

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40262



A True Copy
Certified order issued Feb 01, 2018

John W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

JOHN DOUGLAS MITCHELL,

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:

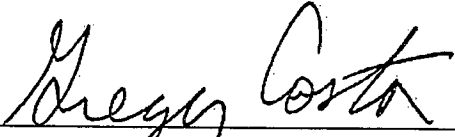
John Douglas Mitchell, Texas prisoner # 1315658, moves for a certificate of appealability (COA) to appeal the district court's denial and dismissal of his 28 U.S.C. § 2254 application in which he attacked his conviction for aggravated sexual assault. The district court denied Mitchell's claims that he was afforded ineffective assistance by his trial and appellate counsel, which he asserted in his initial § 2254 application, on the merits. The district court found that the claims that Mitchell raised in his supplemental § 2254 application were time barred.

In his COA motion, Mitchell alleges that the district court inadequately explained its adoption of the magistrate judge's report and recommendation and did not conduct a proper de novo review; the district court wrongly found

that the trial evidence overwhelmingly established his guilt and, thus, he failed to show prejudice as to his claims of ineffective assistance of his trial counsel; the district court made credibility findings against defense witnesses based on an incomplete review of the record and did not consider that witnesses for the State also offered inconsistent or false testimony; the district court, in denying his ineffectiveness claims, relied on conflicting rulings from state courts; and the district court applied the wrong standard in assessing his ineffectiveness claims as to his appellate counsel. He further contends that the district court incorrectly found that the claims raised in his supplemental § 2254 application were time barred. To the extent that he fails to reassert the substantive claims that he set forth in his § 2254 application, he has abandoned those arguments. *See Hughes v. Johnson*, 191 F.3d 607, 612-13 (5th Cir. 1999).

A COA may issue if the applicant makes a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To obtain a COA, Mitchell must demonstrate “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted). If a district court denies relief based on procedural grounds, a COA should issue only if “the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

Mitchell has not made the required showing. Accordingly, his motion for a COA is DENIED. His motion for leave to supplement the appellate record is likewise DENIED.



GREGG J. COSTA
UNITED STATES CIRCUIT JUDGE

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JOHN DOUGLAS MITCHELL,

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

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motions for certificate of appealability and to supplement the record on appeal. The panel has considered appellant's "Petition for Panel Rehearing" as motion for reconsideration of the denial of certificate of appealability. IT IS ORDERED that the motion is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JOHN DOUGLAS MITCHELL

§

VS.

§

CIVIL ACTION NO. 1:08cv37

DIRECTOR, TDCJ-CID

§

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner John Douglas Mitchell, an inmate confined at the Eastham Unit of 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 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.

Discussion

On April 28, 2005, in the 163rd Judicial District Court for Orange County, Texas, following a trial by jury, petitioner was convicted on Count Two of a three-count Indictment charging him with Aggravated Sexual Assault of a Child. Petitioner was sentenced to a term of ninety-nine years' confinement in the Texas Department of Criminal Justice.

Petitioner appealed his conviction and sentence. On November 8, 2006, petitioner's conviction was affirmed by the Ninth Court of Appeals of Texas. *See Mitchell v. State*, No. 09-05-316 (Tex. App. – Beaumont 2006). Petitioner filed a petition for discretionary review with the Texas Court of Criminal Appeals which was dismissed as untimely filed.

Petitioner filed a state application for writ of habeas corpus on October 26, 2007. The petition was denied without written order by the Texas Court of Criminal Appeals on December 12, 2007. Petitioner filed the above-styled petition on January 8, 2008.

The Petition

Petitioner brings this petition asserting trial counsel provided ineffective assistance of counsel for (a) eliciting damaging testimony from the complainant; (b) failing to conduct any pre-trial investigation on Lowell Frederick; (c) failing to obtain a ruling or hearing on several discovery motions; and (d) failing to specifically ask the venire individually if they could assess a minimum sentence of five years. Additionally, petitioner alleges he was denied effective assistance of counsel on appeal because appellate counsel failed to (a) secure a copy of the sealed jury notes containing important information on two viable trial errors; (b) obtain the required affidavit from any juror; and (c) inform the court of appeals that Rory Risinger was willing to discuss his knowledge of case with defense attorneys.

Petitioner also filed an amended petition asserting the following additional claims of ineffective assistance of counsel with respect to trial counsel: (e) counsel engaged in misconduct which denied him his right to choice of counsel; (f) failed to obtain written notice of the State's intent to offer extraneous offense evidence and request a mid-trial limiting instruction on its use; (g) failed to obtain arrest records of State's witness Rory Risinger; (h) failed to obtain all reports and findings of Child Protective Services and the SANE; (i) failed to object to the State's witness and victim's mother being present in the courtroom; (j) failed to object to the States argument at punishment; and (k) failed to object to the use of shackles, which were seen by the jury, prior to trial. Further, petitioner added a new claims that the trial court erred by refusing to dismiss his trial attorneys and allow him to hire his counsel of choice.

The Response

The respondent has filed a response to the Court's order to show cause why relief should not be granted. The respondent contends petitioner failed to meet his burden of proof because he raised the same allegations from his direct appeal and state habeas application without attempting to show an unreasonable application of federal law as determined by the Supreme Court. The respondent asserts petitioner has failed to show either trial or appellate counsels' performance was deficient or any prejudice associated with the performance. Further, the respondent contends petitioner's new claims asserted in his amended petition are barred by the applicable one-year statute of limitations. Alternatively, the respondent contends the claims are without merit and should be denied.

Factual Background

The relevant facts are summarized in the response as presented in the State's Brief on appeal as follows:

Ashley and Amanda Rainwater were the stepdaughters of the Appellant [Mitchell]. Their mother, Mindy, had been married to [Mitchell] for several years while Ashley and Amanda were young girls moving into their teenage years. Ashley first met [Mitchell] when she was about eight years old. 2 RR 140. She liked him and trusted him. 2 RR 148. When Ashley's mother married [Mitchell], Ashley and her sister, Amanda, lived with them off and on. First, they lived with several others in [Mitchell]'s mother's house in Orangefield, then they moved to Florida, and finally, to [Mitchell]'s house in Mauriceville. Ashley was ten years old and in the fifth grade. 2 RR 144. [Mitchell]'s house in Mauriceville was surrounded by several smaller buildings, including a workshop, a two bedroom trailer in which they lived, and a bungalow that they stayed in sometimes. 2 RR 146. The bungalow had an open floor plan with an area for a bedroom, kitchen, and living room and a small bathroom which was separated by a doorway. 2 RR 146; 3 RR 28. At some point, the bungalow was turned into an office type area, and during the day, people would come and go into the bungalow. 3 RR 29. At times, Ashley and her sister, Amanda, would move back in with their father. Ashley's father lived in a two bedroom trailer with his other three young children. Living conditions at her father's house were "terrible." Ashley and Amanda had to take care of the children, their father, and their stepmother. Living conditions were better "with my mom and [Mitchell]." 3 RR 33. [Mitchell] was like a father to Ashley. 3 RR 34.

The first time [Mitchell] did something to Ashley which made her feel unusual or bad was when the family was living in Florida. Sometime in July of 2002, [Mitchell] picked ten year old Ashley up from his ex-wife's house in Texas to take her back to Florida because she had an ear infection. Ashley and [Mitchell]'s daughter had been staying in Texas with her mother, [Mitchell]'s ex-wife. 2 RR 149, 187-88. It was nighttime and Ashley was riding in the back seat, [Mitchell] in the front, and a friend of [Mitchell]'s named Mike was driving. 2 RR 150. [Mitchell] had leaned his seat all the way back and began touching Ashley's leg. Ashley believed that he was checking her for fever at that point. [Mitchell] "started going further up, and then he started rubbing me where he wasn't supposed to. I told him to stop, and I sat up, and then he did it again, and then I told him to stop, and he finally stopped, and we went to a gas station." [Mitchell] touched Ashley on her vagina, on top of her clothes. 2 RR 150. Ashley said nothing out loud in the car because she was "in shock, because he had never done it to me before, and I trusted him." She did not know why he was touching her in that way. 2 RR 152. She never told anyone else because she was afraid of him. 2 RR 153.

[Mitchell] left Ashley alone until they moved back to Texas and she started the sixth grade in 2002. 2 RR 153. At that time, [Mitchell], Ashley's mother Mindy, and [Mitchell]'s younger sons were living in the two bedroom trailer at [Mitchell]'s house in Mauriceville. 2 RR 154. The kids shared a bedroom and [Mitchell] and Mindy shared the second bedroom. Although the boys were there most of the time, they would often spend weekends with their grandmother, leaving Ashley alone in the bedroom. 2 RR 156.

The first actions [Mitchell] took toward Ashley sexually in the Mauriceville house occurred shortly after [Mitchell] and Ashley's mother had taken Ashley to have her belly button pierced. Ashley thought it was cool that [Mitchell] would allow her to get her belly button pierced. Upon their return to the house that evening, [Mitchell] questioned Ashley about her activities with a boy her age. Ashley told him that the allegations were untrue. 2 RR 160.

A few days later, Ashley stayed home from school. Her mother was at work in Beaumont. She was in her room sleeping when [Mitchell] came in and woke her up. At first, he was just talking to her. "I talked to [Mitchell] about everything. He was the only father figure in my life." Then [Mitchell] began questioning her about the boy "and I told him no, I didn't do anything with him. And then he said that her (sic) would tell me (sic) mom if I didn't let him go down on me . . . I told him no, and that's when he shoved me down on the bed." 2 RR 160, 212. Although Ashley was unsure of exactly what [Mitchell] meant, she knew it was something sexual. After [Mitchell] shoved Ashley on the bed, he pulled her shorts aside and "started kissing me on my vagina and stuff." 2 RR 161. The third time she told him to stop, he did and left the room. 2 RR 162. Ashley did not tell her mother because she believed [Mitchell] "would do stuff against me if I would tell her." After [Mitchell] left the room, Ashley took a shower. 2 RR 219.

[Mitchell] continued to sexually abuse Ashley, primarily at night. If [Mitchell]'s sons were staying there, [Mitchell] would wake Ashley up and take her to the bungalow. She went with him because she was afraid of him. 2 RR 163. For the most part, [Mitchell] performed oral sex on Ashley. When Ashley wanted to go to a sixth grade dance, however, [Mitchell] told Ashley that she could go if she "would let him do stuff." 2 RR 166. Ashley said "whatever" and then walked inside the house. That night, [Mitchell] entered her bedroom, woke her up, and took her to the bungalow because the boys were in the bedroom. 2 RR 167, 222.

Once in the bungalow, [Mitchell] began performing oral sex on Ashley and then he picked her up and sat her on the stove. Ashley kept telling him to stop and she was scared. [Mitchell] unbuttoned and unzipped his pants and then put his penis inside of her while she was sitting on the stove. As he penetrated Ashley's vagina with his penis, [Mitchell] was standing "kind of hunched over" on the floor. 2 RR 227. Ashley was scared. She said that it hurt. 2 RR 168. She asked him to stop and he finally did. As [Mitchell] and Ashley walked back to the trailer, he told her that she could go to the school dance. 2 RR 169.

During the summer between Ashley's sixth and seventh grade years, June through August, 2003, [Mitchell] put his penis into Ashley's vagina on more than one occasion. 2 RR 179. Each time [Mitchell] had sex with Ashley or touched her in some way, they were alone. No one else was around. 3 RR 16.

Once, during the day, [Mitchell] and Ashley were in the bungalow, and he was "doing stuff" to her. 3 RR 30. When they heard someone pull up to the bungalow, [Mitchell] told Ashley to run in the bathroom and act like she was in the shower. Ashley did, walked out in a towel, and saw that Rory Risinger had entered the bungalow. [Mitchell] was still in the bed. 3 RR 30-1. Rory Risinger testified that he, Lowell Frederick and Carl Jackson had driven to [Mitchell]'s place late one afternoon in search of a pickup truck part. 3 RR 54. When they arrived, Risinger saw [Mitchell] in the bed. Risinger saw that [Mitchell] was not wearing a shirt, and that he was covering himself up with the sheet as they were walking in. 3 RR 36. Risinger saw a young girl in a towel walk through the room. Because he hadn't been there before, Risinger did not know the girl. Risinger testified that he commented to Lowell Frederick, "that's some mighty young girls hanging around in here" 3 RR 57. Later, Risinger confronted [Mitchell] about the young girl, [Mitchell] "just made a statement back that when things get itching, somebody's got to scratch them." 3 RR 59. In the statement he gave to Sergeant Humble, Risinger stated "I questioned [Mitchell] many times, and he always joked about it and never denied it. This was when I felt - when I left and quit and didn't have anything to do with [Mitchell]." 3 RR 63. Risinger also testified that [Mitchell] "told me that only him and God know about it." 3 RR 63.

In October 2003, twelve year old Ashley and her sister Amanda wanted to have a Halloween party at the house. Amanda had moved back in and she and Ashley were

rooming in the bungalow. 2 RR 237. Ashley was very excited about the party because they did not have many parties. In the days leading up to the Halloween party, [Mitchell] put his penis inside Ashley's vagina "more than once." 2 RR 172-74. [Mitchell] used a massager on Ashley in the bungalow. The massager was kept in the bathroom of the bungalow. 2 RR 237. Prior to him putting the massager on Ashley's vagina, [Mitchell] and Ashley had been discussing the Halloween party. 2 RR 238. After the massager, [Mitchell] put his penis into Ashley's vagina. 2 RR 239. Ashley related that after [Mitchell] had intercourse with her, he would go into the bathroom. 2 RR 241.

After the Halloween party, Ashley and her sister, Amanda, went to go live with their mother's friend, Latisha Runnels.

In January of 2004, Latisha Runnels drove Ashley Rainwater to the Orange County Sheriff's Department and met with Sergeant Chris Humble. 2 RR 122. The purpose of their visit was to report some things that Ashley had told Ms. Runnels. Sergeant Humble learned that thirteen year old Ashley was there to report a sexual assault. He began by visiting with Ashley about school and her interests and then later actually began speaking about the sexual assault. 2 RR 124. As she talked with Sergeant Humble, Ashley was nervous at first and as "she began to talk about what was going on, it was very apparent that Ashley was pretty fragile at that point Certain parts of her conversation or her description of what happened to her, you can tell it was hard for her to talk about some of these things and to describe them, and she would get very emotional. She would cry or – such as that." 2 RR 126.

Once Ashley's initial statement to Sergeant Humble was complete, Humble began investigating the case. During his investigation, he had the opportunity to speak to [Mitchell], who denied the allegations that he had sexually assaulted Ashley Rainwater. 2 RR 132. In addition, Sergeant Humble also spoke with Rory Risinger. As a result of his conversation with Risinger, Humble contacted Lowell Frederick. 5 RR 96. After identifying himself on the phone to Frederick, Humble questioned him with regard to what knowledge he may have about the present case. Humble learned that Frederick and [Mitchell] were good friends. Humble asked Frederick to provide a statement in reference to this case and Frederick refused. 5 RR 97-8.

At trial, [Mitchell] testified and denied the allegations. In his defense, [Mitchell]'s son John Douglas Mitchell, III, and his daughter, Jerika Mitchell testified on behalf of [Mitchell]. [Mitchell]'s son testified that Ashley and Amanda's mother would punish the girls, not [Mitchell]. 3 RR 75. Although he testified that he would not lie for [Mitchell], [Mitchell]'s son testified that he loved his father and did not want to see him go to prison. 3 RR 77.

[Mitchell]'s sixteen year old daughter, Jerika Mitchell, and [Mitchell]'s current girlfriend's eighteen year old daughter also testified on his behalf. Both of whom have known [Mitchell] for his entire life and have close relationships with him.

Jerika Mitchell testified that she lived with [Mitchell] “the whole time” and that Ashley lived there also. 3 RR 85-86. In addition, Jerika Mitchell’s sixteen year old best friend, Leeann Johnson, also testified on behalf of defendant. Johnson testified that she and Jerika had been best friends “since kindergarten” and “we practically live together.” 3 RR 104. Despite the fact that Jerika Mitchell indicated that she and Ashley lived together for years, Leeann Johnson, Jerika’s best friend, had only known Ashley for “almost a year.” 3 RR 105. Further, Leeann testified that Jerika lived quite a bit of time with her mother. 3 RR 108. This directly conflicts with Jerika’s testimony that she lived with [Mitchell] and Ashley.

Response, at 3-8.

Analysis

Standard of Review

Title 28 U.S.C. § 2254(a) allows a district court to “entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

Section 2254 prohibits a petitioner from relitigating issues that were adjudicated on the merits in State court proceedings, with two exceptions. 28 U.S.C. § 2254(d). The first exception allows a petitioner to raise issues previously litigated in the state court in federal habeas proceedings if the adjudication “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.” 28 U.S.C. § 2254(d)(1). The second exception permits relitigation if the adjudication “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). Federal habeas relief from a state court’s determination is precluded “so long as fairminded jurists could disagree on the correctness of the state court’s decision.” *Harrington v. Richter*, __ U.S. __, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011).

A determination of a factual issue made by a state court shall be presumed to be correct upon federal habeas review of the same claim. The petitioner shall have the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

I. Limitations

The respondent argues that petitioner's grounds raised in his amended petition should be dismissed as barred by limitations pursuant to the Supreme Court decision in *Mayle v. Felix*, 545 U.S. 644 (2005). The respondent contends the claims were filed after the expiration of the one-year limitations period.

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996, amended 28 U.S.C. § 2244 by imposing a one-year statute of limitations for the filing of a habeas corpus petition seeking relief from a state court conviction. 28 U.S.C. § 2244(d)(1), as amended, provides in pertinent part the following:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment of conviction became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Furthermore, “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2).

Petitioner’s conviction was affirmed by the intermediate appellate court on November 8, 2006. The Texas Court of Criminal Appeals granted petitioner an extension of time in which to file a petition for discretionary review. However, petitioner filed his petition for discretionary review after the extension period had expired, and the Texas Court of Criminal Appeals dismissed the petition for discretionary review as untimely. Thus, petitioner’s conviction became final on the last day for seeking further direct review expired, March 16, 2007. *See Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003). Accordingly, petitioner’s petition was due on or before March 16, 2008, absent any tolling.

Petitioner’s first state application was filed on October 26, 2007, and was denied by the Texas Court of Criminal Appeals on December 12, 2007. Thus, the limitations period was tolled for a period of 47 days. Therefore, this petition was due no later than May 2, 2008.

Petitioner filed his second application for state writ of habeas corpus on June 14, 2011 raising new claims. The application was dismissed as an abuse of the writ. As the application was filed long after the expiration of the one-year limitations period, the application did not serve to toll the limitations period. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Further, petitioner’s new claims do not relate back to the original petition because, as the respondent contends, they are separate and distinct from the claims originally asserted. *See Mayle v. Felix*, 545 U.S. 644, 654-664 (2005). Finally, petitioner has failed to show the existence of rare and exceptional circumstances such as to warrant equitable tolling. Therefore, all claims raised in petitioner’s amended petition, mailed on August 22, 2011, are time-barred.

II. Ineffective Assistance of Counsel

Petitioner claims trial counsel provided ineffective assistance of counsel for (a) eliciting damaging testimony from the complainant; (b) failing to conduct any pre-trial investigation on Lowell Frederick; (c) failing to obtain a ruling or hearing on several discovery motions; and (d) failing to specifically ask the venire individually if they could assess a minimum sentence of five years. Additionally, petitioner alleges he was denied effective assistance of counsel on appeal because appellate counsel failed to (a) secure a copy of the sealed jury notes containing important information on two viable trial errors; (b) obtain the required affidavit from any juror; and (c) inform the court of appeals that Rory Risinger was willing to discuss his knowledge of case with defense attorneys.

When addressing the issue of what a petitioner must prove to demonstrate an actual ineffective assistance of counsel claim, courts look to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004). In order to show that counsel was ineffective a petitioner must demonstrate:

First... that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings it cannot be said that the conviction or death sentence resulted in a breakdown of the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687. In order to prove the prejudice prong, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Day v. Quarterman*, 566 F.3d 527, 536 (5th Cir. 2009). "*Strickland*

asks whether it is ‘reasonably likely’ the result would have been different.” *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 791-92, 178 L.Ed.2d 624 (2011).

The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is upon the petitioner, who must demonstrate counsel’s ineffectiveness by a preponderance of the evidence. *See Martin v. Maggio*, 711 F.2d 1273, 1279 (5th Cir. 1983). A habeas petitioner must “affirmatively prove,” not just allege, prejudice. *Day*, 556 F.3d at 536. If a petitioner fails to prove the prejudice part of the test, the Court need not address the question of counsel’s performance. *Id.* A reviewing court “must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy.” *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). In determining the merits of an alleged Sixth Amendment violation, a Court “must be highly deferential” to counsel’s conduct. *Strickland*, 466 U.S. at 687.

Whether the representation was deficient is determined as measured against an objective standard of reasonableness. *Kitchens v. Johnson*, 190 F.3d 698, 701 (5th Cir. 1999). “A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.” *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002) (quoting *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)). “There is a strong presumption that counsel’s conduct falls within a wide range of reasonable professional assistance.” *Woodward v. Epps*, 580 F.3d 318, 329 (5th Cir. 2009) (quoting *Romero v. Lynaugh*, 884 F.2d 871, 876 (5th Cir. 1989)).

Strategic decisions made by counsel during the course of trial are entitled to substantial deference in the hindsight of federal habeas review. *See Strickland*, 466 U.S. at 689 (emphasizing that “[j]udicial scrutiny of counsel’s performance must be highly deferential” and that “every effort

[must] be made to eliminate the distorting effects of hindsight”). A federal habeas corpus court may not find ineffective assistance of counsel merely because it disagrees with counsel’s chosen trial strategy. *See Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. 1999).

On direct appeal, the intermediate appellate court stated, in pertinent part, the following:

Appellant [Mitchell] contends lead counsel was ineffective because he failed to interview the complainant and three other State’s witnesses. Counsel’s duty to investigate is not categorical; rather, he must make reasonable investigations. *McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996). A decision not to investigate is assessed for reasonableness under all the circumstances and counsel’s judgment is entitled to deference. *Id.* Mitchell’s trial lawyer testified that Orange County has an “open-file policy,” and each of his lawyers stated that he reviewed the State’s file. They also conducted personal interviews of some of the witnesses and several potential witnesses. There is no indication in the record that any of the State’s witnesses they failed to interview, three of whom were children, were willing to communicate with trial counsel.

Mitchell also complains that trial counsel’s failure to subpoena a witness named Lowell Frederick to testify in the trial’s guilt phase was not an objectively reasonable trial strategy. Trial counsel indicated the decision not to call Frederick was a strategic one based in part on a statement Frederick gave the police and on counsel’s personal acquaintance with this witness. The defense did call Frederick as a witness in the punishment phase, at the behest of Mitchell and his family. Frederick contradicted another witness’s story about having seen two young girls in towels with [Mitchell], but the State effectively rebutted Frederick’s testimony by showing he did not testify truthfully about having been contacted by authorities and having refused to give a statement.

Next, Mitchell complains that trial counsel should have called Constable Parker Thompson to impeach the complainant’s testimony with evidence of a shoplifting incident in which Constable Thompson discovered the child had initially been untruthful. Trial counsel stated that failing to call the constable was a strategic decision based upon his investigation, which revealed that the witness would have provided negative testimony. Furthermore, the testimony provided by Constable Parker in the motion for new trial hearing did not establish that the witness would have provided admissible character or impeachment evidence had he testified at trial. *See TEX. R. EVID.* 608, 609.

Mitchell v. State, Slip Op. *5-6. See *Sumner v. Mata*, 449 U.S. at 546-47 (holding that state appellate courts' findings are entitled to the same respect that trial judges' findings receive). And with regard to the punishment phase claim, the appellate court found that:

The appellant [Mitchell] also contends trial counsel provided ineffective assistance by failing to "specifically ask the venire individually if they could assess a minimum sentence of five (5) years in the instant case." Mitchell's trial attorneys were not asked about their jury selection strategy during the motion for new trial hearing. The record reflects that the prosecutor questioned the venire about considering the minimum sentence. Trial counsel challenged for cause based upon a veniremember's response to the minimum punishment range. Counsel may have been satisfied with the responses elicited by the prosecutor, and decided to concentrate on other matters. On the record before us, we cannot determine that counsel's conduct in voir dire fell below prevailing standards of professional norms. Especially in light of the nature of the offense, which involved a long-term pattern of sexual abuse and exploitation of the family relationship, we cannot say that the long length of the sentence was the product of counsel's performance rather than the jury's reasoned assessment of a punishment appropriate for this case.

Mitchell v. State, Slip Op. *7.

On state habeas review, the trial court found the following:

The Court finds that there are no controverted, previously unresolved facts material to the legality of the applicant's confinement. Applicant had different counsel on appeal than his trial counsel. His appellate counsel fully explored the issues regarding ineffective assistance of counsel at trial, both by a hearing on a Motion for New Trial and on direct appeal. Relief based on ineffective assistance at trial was denied both by the Trial Court and the Appellate Court. The complaints now raised by writ about appellate counsel's performance give rise to no controverted, previously unresolved facts.

Ex parte Mitchell, No. WR-68,946-01, at 15. The application was denied without written order on findings of the trial court without a hearing. *Id.* at Cover.

a. Trial Counsel

i. *Eliciting Damaging Testimony*

Petitioner alleges counselor Alford elicited damaging testimony from the complainant, Ashley. Petitioner claims counsel exposed a lack of evidence regarding count two of the indictment

which the prosecution then, during redirect examination, “saturated the record with testimony from the complainant that was relative to the allegations.” Petitioner claims that had counsel not questioned the witness, the charge in count two would have been ripe for granting a directed verdict or ripe for a legal sufficiency challenge on direct appeal.

A review of the record reveals the state first elicited testimony from Ashley on direct examination about the 2003 aggravated sexual assault allegations against petitioner regarding Count Two of the Indictment. Defense counsel then questioned the witness further, attempting to clarify her previous testimony. Petitioner has failed to satisfy his burden of rebutting the presumption that counsel was following a sound trial strategy.

Moreover, where the facts adduced at trial overwhelmingly point to the defendant’s guilt, as here, any ineffective assistance of counsel claim must fail for lack of prejudice. *Moawad v. Anderson*, 143 F.3d 942, 948 (5th Cir. 1998); *Williams v. Scott*, 35 F.3d 159, 164 (5th Cir. 1994). The fact that the jury found petitioner guilty and did not assess a lesser punishment than nine-nine years does not prove his attorneys rendered ineffective assistance under the applicable standards or that the outcome of the proceedings would have been any different had the alleged acts or omissions not occurred. Accordingly, petitioner has failed to show either deficient performance or prejudice.

Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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. Accordingly, petitioner’s ground for relief should be denied.

ii. *Failing to Conduct Pre-Trial Investigation*

Next, petitioner contends counsel provided ineffective assistance by failing to investigate Lowell Frederick, and for failing to issue a subpoena for Frederick to have been called to testify at the guilt-innocence phase of the proceeding.

A review of the records reveals counsel had investigated the case, researched the case, and knew Frederick personally. Counsel Alford believed Frederick was not credible, and his personal knowledge of Frederick was part of the reason he did not call him as a witness during the guilt-innocence phase of the trial. Alford also conceded that Frederick's credibility was impeached during the punishment phase of the trial. Additionally, counsel LeBlanc indicated he had contacted several potential witnesses, including Frederick. Petitioner has failed to show it was deficient performance for trial counsel to refrain from calling a person determined not to be a good witness and who could possibly open the door to damaging cross-examination.

As previously set forth, in light of the overwhelming evidence against petitioner, the fact that the jury found petitioner guilty and did not assess a punishment less than nine-nine years does not prove his attorneys rendered ineffective assistance under the applicable standards or that the outcome of the proceedings would have been any different had the alleged acts or omissions not occurred. Accordingly, petitioner has failed to show either deficient performance or prejudice.

Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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. Accordingly, petitioner's ground for relief should be denied.

iii. Failure to Obtain Ruling

Next, petitioner claims counsel was ineffective for failing to obtain a ruling or hearing on several discovery motions. Petitioner's allegations, however, are refuted by the record. On March 7, 2005, the trial court entered an order granting discovery of witnesses, statements, *Brady* material, tangible objects, informants, and criminal records. Accordingly, petitioner has failed to show deficient performance. Additionally, petitioner has failed to show prejudice related to his claims.

Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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. Accordingly, petitioner's ground for relief should be denied.

iv. Failure to Specifically Question Venire

Finally, petitioner contends trial counsel was ineffective for failing to allow a venire panel member the opportunity to answer a question on possible bias. Petitioner claims counsel's actions worked to his detriment by allowing the jury to contain a member whose possible bias was never allowed to surface.

However, a review of the questioning reveals counselor LeBlanc asked Mr. Snell if, regardless of the fact that he has a relative working in law enforcement, he felt he could be a fair and impartial juror in this case. Mr. Snell did not answer negatively, and counsel proceeded to question the second row. Also, when generally questioning each of those with ties to law enforcement on the first row if they could be a fair and impartial juror in the case again Mr. Snell did not answer negatively. Further, there is nothing in the record indicating Mr. Snell would have answered in the affirmative.

Petitioner raised this issue in his state application for writ of habeas corpus which was denied by the Texas Court of Criminal Appeals. The prospective juror was questioned regarding bias, and there is nothing in the record indicating he could not be fair and impartial. Petitioner has failed to overcome his burden of proof regarding the determination that counsel's performance was not deficient, nor has he shown he was prejudiced by the alleged deficient performance. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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. Accordingly, petitioner's ground for relief should be denied.

b. Appellate Counsel

In addition to his assertions of ineffective assistance on the part of trial counsel, petitioner also alleges he was denied effective assistance of counsel on appeal because appellate counsel failed to (a) secure a copy of the sealed jury notes containing important information on two viable trial errors; (b) obtain the required affidavit from any juror; and (c) inform the court of appeals that Rory Risinger was willing to discuss his knowledge of case with defense attorneys.

A claim asserting ineffective assistance of appellate counsel is reviewed under *Strickland*'s performance and prejudice prongs. See *Henderson v. Quarterman*, 460 F.3d 654, 665 (5th Cir. 2006) (recognizing that *Strickland* applies to ineffective assistance of appellate counsel claims). A petitioner alleging ineffective appellate representation "must first show that his counsel was objectively unreasonable . . . in failing to find arguable issues to appeal - that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them" and then "demonstrat[e] prejudice. That is, he must show a reasonable probability that, but for his counsel's

unreasonable failure ... he would have prevailed on his appeal.” *Smith v. Robbins*, 528 U.S. 259, 285–86, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

Appellate counsel “need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.” *Smith v. Robbins*, 528 U.S. at 288 (citing *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)). Thus, it is possible that an ineffective assistance claim may be “based on counsel’s failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent.” *Id.* (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). To demonstrate that a failure to raise an issue was deficient, a petitioner must show that a particular nonfrivolous issue was clearly stronger than issues that counsel did present. *Id.*

Petitioner’s claims are conclusory and lack support in the record or have been determined against him in state court proceedings. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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. Accordingly, petitioner’s grounds for relief against appellate counsel should be denied.

Conclusion

For the reasons set forth above, petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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. Accordingly, petitioner's grounds for relief should be denied. Therefore, the petition should be dismissed.

Recommendation

Petitioner's petition for writ of habeas corpus should be denied and dismissed.

Objections

Within fourteen days after being served with a copy of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636 (b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from the entitlement of *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 18 day of November, 2016.



KEITH F. GIBLIN
UNITED STATES MAGISTRATE JUDGE

2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 26

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

The court referred this matter to the Honorable Keith F. Giblin, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The Magistrate Judge recommends the petition be denied and dismissed.

The court conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration, the court concludes petitioner's objections should be overruled.

The court has thoroughly reviewed all claims properly before the court and has determined petitioner's claims are without merit.¹ Additionally, petitioner has failed to show either that the state

¹ Even assuming, *arguendo*, petitioner's claims in his amended petition are properly before the court, the claims are without merit.

court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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. Accordingly, petitioner's petition for writ of habeas corpus should be denied.

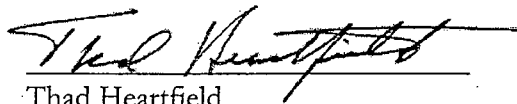
Furthermore, petitioner is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the movant to 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); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the movant need not establish that he should prevail on the merits. Rather, he must 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 are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the movant, 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.), *cert. denied*, 531 U.S. 849 (2000).

Here, petitioner has not shown that any of the issues raised by his claims are subject to debate among jurists of reason. The factual and legal questions advanced by petitioner are not novel and have been consistently resolved adversely to his position. In addition, the questions presented are not worthy of encouragement to proceed further. Therefore, petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability. Accordingly, a certificate of appealability shall not be issued.

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 **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendations.

SIGNED this the 22 day of February, 2017.

A handwritten signature in black ink, appearing to read "Thad Heartfield", is written over a horizontal line.

Thad Heartfield
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

JOHN DOUGLAS MITCHELL

§

VS.

§

CIVIL ACTION NO. 1:08cv37

DIRECTOR, TDCJ-CID

§

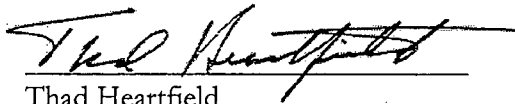
FINAL JUDGMENT

This action came on before the Court, Honorable Thad Heartfield, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, it is

ORDERED and **ADJUDGED** that the above-styled petition for writ of habeas corpus is **DENIED** and **DISMISSED**.

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

SIGNED this the 22 day of February, 2017.

A handwritten signature in black ink, appearing to read "Thad Heartfield", written over a horizontal line.

Thad Heartfield
United States District Judge

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