

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

ROUTY W. ABERNATHY
ADC #143921

PETITIONER

v.

NO. 5:12CV00277 JLH/BD

RAY HOBBS, Director,
Arkansas Department of Correction

RESPONDENT

ORDER

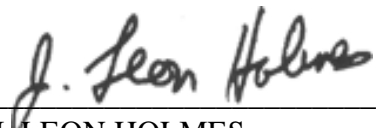
The Court has reviewed the Recommended Disposition (“Recommendation”) filed by United States Magistrate Judge Beth Deere, as well as the objections filed by the petitioner, Routy W. Abernathy. The Court has also made a *de novo* review of the record. After careful consideration, the Court adopts the Recommendation as its own, except with respect to the recommendation that no certificate of appealability issue on Abernathy’s first and second grounds for relief.

Abernathy’s first ground for relief is that his lawyer failed to object to expert testimony by Cheryl Green, a physician’s assistant, that she believed allegations made by a minor female whose testimony against Abernathy was admitted under Arkansas Rule of Evidence 404(b). Abernathy’s second ground for relief is that his lawyer was ineffective for telling the jury during opening statement that if he believed that the state had failed to prove its case beyond a reasonable doubt, he would not call Abernathy to testify, which meant that when he did call Abernathy to testify, the jury could conclude that he believed that the state had met its burden of proof. With respect to these two grounds for relief, the magistrate judge concluded that the Arkansas Supreme Court had not unreasonably applied federal law by concluding that Abernathy had failed to show that his defense counsel’s conduct had prejudiced the defense. The Court agrees with that conclusion but disagrees with the recommendation that no certificate of appealability should issue.

A certificate of appealability may issue only if the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings.” *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). Applying that standard to this case, the Court believes that a certificate of appealability should issue as to Abernathy’s first two grounds for relief. *Cf. Snowden v. Singletary*, 135 F.3d 732, 737-39 (11th Cir. 1996); *United States v. Azure*, 801 F.2d 336, 341 (8th Cir. 1986).

Routy W. Abernathy’s petition for writ of habeas corpus is denied. A certificate of appealability is granted as to Abernathy’s first two grounds for relief. No certificate of appealability will be issued as to Abernathy’s third and fourth grounds for relief.

IT IS SO ORDERED this 29th day of January, 2013.



J. LEON HOLMES
UNITED STATES DISTRICT JUDGE