

# EXHIBIT C

73 Fed.Appx. 84, 2003 WL 21757442 (C.A.5 (Tex.))

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals,  
Fifth Circuit.  
Michael Wayne RICHARD, Petitioner-Appellant,  
v.

Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,  
Respondent-Appellee.

No. 03-20125.  
June 27, 2003.

Appeal from the United States District Court for the Southern District of Texas (02-CV-469).

Before JONES, STEWART, and DENNIS, Circuit Judges.

EDITH H. JONES, Circuit Judge.<sup>FN\*</sup>

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 R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

\*1 Michael Wayne Richard (Richard) was convicted of capital murder and sentenced to death. Richard seeks a certificate of appealability (COA) on two claims to challenge the district court's denial of his 28 U.S.C. § 2254 petition for habeas corpus relief. We deny a COA on his claims.

## I. BACKGROUND

Richard was convicted in Texas state court for fatally shooting Marguerite Lucille Dixon in the course of a burglary. The Texas Court of Criminal Appeals reversed the conviction for failure to comply with *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). On retrial, Richard was again sentenced to death for capital murder; the Texas Court of Criminal Appeals affirmed Richard's conviction and denied him habeas corpus relief. The United States Supreme Court denied Richard's petition for writ of certiorari. In February 2002, Richard filed a federal petition for writ of habeas corpus. The district court denied the petition and refused to issue a COA. Richard asks this Court to grant a COA on two claims; each requested COA is denied.

## II. DISCUSSION

Richard's 28 U.S.C. § 2254 habeas petition, filed in February 2002, is subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *Penry v. Johnson*, 532 U.S. 782, 792, 121 S.Ct. 1910, 1918, 150 L.Ed.2d 9, 22 (2001). Richard must obtain a COA before he can appeal the district court's denial of habeas relief. 28 U.S.C. § 2253(c)(1); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600, 146 L.Ed.2d 542, 551 (2000).

To obtain a COA, Richard must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack*, 529 U.S. at 483, 120 S.Ct. at 1603, 146 L.Ed.2d at 554. When a district court rejects a constitutional claim on the merits, a COA will be granted only if the applicant "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931, 950-51 (2003) (quoting *Slack*, 529 U.S. at 484). When the denial of relief is based on procedural grounds, *Slack* provides a two-prong test for determining whether a COA should issue: the applicant must show (1) that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Each prong of the test is part of a threshold inquiry, and a court may dispose of the application by resolving the issue whose answer is more apparent from the record and arguments. *Id.* at 485.

### A. Richard's appointed counsel

Richard argues that he was denied the right to counsel and due process under the Sixth and Fourteenth Amendments when the state trial court removed his court-appointed second-chair attorney, Stephen Taylor, and appointed Christopher Goldsmith to represent Richard. The district court concluded that the nonretroactivity rule of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), barred Richard's claim, and that, in any event, his claim was meritless. Because reasonable jurists would debate neither the district court's *Teague* ruling nor the district court's assessment of Richard's constitutional claim, we deny a COA on this claim.

\*2 Richard argues that under *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), and *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988), a court may not interfere with an indigent defendant's right to "counsel of his choice" absent a conflict of interest or serious potential for a conflict. This court has "repeatedly held that the right to counsel guaranteed by the Sixth Amendment *does not* include the right to counsel of one's choice." *United States v. Breeland*, 53 F.3d 100, 106 n. 11 (5th Cir.1995). In *Yohey v. Collins*, 985 F.2d 222 (5th Cir.1993), for example, when a Texas trial court, against Yohey's wishes, replaced his counsel with another attorney, this court held that the "right to counsel guaranteed by the Sixth Amendment does not include the right to counsel of Yohey's choice." *Id.* at 228.

Here, Richard does not complain of the adequacy of his ultimate representation. He simply argues that an indigent defendant has a right to appointed "counsel of choice." Reasonable jurists

would not debate the district court's conclusion that this rule was not "*dictated* by precedent existing at the time [Richard's] conviction became final" *Teague*, 489 U.S. at 301, and therefore cannot serve as a basis for habeas relief.

The district court also concluded that even if the rule Richard seeks were not barred by *Teague*, any error in this case would be harmless because it did not result in "actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (concluding that "habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' "). Richard does not contend that Goldsmith's performance was in any way deficient. Because Richard received competent representation, jurists of reason would not find debatable the district court's conclusion that neither Richard's Sixth nor Fourteenth Amendment rights were violated.

#### **B. Opportunity to inform the jury of parole eligibility and to explain or deny certain statements made at trial**

Richard argues that he was denied the effective assistance of counsel and due process guaranteed by the Sixth and Fourteenth Amendments because he was not allowed to inform the jury of Texas law governing parole ineligibility and because "he was unable to explain or deny" certain statements made at trial concerning the future dangerousness of prisoners released from death row. Because jurists of reason would not debate the district court's conclusion that Richard's arguments are meritless and barred by *Teague*, we deny a COA.

In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the Supreme Court held that at the time of death penalty deliberations, the jury should be informed that a defendant is ineligible for parole. This court "has repeatedly refused to extend the rule in *Simmons* beyond those situations in which a capital murder defendant is statutorily ineligible for parole." *Green v. Johnson*, 160 F.3d 1029, 1045 (5th Cir.1998). *Simmons* does not apply to the present case because if Richard received a life sentence, he would be eligible for parole after he served a minimum of 20 years in prison.

\*3 Richard's reliance on *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), and *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), does not support his argument. *Skipper* held that evidence of a defendant's good behavior in prison should be admitted during the punishment phase of a capital sentencing hearing as relevant mitigating evidence, 476 U.S. at 8, and *Gardner* held that a death sentence could not constitutionally be based on portions of a presentence investigation report that were not disclosed to counsel for the parties, *Gardner*, 430 U.S. at 351. Richard relies on these cases to argue that his due process rights were violated when he was unable to explain or deny certain statements made during trial. Specifically, he complains of testimony elicited by the State on cross-examination of a professor at the Criminal Justice Center at Sam Houston State University that at least one former death row inmate released from prison killed a person in free society and of the prosecutor's reiteration of that statement during the State's punishment argument.

*Simmons* involves application of the principles of *Skipper* and *Gardner* to the South Carolina sentencing scheme, *Simmons*, 512 U.S. at 164-65, but this court has repeatedly distinguished the Texas sentencing scheme. An opportunity to explain or deny statements with information regarding parole eligibility is "required only where state law provides for life imprisonment without possibility of parole as an alternative to the death penalty." *Woods v. Cockrell*, 307 F.3d 353, 361 (5th Cir.2002).

Although this issue is easily disposed of on the merits, Richard is also not entitled to a COA because reasonable jurists would not debate that Richard's interpretation of *Simmons*, *Skipper*, and *Gardner* would constitute a "new rule" of constitutional law barred by *Teague*. See *Wheat v. Johnson*, 238 F.3d 357, 361 (5th Cir.2001).

### III. CONCLUSION

For the foregoing reasons, we deny Richard's request for a COA on both claims.

**COA DENIED.**

C.A.5 (Tex.),2003.  
Richard v. Cockrell  
73 Fed.Appx. 84, 2003 WL 21757442 (C.A.5 (Tex.))

Briefs and Other Related Documents (Back to top)

• 03-20125 (Docket) (Feb. 4, 2003)  
END OF DOCUMENT

Richard v. Cockrell 2003 WL 21757442, 3 (C.A.5 (C.A.5 (Tex.),2003)

# EXHIBIT D

Not Reported in S.W.3d, 2007 WL 841768 (Tex.Crim.App.)

Briefs and Other Related Documents Only the Westlaw citation is currently available. UNDER TX R RAP RULE 77.3, UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.

**ORDER**  
**Do Not Publish**

Court of Criminal Appeals of Texas.

Ex Parte Michael Wayne RICHARD.

No. WR-47911-02.

March 21, 2007.

On Application for Writ of Habeas Corpus, In Cause No. 456621 from the 182nd District Court of Harris County.

**ORDER**

PER CURIAM.

\*1 This is a subsequent application for writ of habeas corpus filed pursuant to Texas Code of Criminal Procedure, Article 11.071, Section 5. Applicant asserts that he is mentally retarded and may not be executed. We remanded his claim to the convicting court for resolution.

Applicant was convicted of capital murder on September 4, 1987. Because of error in that trial we reversed the conviction and remanded for a new trial. Richard v. State, 842 S.W.2d 279 (Tex.Crim.App.1992). After remand, applicant was again convicted of capital murder and sentenced to be executed. We affirmed the conviction and sentence. Richard v. State, No. 72,193 (Tex.Crim.App. June 18, 1997). On April 3, 1998, applicant filed his initial application for writ of habeas corpus pursuant to Article 11.071. We denied relief. Ex parte Richard, WR-47,911-01 (Tex.Crim.App. February 2, 2000).

The convicting court has returned the case to this Court with its findings of fact and conclusions of law and a recommendation to deny relief. We have reviewed the record of the proceedings on remand. The convicting court's findings of fact and conclusions of law are supported by the

record and we adopt them as our own. We conclude that applicant has not shown he is mentally retarded and, therefore, relief is denied.

IT IS SO ORDERED THIS THE 21ST DAY OF MARCH, 2007.

PRICE, J., would file and set.

Tex.Crim.App.,2007.

Ex Parte Richard

Not Reported in S.W.3d, 2007 WL 841768 (Tex.Crim.App.)

Briefs and Other Related Documents ([Back to top](#))

- [WR-47,911-02 \(Docket\)](#) (Sep. 11, 2003)

END OF DOCUMENT