart v. Hargett*, 16 F.3d 642, 647 (5th Cir. 1994); *Hill v. Wainwright*, 617 F.2d 375, 379 (5th Cir. 1980). Petitioner therefore did not validly assert his right to a speedy trial. As petitioner made no valid assertion of his right to a speedy trial, this factor is given strong evidentiary weight in favor of the state. *Cowart*, 16 F.3d at 647.[2]

Under the fourth *Barker* prong, unless the first three factors weigh heavily in favor of the defendant or the delay is at least five years, the burden is on the petitioner to put forth evidence of actual prejudice. *Divers v. Cain*, 698 F.3d 211, 219 (5th Cir. 2012). As the delay in this case was shorter than five years and the first three factors do not weigh heavily in favor of petitioner, he has the burden to show prejudice. In considering the prejudice element, courts are to bear in mind the factors meant to be protected by a speedy trial: "(i) to prevent oppressive pretrial incarceration; (ii)

[2] Even if it could be concluded petitioner validly asserted his right to a speedy trial, the lengthy delay between arrest and indictment and petitioner's attempt to assert his right weighs against him. *United States v. Parker*, 505 F.3d 323, 329-30 (5th Cir. 2007) ("Mere assertion of the speedy trial right is not enough for this factor to weigh in a [petitioner's] favor. If he waits too long, his pre-assertion silence will be weighed against him.").

to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. The third interest is "the most serious ... because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Petitioner was incarcerated from his arrest until trial. In addition, he states he lost his business while awaiting trial and was anxious and scared because he did not know what was happening to his family. As a result, these two subfactors weigh in petitioner's favor.

Petitioner states his defense was impaired because a prospective witness, Willy Wells, died prior to trial. He states Mr. Wells was in a relationship with the victim's mother. He states Mr. Wells told him that the victim's mother told Mr. Wells that she was going to "get" petitioner because petitioner had stopped seeing her and begun a relationship with her sister, the victim's aunt. He states the victim's mother told her that the person who examined the victim did not know anything and that the victim was still a virgin.

Petitioner has failed to demonstrate his defense was impaired. As described by petitioner, the testimony of Mr. Wells would have consisted of his stating what the victim's mother told him. This testimony would have been a out-of court statement offered to prove the truth of the matter asserted. As a result, it would have constituted inadmissible hearsay under Texas Rule of Evidence 801(d). In addition, the victim's aunt testified that the victim's mother was "a little bit jealous" of her relationship with petitioner. The aunt also testified that she had previously stated she believed the victim made up her story because of her mother's jealousy. Accordingly, any testimony of Mr. Wells would have been mostly cumulative of the testimony of the victim's aunt.

As the testimony of Mr. Wells would have been inadmissible and mostly cumulative of other testimony, petitioner has not shown that his inability to have Mr. Wells testify impaired his defense. As this is the most important subfactor of the fourth *Barker* factor, this factor weighs against petitioner.

The first two *Barker* factors weigh in favor of petitioner, but not heavily. The third factor weighs strongly in favor of the prosecution and the fourth factor weighs against petitioner. As two

of the applicable factors weigh against petitioner, one of them strongly, and being mindful of the deference that is to be accorded a state court's speedy trial analysis, it cannot be concluded that the decision of the state courts on this point was contrary to, or involved an unreasonable application of, clearly established law.

Insufficient Evidence

Petitioner states there was insufficient evidence to support the verdict. He states the alleged assault occurred on August 2, 2001. A physician examined the victim four to six days later.[3] The examination returned negative results, only showing a small abrasion and a small tear to the posterior fourchette of the victim's vaginal area. He asserts that State's Exhibit Number 2, the report of the examination, showed there was no acute trauma to the hymen or the labia majora. He states the report showed that the victim was still a virgin.

Claims regarding sufficiency of the evidence are governed by the standard set forth by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). A federal habeas court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. The court may not substitute its view of the evidence for that of the jury, but must consider all of the evidence in the light most favorable to the prosecution. *Weeks v. Scott*, 55 F.3d 1059, 1061 (5th Cir. 1995).

Under Section 22.021 of the Texas Penal Code, a person commits the offense of aggravated sexual assault of a child if the person intentionally or knowingly causes the penetration of the sexual organ of a child by any means and the victim is under the age of 14. Article 38.07 of the Texas Code of Criminal Procedure provides that a conviction for aggravated sexual assault of a child may be supported by the uncorroborated testimony of the victim of the offense. Any penetration, no matter how slight, is sufficient to satisfy the requirements of the statute. *Cowan v. State*, 562 S.W.2d 236, 238 (Tex.Crim.App. 1978).

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[3] As stated above, a nurse examined the victim.

The victim testified she was born in September, 1989, making her 11 on August 2, 2001, the date of the assault. She further testified that after pulling down her pants, petitioner placed his penis halfway in her vagina and started moving up and down. The victim's mother and the nurse who performed the sexual assault examination stated the victim told them petitioner inserted his penis into her vagina. Based on this testimony, there was sufficient evidence to support a finding that petitioner was guilty of the offense with which he was charged. This ground for review is therefore without merit.

START →

Claims of Ineffective Assistance of Counsel

A. Legal Standard

In order to establish an ineffective assistance of counsel claim, a petitioner must prove counsel's performance was deficient, and that the deficient performance prejudiced petitioner's defense. *Strickland v. Washington*, 466 U.S. 668 (1984). As a petitioner must prove both deficient performance and prejudice, failure to prove either will be fatal to his claim. *Johnson v. Scott*, 68 F.3d 106, 109 (5th Cir. 1995).

Judicial review of counsel's performance is highly deferential. *Strickland*, 466 U.S. at 689. There is a strong presumption counsel rendered reasonable, professional assistance and that the challenged conduct was the result of a reasoned strategy. *Id.*; *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). To overcome the presumption that counsel provided reasonably effective assistance, a petitioner must prove counsel's performance was objectively unreasonable in light of the facts of the case. *Strickland*, 466 U.S. at 689-90. A reasonable professional judgment to pursue a certain strategy should not be second-guessed. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983).

In addition to demonstrating counsel's performance was deficient, a petitioner must also show prejudice resulting from the inadequate performance. *Strickland*, 466 U.S. at 691-92. A petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A petitioner must

show a substantial likelihood that the result would have been different if counsel had performed competently. *Harrington v. Richter*, 131 S.Ct. 770, 791 (2011). Mere allegations of prejudice are insufficient; a petitioner must affirmatively prove, by a preponderance of the evidence, that he was prejudiced due to counsel's deficient performance. *Armstead v. Scott*, 37 F.3d 202, 206 (5th Cir. 1994).

Analysis of an ineffective assistance claim on federal habeas review of a state court conviction is not the same as adjudicating the claim on direct review of a federal conviction. *Ritcher*, 131 S.Ct. at 785. The key question on habeas review is not whether counsel's performance fell below the *Strickland* standard, but whether the state court's application of *Strickland* was unreasonable. *Id.* Even if a petitioner has a strong case for granting relief, that does not mean the state court was unreasonable in denying relief. *Id.*

B. Application

1. Failure to Obtain Expert Witness

Petitioner complains that counsel failed to hire a medical expert to testify on his behalf. He states an expert could have cast doubt on the testimony of the nurse who examined the victim, perhaps by stating that similar injuries were suffered by girls who had not been abused. He states that he asked counsel to hire such an expert. He asserts counsel replied by acknowledging that they should have an expert, but stated the state's budget crisis would not permit them to hire an expert.

Complaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of witnesses is a matter of trial strategy and because allegations of what a witness would have stated are largely speculative. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009) (citing *Bray v. Quarterman*, 265 F. App'x 296, 298 (5th Cir. 2008)). To prevail on an ineffective assistance of counsel claim based on counsel's failure to call a witness, the petitioner must identify the witness, demonstrate that the witness was available to testify and would have done so, set out the contents of the witness's proposed testimony and show that the testimony would have been favorable to a particular defense. *Id.* (citing *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir.

1985)). This requirement applies to both lay and expert witnesses. *Evans v. Cockrell*, 285 F.3d 370, 377-78 (5th Cir. 2002) (rejecting uncalled expert witness claim when the petitioner failed to present evidence of what a scientific expert would have stated). The requirements of showing availability and willingness to testify "[are] not a matter of formalism." *Woodfox v. Cain*, 609 F.3d 774, 808 (5th Cir. 2010). A petitioner must present evidence on these points as part of the burden of proving trial counsel could have found and presented a favorable witness, including an expert witness. *Id.*

Petitioner has failed to satisfy several of these requirements. He has not named a medical professional who could have been called to testify or demonstrated availability and willingness to testify. Nor has he, other than in speculative generalities, set forth the contents of the testimony to be provided by a medical expert. As a result, the state courts' rejection of this ground for review was not contrary to, and did not involve an unreasonable application of, clearly established law.

2. Failure to Adequately Cross-Examine the Victim

Petitioner asserts counsel failed to adequately cross-examine the victim. He states that in a police report taken on August 5, 2001, the officer stated the victim told him that after petitioner grabbed her from behind and pulled her towards him, he pulled down her pants and began to touch her about her vaginal area and penetrated her vagina with his fingers. Petitioner states that, in contrast, the victim testified that petitioner took his penis out and, while she was on the bed, put it in her vagina halfway and began to move it in and out. He states counsel failed to cross-examine her regarding these discrepancies.

Petitioner's counsel conducted a lengthy cross-examination of the victim. He demonstrated that while she testified the petitioner was wearing gray jogging pants during the assault, she had earlier stated he was wearing a jumpsuit. He also had her admit that initially she told her aunt, who owned the house where the assault occurred, that nothing had happened. She also admitted she had initially told her mother that petitioner had penetrated her digitally. Counsel had the victim's mother confirm this during his cross-examination of her. In addition, the victim testified she was wearing a gray pullover shirt and that nothing was wrong with the shirt after the assault. During

cross-examination of the victim's uncle, counsel elicited testimony that the victim's shirt was inside out after the assault.

During his cross-examination of the victim and other witnesses, counsel was able to point out inconsistencies in her testimony, including the inconsistencies petitioner states he could have pointed out by using the police report. As a result, counsel's performance in this respect did not fall below an objective standard of reasonableness and did not cause petitioner to suffer prejudice. The resolution of this issue by the state courts was therefore not contrary to, and did not involve an unreasonable application of, clearly established law.

3. Failure to Conduct Adequate *Voir Dire*

Petitioner states that while counsel questioned some prospective jurors, he failed to ask four of the prospective jurors any questions at all. As a result, these individuals became members of the jury without the defense having acquired any information to use to challenge them for cause.

Petitioner's counsel asked the jury panel several questions, including: (1) whether they had been stopped by a police officer and given a ticket; (2) whether they believed the officer who gave them a ticket was wrong; (3) whether they would consider a defendant's failure to testify as some evidence of guilt; (4) whether they knew any of the individuals he listed as being witnesses; (5) whether they worked in or had close friends or relatives in law enforcement; (6) whether they had any experience in alleged child abuse cases; (7) whether they had any experience with Child Protective Services or Court-Appointed Special Advocates and (8) whether anyone, for whatever reason, felt it would be improper for them to be a juror in the case. Counsel asked follow-up questions for the prospective jurors who indicated an affirmative response to his questions. The record does not reflect that any of the prospective jurors listed by petitioner indicated an affirmative response.

After reviewing the *voir dire* conducted by counsel, it cannot be concluded that his performance fell below an objective standard of reasonableness. Further, petitioner does not suggest what questions counsel should have asked the four individuals he lists or state what answers they

might have given that would have made them unsuited for jury service. As a result, petitioner has not shown he suffered any prejudice as a result of the deficiencies he attributes to counsel. Accordingly, the determination by the state courts on this issue was not contrary to, and did not involve an unreasonable application of, clearly established law.

4. Failure to Investigate and Interview Witness

Petitioner states that when meeting with counsel prior to trial, he told counsel to talk to Willy Wells. As described above, petitioner states Mr. Wells told him that while Mr. Wells was talking to the victim's mother, she stated they were going to "get" petitioner. She said the person who examined the victim did not know what they were talking about and the victim was still a virgin.

Petitioner states Mr. Wells called counsel's office many times, but counsel was never there and never returned his calls. Mr. Wells also made an appointment to see counsel, but counsel was not at his office when Mr. Wells arrived.

Petitioner further states that each time he saw counsel, counsel told him to agree to a plea agreement offered by the state whereby petitioner would serve two years in prison. He states counsel never discussed the facts of the case with him and states he only saw counsel three times prior to trial. He also asked petitioner several times for his wife's address even though petitioner had previously provided it to him.

As set forth above, Mr. Wells passed away prior to trial and was therefore not available to testify. Further, his proposed testimony would have been inadmissible hearsay and mostly cumulative of testimony offered by another witness. Petitioner has therefore not demonstrated there is a reasonable probability the result of the proceeding would have been different if counsel had interviewed Mr. Wells. Further, petitioner has not shown how additional conversations and meetings with his attorney, or further investigation by his attorney, would have assisted his defense. As a result, petitioner has not shown he suffered prejudice as a result of these alleged deficiencies on the part of counsel. In the absence of a showing of prejudice, it cannot be concluded that the conclusion of the state courts regarding this ground for review was contrary to, or involved an unreasonable

application of, clearly established law.

Recommendation

This petition for writ of habeas corpus should be denied.

Objections

Objections must be (1) specific, (2) in writing, and (3) served and filed within 14 days after being served with a copy of this report. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 6(a), 6(b) and 72(b).

A party's failure to object bars that party from (1) entitlement to *de novo* review by a district judge of proposed findings and recommendations, *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error, of unobjected-to factual findings and legal conclusions accepted by the district court, *Douglass v. United Serv. Auto. Ass'n.*, 79 F.3d 1415, (5th Cir. 1996) (*en banc*).

SIGNED this 3rd day of August, 2015.

Zack Hawthorn
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

JOHN MARTIN, SR.	§	
VS.	§	CIVIL ACTION NO. 1:08cv669
DIRECTOR, TDCJ-CID	§	

ORDER OVERRULING OBJECTIONS AND ADOPTING
THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

John Martin, Sr., proceeding *pro se*, filed the above-styled petition for writ of habeas corpus. Petitioner challenges a conviction for aggravated sexual assault of a child.

The court referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to 28 U.S.C. § 636 and applicable orders of this Court. The Magistrate Judge has submitted a Report and Recommendation of United States Magistrate Judge recommending that the petition be denied with prejudice.

The court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record and pleadings. Petitioner filed objections to the Report and Recommendation.[1]

The court has conducted a *de novo* review of the objections. After careful consideration, the court is of the opinion the objections are without merit. For the reasons set forth in the Report and Recommendation, petitioner has failed to demonstrate that the adjudication of his grounds for review in state court resulted in a decision that was contrary to, or involved a unreasonable application of, clearly established federal law or resulted in a decision based on an unreasonable determination of the facts. The petition is therefore without merit.

ORDER

Accordingly, petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the Magistrate Judge are correct and the report of the Magistrate Judge is

[1] The court notes that in his objections petitioner abandons his first ground for review, the contention that he was improperly denied the right to be present during *voir dire*.

APPENDIX "I"

ADOPTED as the opinion of the court. A final judgment shall be entered denying the petition.

In addition, the court is of the opinion that the petitioner is not entitled to a certificate of appealability. An appeal from a judgment denying federal habeas relief may not proceed unless a a court issues a certificate of appealability. *See* U.S.C. § 2253. In order to receive a certificate of appealability, a petitioner must make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004). To make a substantial showing, the petitioner is not requited to demonstrate that he would prevail on the merits. Rather, he need only demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented in the petition are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. If the petition was dismissed on procedural grounds, the petitioner must show that jurists of reason would find it debatable: (1) whether the petition raises a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484; *Elizalde*, 362 F.3d at 328. Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000).

In this case, the petitioner has not shown that any of the issues raised are subject to debate among jurists of reason. The factual and legal questions raised by petitioner have been consistently resolved adversely to his position and the questions presented are not worthy of encouragement to proceed further. As a result, a certificate of appealability shall not issue in this matter.

SIGNED this the 27 day of **August, 2015.**

Thad Heartfield
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

JOHN MARTIN, SR.	§	
VS.	§	CIVIL ACTION NO. 1:08cv669
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

This action came on before the Court, and the issues having been duly considered and a decision rendered, it is

ORDERED AND ADJUDGED that this petition for writ of habeas corpus is **DENIED** with prejudice.

All motions by any party not previously ruled on are **DENIED**.

SIGNED this the 27 day of **August, 2015.**

Thad Heartfield
United States District Judge

Additional material from this filing is available in the Clerk's Office.