

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-5032
Conference Calendar

LASHUN RICHARDSON,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Dept. of Criminal Justice,
Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 90-CV-541

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(January 21, 1993)

Before GARWOOD, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

To be constitutionally ineffective and thus entitle a § 2254 petitioner to relief, counsel's performance must have been both deficient and prejudicial to the petitioner. Courts indulge a strong presumption that counsel's performance was not deficient. Wilkerson v. Collins, 950 F.2d 1054, 1063-64 (5th Cir. 1992) (citations omitted), petition for cert. filed (Mar. 18, 1992)(No. 91-7669). This presumption is especially suitable to claims of uncalled witnesses "because the presentation of witness testimony

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

is essentially strategy and thus within the trial counsel's domain." Millard v. Lynaugh, 810 F.2d 1403, 1410 (5th Cir.), cert. denied, 484 U.S. 838 (1987).

In his affidavit, Attorney Scott stated that he tried repeatedly to contact the two potential alibi witnesses. He indicated that the witnesses seemed to be dodging him. Scott's decision not to pursue witnesses who appeared unwilling to provide Richardson with an alibi was a strategic decision. Strategic choices made after thorough investigation of law and facts are virtually unchallengeable. See Strickland, 466 U.S. at 690. There is no error in failing to call a witness when counsel's decision was based on reasonable professional judgment after proper investigation. Millard, 810 F.2d at 1410.

Richardson asserts that Scott failed to preserve the district court's denial of his motion for a continuance by moving for a new trial.** When a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. Strickland, 466 U.S. at 691.

Richardson's claim of ineffectiveness also fails because he has made no showing of prejudice. A petitioner who claims that counsel was ineffective for failure to call witnesses must show

** Texas courts have interpreted Tex. Code Crim. P. Ann. art. 29.06 as requiring that a defendant move for a new trial in order to preserve error for failure to grant a continuance. See Varela v. State, 561 S.W.2d 186, 191 (Tex. Crim. App. 1978)(en banc).

that the witnesses would have testified favorably to him. McCoy v. Cabana, 794 F.2d 177, 183 (5th Cir. 1986). Richardson has not shown that the witnesses would have testified in his favor. He asserts merely that "[t]here is not[h]ing in the record indicating that Appellant [sic] alibi witnesses would not have rendered favorable testimony."

Richardson has failed to establish that counsel was ineffective. His petition for habeas corpus lacks merit. The district court's dismissal of his petition is AFFIRMED.