**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 93-2287

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MIKE ROBERT WEISINGER,

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-3317)

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(May 23, 1994)

Before KING and SMITH, Circuit Judges, and KAZEN,[*] District Judge.

JERRY E. SMITH, Circuit Judge.[**]

Mike Robert Weisinger challenges, on federal habeas corpus grounds, his state court convictions for aggravated sexual assault of a child. Finding no error, we affirm.

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[*] District Judge for the Southern District of Texas, sitting by designation.

[**] 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Weisinger was indicted in Harris County, Texas, for two first-degree felony counts of aggravated sexual assault of a child. The indictment also alleged a prior felony conviction for sentence enhancement purposes. Weisinger pled not guilty to the charges and not true to the enhancement paragraphs. The charges were tried to the court, which found Weisinger guilty on both counts and found the enhancement allegations to be untrue. Weisinger was sentenced to forty years' imprisonment. His conviction was affirmed. Weisinger v. State, 775 S.W.2d 424 (Tex. App. )) Houston [14th Dist.] 1989, pet. ref'd). Weisinger petitioned for habeas corpus relief in state court, claiming that he had not knowingly and voluntarily waived his right to a jury trial and that he had otherwise received ineffective assistance of counsel. His state application for habeas corpus was denied by the Texas Court of Criminal Appeals. His subsequent federal petition in district court was denied on the state's motion for summary judgment, and the court granted a certificate of probable cause to appeal.

II.

Under 28 U.S.C. § 2254(d), state court findings of fact made after a hearing to which a petitioner and the state are parties and which findings are evidence in writing are afforded a presumption of correctness, unless one of eight enumerated exceptions applies. Weisinger contends that the federal habeas court should not apply a presumption of correctness to the state court's findings of fact

because he was not afforded a "full and fair hearing" in state court. Specifically, he complains that the affidavits presented to the trial court involved substantial disputes of material facts, necessitating crucial determinations of credibility, which could be made validly only in a live evidentiary hearing. We disagree.

To satisfy the "hearing" requirement, the state court need not hear live testimony and allow witnesses to be cross-examined. Sumner v. Mata, 449 U.S. 539, 547 (1981); May v. Collins, 955 F.2d 299, 310 (5th Cir.), cert. denied, 112 S. Ct. 1925 (1992). Where, as here, a state court enters written findings of fact resolving credibility questions and the same state district judge hears both the trial on the merits and the state application for writ of habeas corpus, the state findings are entitled to a presumption of correctness even though the findings are based on affidavits and the record. Ellis v. Collins, 956 F.2d 76, 79 (5th Cir. 1992), cert. denied, 112 S. Ct. 1285; Clark v. Collins, 956 F.2d 68, 72 (5th Cir. 1992); May, 955 F.2d at 310. Weisinger does not claim that any of the other exceptions enumerated in section 2254(d) applies.

III.

Weisinger contends that errors by his defense counsel deprived him of the right to effective assistance of counsel. Weisinger claims that because of erroneous advice from his counsel he did not knowingly or voluntarily waive his right to a jury trial. He also claims that the failure to call Tim Bearcat as a witness denied him

the effective assistance of counsel. Finally, Weisinger alleges seven ares in which his counsel's performance was deficient: (1) counsel failed to object to inadmissible testimony; (2) counsel had a conflict of interest between himself and Weisinger; (3) counsel failed to investigate the facts of Weisinger's case; (4) counsel failed to prepare for Weisinger's trial; (5) counsel failed correctly to advise Weisinger of applicable law; (6) counsel elicited testimony harmful to Weisinger's defense; and (7) counsel failed to consult with Weisinger.

To prove ineffective assistance of counsel, the party must show that his attorneys' performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 688 (1984). A failure to make both of these showings will result in a dismissal of the claim. Lavernia v Lynaugh, 845 F.2d 493, 498 (5th Cir. 1988). To prove prejudice, a complainant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Washington, 466 U.S. at 694; Sawyer v. Butler, 848 F.2d 582, 588 (5th Cir. 1988), aff'd sub nom. Sawyer v. Smith, 497 U.S. 227 (1990). A complainant must show that the errors made by his attorney were so serious as to deprive him of a fair and reliable trial. Washington, 466 U.S. at 688.

A.

Weisinger contends that his counsel erroneously advised him that a jury would hear evidence of his past criminal record both

when the impeachment paragraph of the indictment was read to the jury and as impeachment evidence if he chose to testify. Weisinger's attorney, Charles Rice Young, averred in his affidavit that he advised Weisinger that in his professional judgment the judge would be less biased against him than would a jury should his past criminal record come out at trial. Young also stated in his affidavit that he believed the state would "hammer" Weisinger with his prior convictions if he took the stand and that, although he would try to prevent it, the state would also try to talk about the enhancement paragraphs during voir dire. The state trial court concluded that the facts as set forth in Young's affidavit are true, and therefore entitled to a presumption of correctness. Young's advice appears to have been reasonable, so we agree with the district court that it did not constitute ineffective assistance.

B.

Weisinger contends that his counsel was deficient because of the failure to call Tim Bearcat as a witness. This claim is meritless.

Weisinger has not shown that the failure to call Bearcat demonstrated deficient performance by his counsel. Young decided not to call Bearcat because he believed that Bearcat's testimony would have harmed the defense and because Bearcat would have testified untruthfully. Even if the substance of Bearcat's testimony would have been helpful, he would have been subject to

impeachment by prior inconsistent statements. Weisinger also did not request that Bearcat be called as a witness at trial. In sum, Weisinger has not overcome the deference afforded his counsel's trial strategy by Washington.

Weisinger also has not shown prejudice. Young's notes state that Bearcat would have testified that he "never saw [Weisinger] do anything." But he also would have testified that he saw children "go into [the] room with Mike [Weisinger]," that "Mike would save up change to give to kids," and that Weisinger had a "big change drawer in [his] bedroom." It is doubtful that the failure to introduce the sum of this testimony prejudiced Weisinger.

C.

Weisinger's seven additional claims of ineffective assistance of counsel are merely a laundry list of conclusory allegations. Such allegations do not raise a constitutional issue. Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1986), cert. denied, 484 U.S. 873 (1987). The conclusory allegations also do not demonstrate prejudice. Weisinger does not identify the specific evidence that could have been adduced or excluded, nor how the evidence would have altered the outcome of his trial.

IV.

Weisinger argues that his waiver of jury trial was involuntary because based on his counsel's erroneous advice. Weisinger claims that his counsel advised him that the jury could learn of his prior

criminal record involving similar crimes when the indictment was read to the jury during voir dire and as impeachment evidence if he testified. This advice was incorrect, as the enhancement paragraphs of the indictment that contained the evidence of his prior convictions would not be read to the jury until punishment. Because the judge would assess punishment, the jury would have never heard the information.

Weisinger avers that he waived the trial by jury because he thought that the enhancement paragraphs would be read to the jury as part of his indictment during voir dire. This argument is implausible, as he waived trial by jury before knowing whether his motion to quash this element of the indictment would be granted. Thus, he planned on voluntarily waiving his right to jury regardless of the outcome on the motion to quash the enhancement paragraphs of the indictments.

He also contends that he did not want his prior criminal record to be used for impeachment if he testified. He considers this advice to be erroneous because the convictions contained in the enhancement paragraphs of the indictments were invalid and therefore could not be used for impeachment. The prior conviction, however, may be used for impeachment even if it does not appear in the indictment. The defense offered a "corrected judgment" of the prior offense that indicates that a valid conviction exists and could have been used for impeachment.

Second, Weisinger contends that because he never testified, the state could not have presented his prior record, thus there was

no fear of being impeached in front of a jury. Weisinger presents no evidence that he had decided not to testify at the time the decision to waive trial by jury was made. His decision not to testify does not detract from his perceived advantage in waiving a jury trial, as he retained the option of testifying without fear of being unduly prejudiced before a jury by impeachment evidence of similar prior criminal behavior.

There is no support for Weisinger's claim that he involuntarily waived his right to a jury trial because of erroneous advice from his counsel. Self-serving assertions are entitled to no probative evidentiary value. Ross v. Estelle, 694 F.2d 1008, 1011 (5th Cir. 1983).

Finding no error, we AFFIRM the district court's denial of habeas relief.