

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GUNTHER FIEK
Telfair State Prison,
Petitioner,

v.

FRED BURNETTE
in his official capacity as Warden of
Telfair State Prison,
Respondent.

CIVIL ACTION FILE
NO. 1:07-CV-1443-TWT

ORDER

This is a pro se habeas corpus action. It is before the Court on the Report and Recommendation [Doc. 44] of the Magistrate Judge recommending that the Petition be dismissed and denying a certificate of appealability. The Petitioner was convicted of three counts of aggravated child molestation and eighteen counts of child molestation. He was acquitted of three counts of child molestation. As set forth in the thorough and well-reasoned Report and Recommendation, the Petitioner's right to confront the witnesses against him was not violated by the admission of hearsay statements of the victims and their parents when the victims testified and were subject to cross examination by defense counsel. The state habeas corpus finding that neither

trial nor appellate counsel rendered ineffective assistance of counsel was neither contrary to nor an unreasonable application of clearly established federal law. The Petitioner's other claims are without merit for the reasons set forth in the Report and Recommendation. The Petitioner claims that the procedurally defaulted claims should be considered because he is actually innocent of the crimes for which he was convicted. To avoid the procedural bar, he must show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. Schlup v. Delo, 513 U.S. 298, 327 (1995). To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. Id. The Petitioner's claim that the detectives used improper methods of interviewing the victims does not come close to establishing that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. This Court cannot second guess the jury's credibility determinations in a habeas corpus proceeding. The Court approves and adopts the Report and Recommendation as the judgment of the Court. This action is DISMISSED. The request for a Certificate of Appealability is DENIED.

SO ORDERED, this 25 day of August, 2010.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge