APPENDIX A

The Order of the United States Court of Appeals for the Fifth Circuit, which denied Mr. Taylor's Motion for a Rehearing.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30227

KEVIN TAYLOR,

Petitioner - Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent - Appellee

Appeals from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

Before WIENER, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

APPENDIX B

The opinion of the United States Court of Appeals for the Fifth Circuit denying Mr. Taylor's Appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30227
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
March 20, 2018
Lyle W. Cayce
Clerk

KEVIN TAYLOR,

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:15-CV-5629

Before WIENER, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Kevin Taylor, Louisiana prisoner # 117058, filed a 28 U.S.C. § 2254 application challenging his conviction for simple burglary, for which he was sentenced to 24 years of imprisonment. The district court granted a certificate of appealability (COA) on a single issue – whether Taylor's constitutional right to compulsory process to call a witness was violated.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

This court's review is limited to those issues for which a COA has been granted. *See* 28 U.S.C. § 2253(c); *United States v. Kimler*, 150 F.3d 429, 430 (5th Cir. 1998). Pro se briefs are afforded liberal construction, but even pro se litigants must brief claims to preserve them. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993); FED. R. APP. P. 28(a).

Taylor has failed to address the issue whether his right to compulsory process was violated. He has instead briefed the merits of his claim that his trial counsel rendered ineffective assistance for failing to subpoena and present a potential alibi witness. Taylor has neither addressed the only issue on which a COA was granted, nor expressly requested to expand the scope of the COA, so he has abandoned the only cognizable issue on appeal. *See Yohey*, 985 F.2d at 224-25; *Kimler*, 150 F.3d at 431 n.1. The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KEVIN TAYLOR	CIVIL ACTION
VERSUS	NO: 15-5629
DARREL VANNOY, et al	SECTION: "A"

JUDGMENT

The Court having adopted the report and recommendation of the United States Magistrate Judge;

IT IS ORDERED, ADJUDGED AND DECREED that the federal application for habeas corpus relief filed by Kevin Taylor is **DENIED WITH PREJUDICE**.

New Orleans, Louisiana, this 7th day of March 2017.

JAY C. ZAINEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KEVIN TAYLOR	**CIVIL ACTION**
VERSUS	**NO. 15-5629**
DARREL VANNOY, WARDEN	**SECTION: "A"(1)**

REPORT AND RECOMMENDATION

This matter was referred to this United States Magistrate Judge for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings of fact and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Upon review of the record, the Court has determined that this matter can be disposed of without an evidentiary hearing. See 28 U.S.C. § 2254(e)(2). Therefore, for all of the following reasons, **IT IS RECOMMENDED** that the petition be **DISMISSED WITH PREJUDICE**.

Petitioner, Kevin Taylor, is a state prisoner incarcerated at the Dixon Correctional Institute in Jackson, Louisiana. On January 11, 2011, he was convicted of simple burglary under Louisiana law.[1] On July 7, 2011, he was found to be a fourth offender,[2] and, on September 23, 2011, he was then sentenced as such to a term of twenty-four years imprisonment.[3] On August 7, 2013, the

[1] State Rec., Vol. 3 of 4, transcript of January 11, 2011, p. 93; State Rec., Vol. 1 of 4, minute entry dated January 11, 2011; State Rec., Vol. 1 of 4, jury verdict form.
[2] State Rec., Vol. 3 of 4, transcript of July 7, 2011, p. 20; State Rec., Vol. 1 of 4, minute entry dated July 7, 2011.
[3] State Rec., Vol. 3 of 4, transcript of September 23, 2011; State Rec., Vol. 1 of 4, minute entry dated September 23, 2011.

Louisiana Fourth Circuit Court of Appeal affirmed his conviction and sentence.[4] The Louisiana Supreme Court then denied his related writ application on February 28, 2014.[5]

On June 26, 2014, petitioner then filed an application for post-conviction relief with the state district court.[6] That application was denied on July 31, 2014.[7] His related writ applications were then likewise denied by the Louisiana Fourth Circuit Court of Appeal on October 10, 2014,[8] and by the Louisiana Supreme Court on September 25, 2015.[9]

On October 22, 2015, petitioner filed the instant federal application seeking habeas corpus relief.[10] The state concedes that the application is timely.[11]

Standards of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") comprehensively overhauled federal habeas corpus legislation, including 28 U.S.C. § 2254. Amended subsections 2254(d)(1) and (2) contain revised standards of review for pure questions of fact, pure questions of law, and mixed questions of both. The amendments "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." Bell v. Cone, 535 U.S. 685, 693 (2002).

As to pure questions of fact, factual findings are presumed to be correct and a federal court will give deference to the state court's decision unless it "was based on an unreasonable

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[4] State v. Taylor, 123 So.3d 256 (La. App. 4th Cir. 2013); State Rec., Vol. 4 of 4.
[5] State v. Taylor, 134 So.3d 1174 (La. 2014); State Rec., Vol. 4 of 4.
[6] State Rec., Vol. 4 of 4.
[7] State Rec., Vol. 4 of 4, Judgment dated July 31, 2014.
[8] State v. Taylor, No. 2014-K-1057 (La. App. 4th Cir. Oct. 10, 2014); State Rec., Vol. 4 of 4.
[9] State *ex rel.* Taylor v. State, 178 So.3d 159 (La. 2015); State Rec., Vol. 4 of 4.
[10] Rec. Doc. 1.
[11] Rec. Doc. 10, p. 9.

determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); see also 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

As to pure questions of law and mixed questions of law and fact, a federal court must defer to the state court's decision on the merits of such a claim unless that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Courts have held that the "'contrary to' and 'unreasonable application' clauses [of § 2254(d)(1)] have independent meaning." Bell, 535 U.S. at 694.

Regarding the "contrary to" clause, the United States Fifth Circuit Court of Appeals has explained:

> A state court decision is contrary to clearly established precedent if the state court applies a rule that contradicts the governing law set forth in the [United States] Supreme Court's cases. A state-court decision will also be contrary to clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of the [United States] Supreme Court and nevertheless arrives at a result different from [United States] Supreme Court precedent.

Wooten v. Thaler, 598 F.3d 215, 218 (5th Cir. 2010) (internal quotation marks, ellipses, brackets, and footnotes omitted).

Regarding the "unreasonable application" clause, the United States Supreme Court has held: "[A] state-court decision is an unreasonable application of our clearly established precedent

if it correctly identifies the governing legal rule but applies that rule unreasonably to the facts of a particular prisoner's case." White v. Woodall, 134 S. Ct. 1697, 1706 (2014). However, the Supreme Court cautioned:

> Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies this Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error. Thus, if a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision. AEDPA's carefully constructed framework would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.

Id. (citations and quotation marks omitted). Therefore, when the Supreme Court's "cases give no clear answer to the question presented, let alone one in [the petitioner's] favor, it cannot be said that the state court unreasonably applied clearly established Federal law." Wright v. Van Patten, 552 U.S. 120, 126 (2008) (quotation marks and brackets omitted). The Supreme Court has also expressly cautioned that "an unreasonable application is different from an incorrect one." Bell, 535 U.S. at 694. Accordingly, a state court's merely incorrect application of Supreme Court precedent simply does not warrant habeas relief. Puckett v. Epps, 641 F.3d 657, 663 (5th Cir. 2011) ("Importantly, 'unreasonable' is not the same as 'erroneous' or 'incorrect'; an incorrect application of the law by a state court will nonetheless be affirmed if it is not simultaneously unreasonable.").

While the AEDPA standards of review are strict and narrow, they are purposely so. As the United States Supreme Court has held:

> [E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable.
>
> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves

> authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a guard against *extreme malfunctions* in the state criminal justice systems, *not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.*

Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (citations omitted; emphasis added); see also Renico v. Lett, 559 U.S. 766, 779 (2010) ("AEDPA prevents defendants – and federal courts – from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.").

The Supreme Court has expressly warned that although "some federal judges find [28 U.S.C. § 2254(d)] too confining," it is nevertheless clear that "all federal judges must obey" the law and apply the strictly deferential standards of review mandated therein. White v. Woodall, 134 S. Ct. 1697, 1701 (2014).

Facts

On direct appeal, the Louisiana Fourth Circuit Court of Appeal summarized the facts of this case as follows:

> The testimony of Rebecca Paz established that the previous year,[FN4] she and her boyfriend were on Clio Street in New Orleans, Louisiana, assisting her boyfriend's uncle, Greg Surry, with the opening of a restaurant. Paz recalled that when she parked her vehicle, the doors were locked and all of the windows were up. As Paz and her boyfriend were sweeping inside the restaurant, Surry, who lived across the street from the restaurant and had heard the sound of glass breaking, came over and alerted her that someone had broken into her vehicle. Paz testified that she ran outside to find that the window of her car had been smashed open, and that her purse had been taken from her vehicle, which contained her digital camera, prescription medication (Amoxicillin), and Invisalign teeth trays.

[FN4] Paz testified that she could not recall the exact date of the automobile burglary, which occurred on July 18, 2009. She also could not recall what time that the incident occurred.

Paz did not personally observe the burglary to her vehicle or hear the window break, although she was across the street from where her vehicle was parked at the time. Paz further testified that she did not see anyone running away from the vehicle, but became aware that a person whose name she did not know "said that they were chasing after somebody for me." She did not observe the person chasing the perpetrator, but observed him coming back down the street. After standing outside for a few minutes, Paz called the police, but she could not recall exactly which items she had reported to the police as being stolen. Paz said that she did not know the defendant and had not given anyone permission to use her car.

Ryan Haigler testified that on the morning of July 18, 2009, around 11:00 a.m., he was at the intersection of Clio and Carondelet Streets on his apartment balcony, which faced the intersection. While on his balcony, he observed a man sitting on the edge of a planter on the corner of Carondelet and Clio Streets looking around very suspiciously for about three to four minutes. When asked what was suspicious, Haigler stated that "[p]eople don't usually stop for a breather at that spot. It's an unusual position to be sitting on the edge of a plant. And that's why it took notice – took my notice at that time." Haigler estimated that the man was approximately twelve feet away and that there was nothing obstructing his view of the man's face. He recalled that the man was wearing "work clothes" that were "definitely a work uniform" and had a large purple bag. When asked whether he recalled if the man was wearing a vest, Haigler responded, "[the man's clothing] was almost like a blue and – blue pants and maybe a – I don't know. I can't say as to a vest, you know. It's been a while."

Haigler observed the man get up and pick up his belongings and walk toward the direction of the victim's automobile, which was parked in front of another apartment building that was across the street from his building, and "around the corner just a bit." Immediately thereafter, he "heard a smash, a window break, something of the sort." Haigler claimed that he was unable to see the window break because the man had crossed over to Clio Street where he could no longer see him from the balcony.

After hearing the smash of glass, Haigler ran downstairs and out of his apartment building, at which time he observed "the purple bag kind of going around the corner." He estimated that it took him about thirty seconds to run from his balcony to the area in front of his apartment building, where he noticed that the man, heading against traffic on Carondelet Street, had "gone up by Martin Luther King by that point" and was "moving at a fast pace." Haigler was unable to keep up with the perpetrator because he was barefoot. At that point, he relocated back to Paz's vehicle and spoke to Paz. Haigler also spoke to police that same day regarding the incident. When asked if he recalled giving the police a description of

the perpetrator as having short hair and a medium build, Haigler responded that he was not sure, stating, "I mean, short hair, yeah. Definitely like extremely short hair, if any at all."

On August 28, 2009, Haigler was shown a photographic lineup by police, which he identified in court. He also identified the defendant in open court. According to Haigler, he immediately identified the defendant from the lineup and signed the back of the photograph. He said that the officers never indicated which photograph he should choose from the lineup or offered him anything for making an identification, nor did they threaten, coerce, or intimidate him into making an identification.

Rebecca Begtrup, another victim of an automobile burglary, testified at trial and confirmed that her car window had been smashed in and that her cell phone charger, some currency, and some compact discs had been taken from her vehicle. Begtrup identified the items in open court and confirmed that she did not know the defendant or give him permission to enter her vehicle.

Officer Edward Davis testified that on June 28, 2009, he responded to the call of an automobile burglary that had been reported by Lauren Archer, meeting her at Tulane University, her place of employment. Archer reported that the automobile burglary had occurred on Delechaise Street. Officer Davis observed that the driver's side front window was shattered. He played no role in the follow-up investigation of the burglary.

Christine Vo, the manager of the Magazine Street Pawn Shop, testified regarding the procedure used when an individual pawns an item at the shop. When an individual pawns an item, after a price is agreed upon, the customer must present a valid form of identification, and a receipt is generated listing the customer's name and address. Vo authenticated a receipt in defendant's name for a pawned Husqvarna model 445 chainsaw, including the serial number. The address listed for the defendant on the receipt was 3314 Chippewa Street, and receipt was signed by both the defendant and an employee of the pawn shop. Although she recalled the transaction taking place, Vo did not specifically recall the defendant by his face and did not know if he had been a prior customer.

Det. Robert Barrere investigated the report of a burglary from a truck on Erato Street wherein a Husqvarna chainsaw and other items were stolen from the vehicle. As part of his investigation, Det. Barrere contacted the Magazine Street Pawn Shop, as well as other pawn shops, and learned that a Husqvarna chainsaw had been pawned at the Magazine Street Pawn Shop on the date that the burglary reportedly occurred. Det. Barrere was ultimately able to determine that the pawned chainsaw was the same chainsaw that was stolen from the truck in the Erato Street burglary, and he returned the chainsaw to its owner.

In addition to the Husqvarna chainsaw, other items were reported as stolen from the vehicle. Therefore, Det. Barrere and his supervisor relocated to the address listed on the Magazine Street Pawn Shop receipt as belonging to the defendant. After advising defendant's mother, May Bell Taylor, that they were investigating a burglary, Ms. Taylor gave the officers permission to search the

residence and directed them to the room used by the defendant. During the search, the officers observed numerous items that previously had been reported as stolen in the Sixth District area. The items included a Cobra radar detector; a cell phone charger that had been reported stolen by Rebecca Begtrup; a Saturn Ion CD case with the name Begtrup written on it; numerous credit cards bearing the name Lauren M. Archer; numerous gift cards; student identification cards and a health card in Rebecca Paz's name; and a prescription pill bottle bearing Rebecca Paz's name.

After reviewing the police report that had been prepared by the responding officer, Det. Barrere subsequently compiled a six-person photographic lineup that included a photograph of the defendant and relocated to Haigler's apartment building with Det. Matthew McCleary on August 28, 2009. Det. Barrere corroborated Haigler's testimony regarding his immediate identification of the defendant from the photographic lineup.

Det. Barrere further testified that after meeting with Haigler for the photographic lineup identification, he relocated to the police station to prepare paperwork necessary to arrest defendant for simple burglary. Although he was not a responding officer on July 18, 2009, Det. Barrere read the report prepared by Officer Harper, the officer who initially handled the incident, before preparing his supplemental report. In the supplemental report regarding the burglary, Det. Barrere indicated that Haigler had provided a description of the defendant. However, because Det. Barrere was not a responding officer on the date of the burglary of Paz's vehicle, he obtained Haigler's description of the perpetrator from Sgt. Christopher Kalka, who spoke to Haigler at the scene. He recalled that his description of the perpetrator was "a black male, late 30's, early 40's. I don't recall the clothing. I believe, you know, like a work vest, fluorescent work vest."

When asked where he heard the term "work vest," Det. Barrere responded that he believed he heard it from Sgt. Kalka pursuant to Sgt. Kalka's interview with Haigler at the scene. Det. Barrere could not specifically recall whether there was a mention in the initial report of a fluorescent work vest, and he testified that to his knowledge, there was not mention of a fluorescent work vest in the initial report.

Sgt. Christopher Kalka testified that he investigated an automobile burglary on July 18, 2009, and spoke to Haigler pursuant to his investigation. Sgt. Kalka's recollection of Haigler's description of the perpetrator was "a black male, very short hair, medium build, with dark brown complexion. He was wearing a navy blue basketball jersey, maybe like a LeBron James, Cleveland Cavaliers, basketball jersey, and jeans. But on top of the jersey, he wore a fluorescent yellow-like a work vest."[FN5] Sgt. Kalka further testified that he participated in the search of defendant's residence, at which time "four fluorescent yellow work vests" were discovered.

> [FN5] The description of the perpetrator in the initial police report was "[a]n unidentified black male wearing a blue sports jersey and blue jeans."

Sgt. Kalka confirmed that although he reported to the scene at the time of the incident, Officer Harper wrote the initial incident report. Counsel for the defendant read in open court the description of the perpetrator in the initial police report, which did not specifically include a reference to a fluorescent work vest. Sgt. Kalka was also presented with a copy of a Sixth District crime bulletin attached to Officer Harper's initial report. Sgt. Kalka testified that the purpose of this bulletin was to list missing property, to be on the lookout, and "just to notify everyone of some of the identifiable property that was taken and any perpetrator descriptions." Sgt. Kalka read the description of the perpetrator in the bulletin in open court:

> Okay. The only fields that are filled in [on the crime bulletin] are "Black male, medium build." And the clothing description is listed as, "Blue sports jersey, blue jeans, short hair, with a backpack." Height, weight, complexion, age, all of those, were left blank.

After the State rested, the defense called Luis Lizama, the Division Manager for IESI Southshore, a waste collection company. He confirmed that he knew the defendant, who was employed through a temporary agency with which IESI contracted. Although Lizama could not recall if the defendant was working on July 18, 2009, he confirmed that the defendant was employed by IESI on that date. He was not certain how long the defendant was employed by IESI.[FN6]

> [FN6] Counsel for the defendant approached the bench with a document, and a bench conference ensued. The State objected to the document, and the trial court sustained the objection. Counsel for the defendant requested that the trial be continued "until we can get someone here ... [to] authenticate the document." The trial court denied the request. Counsel for the defendant noticed intent to seek supervisory writs and requested a stay, which the trial court denied, noting the intent to take a writ. There is no evidence that a writ was ultimately taken from the denial of the request for a continuance. Counsel for the defendant proffered the document as Defense Exhibit Three. After the close of the trial and the jurors were excused, counsel for the defendant noted an objection for the record, indicating that the unauthenticated document that was the subject of the State's objection was a time sheet purportedly verifying the defendant's presence at work on the date of the incident.

Lizama further testified that he was not familiar with the defendant's individual work schedule, and that he had no independent recollection or firsthand knowledge of the defendant working on July 18, 2009. He testified that waste collection trucks begin any one of sixty-five routes at various times of the morning

and at different locations, generally six days per week, and that a shift is generally eight to ten hours. The routes encompass various municipalities in Jefferson Parish and St. Charles Parish; IESI did not provide service to New Orleans. After stopping at a landfill, the trucks return to the IESI facility at 500 Bridge City Avenue.

The defendant testified that he stayed with his mother at her house from time to time and confirmed that he was staying at his mother's residence on August 28, 2009.[FN7] The defendant confirmed that he pawned the chainsaw, but maintained that he found the chainsaw in the garbage in Kenner near a school, but could not recall the name of the school. The defendant insisted that he would not have pawned the chainsaw if he had been aware that it was stolen. When asked where he stored the chainsaw upon retrieving it from the trash pile, the defendant stated that the truck had "a little box on the side, on the side of the truck where we could store our stuff." He denied breaking into a vehicle at Carondelet and Clio Streets. When questioned regarding the items belonging to Rebecca Paz that were recovered at his mother's house, the defendant testified that he had no idea how the items got there.

> [FN7] His uncle, Charles Taylor, and his uncle's girlfriend would also stay at the house occasionally. The defendant denied that it was "his room" and testified that he slept in the living room. The State showed Defendant Exhibit Twenty-two, which consisted of the papers bearing defendant's name which were recovered from the bedroom, at which time the defendant confirmed that they were his papers. Id. When asked if someone else had gathered all the stolen items belonging to different individuals and brought them to his room on Chippewa Street, the defendant responded, "I don't know" and insisted that he was at work that day.

The defendant testified that on July 18, 2009, he was employed with AMI, a temporary service agency; that AMI had a contract with IESI; and that he was "on the Kenner route" and had reported to work at approximately 4:30 or 5:00 a.m. for his shift, which lasted four to five hours. The defendant testified that to work for IESI, he was required to fill out a time sheet, and to sign in and out; however, sometimes the driver would sign the time sheet. When questioned regarding his uniform, the defendant testified that he could wear whatever he wanted, except that "we must wear a vest. If we don't, we cannot ride on that truck."

The defendant confirmed that he had been convicted of other felonies, including a theft conviction in 1989; a conviction for burglary of an automobile in a 1994 incident; and a "conviction in 2008 dealing with heroin."

The defense rested; however, defense counsel requested a continuance until John Woods could appear, which the trial court denied.[12]

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[12] State v. Taylor, 123 So.3d 256, 258-63 (La. App. 4th Cir. 2013); State Rec., Vol. 4 of 4.

Petitioner's Claims

In connection with his federal application, petitioner submitted a standard form petition and an accompanying memorandum. Although he does not specifically list his claims, he appears to be seeking review of all claims he submitted both on direct appeal and in the post-conviction proceedings; however, the only claim he briefs is an ineffective assistance of counsel claim. In its response, the state addresses only that one briefed claim. Nevertheless, out of an abundance of caution, the undersigned will consider all of the claims petitioner presented to the state courts.

Sufficiency of the Evidence

On direct appeal, petitioner claimed that there was insufficient evidence to support his conviction. The Louisiana Fourth Circuit Court of Appeal denied that claim, holding:

> When reviewing the sufficiency of the evidence to support a conviction, this Court is controlled by the standard set forth by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which dictates that to affirm a conviction "the appellate court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt." State v. Captville, 448 So.2d 676, 678 (La. 1984). In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. State v. Robinson, 2002-1869, p. 16 (La. 4/14/04), 874 So.2d 66, 79. Under the Jackson standard, the rational credibility determinations of the trier of fact are not to be second guessed by a reviewing court. State v. Juluke, 98-0341 (La. 1/8/99), 725 So.2d 1291, 1293.
>
> When there is conflicting testimony about factual matters, the resolution of which depends upon a determination of credibility of the witness, the matter is one of the weight of the evidence, not its sufficiency. State v. Allen, 94-1895 (La.App. 4 Cir. 9/15/95), 661 So.2d 1078. The trier of fact determines the weight to be given the evidence presented. It is not the function of an appellate court to assess credibility or reweigh the evidence. State v. Helou, 2002-2302, p. 5 (La. 10/23/03), 857 So.2d 1024, 1027.
>
> A fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Jackson v. Virginia, *supra*, 443 U.S. at 319, 99 S.Ct. at 2789, 61 L.Ed.2d at 573-74. Where rational triers of fact could disagree as to the interpretation of the evidence, the rational

trier's view of all evidence most favorable to the prosecution must be adopted on review. Only irrational decisions to convict by the trier of fact will be overturned. See State v. Mussall, 523 So.2d 1305, 1310 (La. 1988).

Simple burglary is defined as "the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein, other than as set forth in R.S. 14:60."[FN8] This Court has recognized that "[t]o convict a defendant of simple burglary, the state must prove beyond a reasonable doubt that the defendant entered the structure or vehicle without authorization and had the specific intent to commit a felony or theft therein." State v. Smith, 2006-0318, p. 5 (La.App. 4 Cir. 11/21/06), 946 So.2d 218, 221 (citing State v. Ewens, 98-1096 (La.App. 5 Cir. 3/30/99), 735 So.2d 89, 93). "Specific intent is a state of mind that need not be proven as fact but may be inferred from circumstances and the actions of the defendant." State v. Smith, 2006-0318, p. 5, 946 So.2d at 221 (citing State v. Bailey, 00-1398 (La.App. 5 Cir. 2/14/01), 782 So.2d 22, 24).

> [FN8] La. R.S. 14:62(A). La. R.S. 14:60 governs aggravated burglary and provides as follows:
>
> Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure, water craft, or movable where a person is present, with the intent to commit a felony or any theft therein, if the offender,
>
> (1) Is armed with a dangerous weapon; or
> (2) After entering arms himself with a dangerous weapon; or
> (3) Commits a battery upon any person while in such place, or in entering or leaving such place.
>
> Whoever commits the crime of aggravated burglary shall be imprisoned at hard labor for not less than one nor more than thirty years.

The defendant argues that Haigler's testimony was unreliable, as he testified that he did not see the actual breaking of the car window, but only that he heard a smash and window breaking and investigated the noise. The defendant submits that La. R.S. 14:62 provides that the elements of simple burglary that must be proven are 1) entry into a structure; 2) that was unauthorized; and 3) the specific intent to commit a felony or theft therein. The defendant argues that Haigler's testimony wherein he stated that he observed someone meeting the defendant's description sitting across the street from his home was insufficient to establish that the defendant was the same person who burglarized Paz's automobile. Furthermore, the defendant argues that the fact that Haigler testified that he saw a person with the defendant's description running away from Paz's vehicle after the

sound of glass breaking was insufficient to establish that the defendant entered Paz's vehicle.

The defendant further argues that when evidence is circumstantial, it must exclude every reasonable hypothesis of innocence. Defendant contends that this case is distinguishable from State v. Conner, 2008-0473, p. 6 (La.App. 4 Cir. 10/1/08), 996 So.2d 564, 568, wherein the victim testified that she witnessed the defendant smash her car window, reach into her car, and remove the bag that was on the seat next to her.

In this case, the State presented the jury with testimony from Haigler, who testified that at the time of the incident he was at the intersection of Clio and Carondelet Streets on his apartment balcony, which faced the intersection. While on his balcony, Haigler observed, from only twelve feet away, "a man sitting on the edge of a planter on the corner of Carondelet and Clio looking around, you know, very suspiciously" for about three to four minutes. Notably, Haigler testified that he had an unobstructed view of the man's face for the three to four minute period that he was watching the man. Haigler recalled that the man was wearing "work clothes" that were "definitely a work uniform" and that the man was carrying a large purple bag.

Haigler observed the man stand up with his belongings and walk towards the direction of Paz's automobile, which was parked in front of a building that was across the street and "around the corner just a bit." Immediately thereafter, Haigler "heard a smash, a window break," but could not see the man at the moment of the window breaking because the man had moved out of his line of vision. Haigler testified that after hearing the smash of glass, he ran downstairs and out of his apartment building, at which time he observed "the purple bag kind of going around the corner" at a fast pace and heading against traffic on Carondelet Street towards Martin Luther King Boulevard.

Upon being shown a photographic lineup by the police, Haigler immediately identified the defendant as the man he observed sitting suspiciously on the planter before hearing the sound of glass breaking. Haigler also made an identification of the defendant in open court at trial.

Additionally, the State presented the jury with evidence of items that Paz had specifically reported as stolen from her vehicle that were discovered during the detectives' search of defendant's room, including student identification cards, a health card, and a prescription pill bottle bearing Rebecca Paz's name, as well as various other items that had been reported as stolen in other recent automobile burglaries. Considering the evidence presented to the jury at trial, viewed in a light most favorable to the State, the jury could conclude that the defendant was guilty of simple burglary of Paz's automobile. See State v. Conner, 2008-0473, p. 6, 996 So.2d at 568. This assignment of error lacks merit.[13]

[13] State v. Taylor, 123 So.3d 256, 263-65 (La. App. 4th Cir. 2013); State Rec., Vol. 4 of 4.

The Louisiana Supreme Court then denied petitioner's related writ application without assigning additional reasons.[14]

Because a sufficiency of the evidence claim presents a mixed question of law and fact, this Court must defer to the state court's decision rejecting this claim unless petitioner shows that the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); Taylor v. Day, Civ. Action No. 98-3190, 1999 WL 195515, at *3 (E.D. La. Apr. 6, 1999), aff'd, 213 F.3d 639 (5th Cir. 2000). For the following reasons, the Court finds that he has made no such showing.

As correctly noted by the Louisiana Fourth Circuit Court of Appeal, claims of insufficient evidence are to be analyzed pursuant to the standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979). In Jackson, the United States Supreme Court held that, in assessing such a claim, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. Accordingly, "[t]he Jackson inquiry 'does *not* focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* decision to convict or acquit.'" Santellan v. Cockrell, 271 F.3d 190, 193 (5th Cir. 2001) (quoting Herrera v. Collins, 506 U.S. 390, 402 (1993)) (emphasis added); see also Cavazos v. Smith, 132 S. Ct. 2, 4 (2011) ("[A] federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. ... Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken,

[14] State v. Taylor, 134 So.3d 1174 (La. 2014); State Rec., Vol. 4 of 4.

but that they must nonetheless uphold."). Moreover, because the state court's decision applying the already deferential Jackson standard must be assessed here under the strict and narrow standards of review mandated by the AEDPA, the standard to be applied by this Court is in fact "twice-deferential." Parker v. Matthews, 132 S. Ct. 2148, 2152 (2012); see also Coleman v. Johnson, 132 S. Ct. 2060, 2062 (2012).

Further, it must be remembered that Louisiana's circumstantial evidence standard requiring that every reasonable hypothesis of innocence be excluded does *not* apply in federal habeas corpus proceedings; in these proceedings, *only* the Jackson standard need be satisfied, even if state law would impose a more demanding standard of proof. Foy v. Donnelly, 959 F.2d 1307, 1314 n.9 (5th Cir. 1992); Higgins v. Cain, Civ. Action No. 09-2632, 2010 WL 890998, at *21 n.38 (E.D. La. Mar. 8, 2010), aff'd, 434 Fed. App'x 405 (5th Cir. 2011); Williams v. Cain, No. 07-4148, 2009 WL 224695, at *4 (E.D. La. Jan. 29, 2009), aff'd, 408 Fed. App'x 817 (5th Cir. 2011); Davis v. Cain, Civ. Action No. 07-6389, 2008 WL 5191912, at *14 (E.D. La. Dec. 11, 2008); Wade v. Cain, Civil Action No. 05-0876, 2008 WL 2679519, at *6 (W.D. La. May 15, 2008) (Hornsby, M.J.) (adopted by Stagg, J., on July 3, 2008), aff'd, 372 Fed. App'x 549 (5th Cir. Apr. 9, 2010); see also Coleman, 132 S. Ct. at 2064 ("Under Jackson, federal courts must look to state law for the substantive elements of the criminal offense, but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." (citation and internal quotation marks omitted)).

Here, petitioner's argument is that the state's evidence was insufficient because Haigler did not actually see petitioner break the vehicle's window and steal the items. However, Haigler testified: he saw petitioner with a large purple bag sitting on a planter "looking around, you know,

very suspiciously" for about three to four minutes; he then saw petitioner walk around the corner to where Paz's vehicle was located; he heard a smash immediately after petitioner rounded the corner; and he ran to scene of the crime and saw "the purple bag kind of going around the corner" at a fast pace and heading against traffic away from the crime scene. Additionally, other testimony established that the items stolen from Paz's vehicle were later found in petitioner's room. When that evidence is considered together and viewed *in the light most favorable to the prosecution*, it simply cannot be said that it was *irrational* for the jury to conclude that petitioner was guilty of the simple burglary of Paz's vehicle.

For these reasons, petitioner cannot show that the state court's decision rejecting this claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Accordingly, under the doubly-deferential standards of review which must be applied by this federal habeas court, relief is not warranted.

Denial of Continuance

Petitioner's next claim is that his rights were violated by the trial court's denial of the defense motion for continuance. On direct appeal, the Louisiana Fourth Circuit Court of Appeal denied that claim, holding:

> [T]he defendant asserts that the trial court abused its discretion in denying a continuance due to the absence of John Woods, his alibi witness.
>
> La. C.Cr.P. art. 707 governs motions for continuances in criminal cases and provides:
>
> > A motion for a continuance shall be in writing and shall allege specifically the grounds upon which it is based and, when made by a defendant, must be verified by his affidavit or that of his counsel. It shall be filed at least seven days prior to the commencement of trial.

> Upon written motion at any time and after contradictory hearing, the court may grant a continuance, but only upon a showing that such motion is in the interest of justice.

La. C.Cr.P. art. 709 governs the procedure for a motion for continuance based upon the absence of a witness and provides, in pertinent part:

> A. A motion for a continuance based upon the absence of a witness shall state all of the following:
>
> (1) Facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial.
>
> (2) Facts and circumstances showing a probability that the witness will be available at the time to which the trial is deferred.
>
> (3) Facts showing due diligence used in an effort to procure attendance of the witness.

La. C.Cr.P. art. 712 provides that "[a] motion for continuance, if timely filed, may be granted, in the discretion of the court, in any case if there is good ground therefor."[FN9]

> [FN9] La. C.Cr.P. art. 708 provides:
>
> > A continuance is the postponement of a scheduled trial or hearing, and shall not be granted after the trial or hearing has commenced. A recess is a temporary adjournment of a trial or hearing that occurs after a trial or hearing has commenced.
>
> In any event, however, "[a] motion for a recess is evaluated by the same standards as a motion for a continuance." State v. Plaisance, 2000-1858, p. 29 (La.App. 4 Cir. 3/6/02), 811 So.2d 1172, 1193 (citing State v. Hodges, 98-0513 (La.App. 4 Cir. 11/17/99), 749 So.2d 732, 739).

In State v. Duplessis, this Court recognized that for a defendant to demonstrate prejudicial error, a defendant must demonstrate that the absent witness' testimony would have been favorable to the defense as well as the possibility of a different result if the witness were to testify:

> The right of a defendant to compulsory process is the right to demand subpoenas for witnesses and the right to have those subpoenas served. This right is embodied in both the federal and state constitutions and in this state's statutory law. State v. Lee, 446 So.2d 334 (La.App. 4th Cir. 1984); United States Constitution, Amendment 6; La. Const. Art. I, sec. 16 (1974); La. C.Cr.P. art. 731.
>
> However, in State v. Nicholas, 97-1991 (La.App. 4 Cir. 4/28/99), 735 So.2d 790, this Court stated that this right does not exist in a vacuum, and a defendant's inability to obtain service of requested subpoenas will not be grounds for reversal of his conviction or new trial in each and every case. **In order for a defendant to show prejudicial error, he must demonstrate that the testimony of the absent witness would be favorable to the defense and would indicate the possibility of a different result if the witness were to testify.** See also, State v. Green, 448 So.2d 782 (La.App. 2 Cir. 1984).
>
> Prejudicial error arises where the absent witness is "vital" to the defense. State v. Peterson, 619 So.2d 786, 790 (La.App. 4 Cir. 1993).

State v. Duplessis, 2000-2122, pp. 12–13 (La.App. 4 Cir. 3/28/01), 785 So.2d 939, 947 (emphasis added).

As previously noted, counsel for the defendant moved for a continuance after the sidebar conference during Lizama's testimony, at which time the trial court sustained the objection to the introduction of an unauthenticated document. However, defense counsel did not indicate on the record specifically which witness was needed to authenticate the document:

> [Counsel for the defendant]:
>
> Is there a ruling of the Court on this issue?
>
> THE COURT:
>
> The Court [is] going to sustain the State's objection to that document.
>
> [Counsel for the defendant]:
>
> Your Honor, I would ask that the trial be continued until we can get someone here [to] authenticate the document.
>
> THE COURT:
>
> All right. The Court is going to deny the request for a continuance.

[Counsel for the defendant]:

> And I will also put my intent to seek a supervisory writ in this matter, your Honor, and request a stay of these proceedings.

THE COURT:

> Notice of intent to take writs noted. Stay denied.

[Counsel for the defendant]:

> Okay. And note the defense's objection, your Honor.

THE COURT:

> Defense objection is noted.

Immediately prior to the close of trial, counsel for the defendant orally moved for a continuance specifically due to John Woods' absence:

[Counsel for the defendant]:

> If Mr. Woods hasn't checked in, then I have no further witnesses, your Honor.

The Court:

> Defense rests, subject to its introduction of its documents, D-One and Two?

[Counsel for the defendant]:

> Yeah. And I would once again request a continuance and to leave the case open until I can have a chance to have Mr. Woods appear.

The Court:

> Motion for continuance is denied. Has Mr. Woods checked in personally today?

[Counsel for the defendant]:

> Not to me.

The Court:

> All right.

[Counsel for the defendant]:

> If Mr. Woods [has] check[ed] in with anyone, I don't know.

The Court:

State, any witnesses in rebuttal?

After the close of trial and the jurors had been excused from the courtroom, the trial court allowed defense counsel to indicate on the record the need for John Woods' testimony, which had apparently been discussed at the sidebar conference during Luis Lizama's testimony:

THE COURT:

All right. We'll finish the judge trial [on the misdemeanor charges] on the 28th. And just preserving something, we did it at sidebar during the trial, but just to make the record complete out of the presence – now that the jury has been dismissed – regarding the proffer of D-Three, that being the time sheet. And just allowing you to put something and the record and the State to counter that, so that the record bears out on appeal –

* * * *

[Counsel for the defendant]:

Yes, your Honor. Thank you. The defense had intended, obviously, to present an alibi witness. That alibi witness was to be verified by a time sheet showing that he was at work at the time. That time sheet was authored by a man named John Woods, who was under subpoena to be here today. He's been under subpoena since August to show up.

I believe he did show up once early on in the trial setting. However, he did not show up today. His mother came in and said that he hasn't been home for a few days. She hasn't seen him.

I requested a continuance or a stay of the proceedings until such time as we could get him properly served and brought to court. This was a crucial piece of evidence that would have established an alibi for Mr. Taylor. And I attempted to get that time sheet in through another employee, a manager of the company named Luis Liza[m]a. The Court denied my request to do so.

So what – we object to the Court's ruling on that. I do intend to seek a writ pre-sentencing.[FN10] And that's my record.

[FN10] The record indicates no writ was taken on the denial of the motion for a continuance.

After the State presented its arguments, the trial court stated its reasons for sustaining the State's objection to the document, which was not an original copy of the document and had a handwritten date, but no year:

> And the Court's ruling was based on that, its review of the proffered document, that being a time sheet [R. 59–60]. It was not an original. It looked like a Xeroxed filled-in sheet. It did not even have a year on it. It had handwritten "July 18th," but no year on it.
>
> And, again, Mr. Liza[m]a could not testify that he was either the bookkeeper or the time sheet custodian or any other type of link to the document which would, A, verify that that document was, in fact, an IESI or a temp agency document and [B,] that that document had been generated by the agency.
>
> And, therefore, without any foundation for its admissibility, the Court sustained the State's objection to that document being put before the jury, as the Court felt it would mislead or confuse the jury. And, again, there was no foundation for its being validated or authenticated as a true document from that company.

The defendant argues that the requirements of La. C.Cr.P. art. 709 are met because John Woods' status as an alibi witness satisfies the first requirement of the Article (the motion shall state facts to which the absent witness is expected to testify, the materiality of same, and the necessity for the witness' presence at trial), while the fact that Woods was subpoenaed for trial satisfies the latter two requirements (facts demonstrating that the witness will be available at the time to which trial is deferred and facts showing due diligence was used in the effort to procure the attendance of the absent witness). The defendant argues that the trial court's denial of his request for a continuance without reasons violated his Sixth Amendment right to compulsory process as well as a right to a fair trial.

The State contends that in orally requesting a continuance, the defendant failed to state the substance of Woods' expected testimony and therefore did not demonstrate either the materiality of his testimony or the necessity of Woods' presence at trial. Additionally, the State contends that the defendant did not establish a reasonable probability that Woods would be available at the time that the trial would have been continued, nor did the defendant establish due diligence in his efforts to procure Woods' presence for trial. Accordingly, the State submits that the trial court did not abuse its discretion in denying the defendant's request for a continuance.

A review of the record indicates that the defendant failed to meet all three of the requirements of La. C.Cr.P. art. 709. Although counsel for the defendant represented to the court that Woods was an alibi witness, and arguably set forth "[f]acts to which [Mr. Woods] is expected to testify," as well as the alleged "materiality of the testimony and the necessity for the presence of [Mr. Woods] at the trial," the other two elements of the Article were not met in this case. See La. C.Cr.P. art. 709.

Specifically, La. C.Cr.P. art. 709(A)(3) was not met because the defendant did not demonstrate to the trial court "[f]acts showing due diligence used in an effort to procure [his] attendance." Id. The record indicates that one writ of instanter for Woods[FN11] was filed on either August 20, 2010, or August 23, 2010, for the original August 25, 2010 trial date, and that a second writ of instanter for Woods was filed on January 11, 2011, the date of trial. However, this evidence alone is insufficient to demonstrate due diligence to procure Woods' attendance at the January 11, 2011 trial pursuant to La. C.Cr.P. art. 709.

> [FN11] Writs of instanter were also filed to command Luis Lizama's presence at trial.

In State v. Plaisance, this Court considered whether a trial court erred in denying a defendant's oral motion for a two-day recess, after the close of the State's case, to secure the attendance of a witness for the defense who was purportedly to testify in rebuttal of the State's introduction of good character evidence of the victim. State v. Plaisance, 2000-1858, p. 28 (La.App. 4 Cir. 3/6/02), 811 So.2d 1172, 1193. The witness had left the state, and the defendant was unable to secure the witness' presence at trial. Id. Although the record did not evidence that the defendant moved for a recess at trial, for purposes of appeal, the Plaisance Court assumed that the motion had been made, holding that the defendant did not demonstrate that the trial court abused its discretion in denying the defendant's motion for a recess:

> The record reflects that at the sentencing hearing the trial court initially considered the defendant's motion for a new trial, at which defense counsel acknowledged that the witness had been subpoenaed for trial, but failed to appear. **Defense counsel offered no explanation for the witness's absence and failed to show that he had used due diligence to procure his attendance at trial.** In view of this, we find the defendant failed to demonstrate a sufficient showing under La. C.Cr.P. art. 709 to justify the granting of a two-day recess to secure the witness.

Id. at p. 29, 811 So.2d at 1193 (emphasis added).

Likewise, in this case, the defendant offered no explanation for Woods' absence, and the record suggests that neither defense counsel nor Woods' mother could locate Woods. Defense counsel represented that Woods' mother indicated that she had not seen him for days and had no knowledge as to Woods' whereabouts. Accordingly, La. C.Cr.P. art. 709(A)(2) was not met because this alleged information from Woods' mother does not establish "[f]acts and circumstances showing a probability that the witness will be available at the time to which the trial is deferred." Thus, the record indicates that even if a continuance

were granted, it is unlikely that Woods would have been available on the date to which the trial was deferred.

Furthermore, even assuming that as an alibi witness, Woods' testimony would have been favorable to the defense, the defendant did not demonstrate prejudicial error due to the denial of the continuance because the defendant did not establish that Woods' testimony would "indicate the possibility of a different result if [Mr. Woods] were to testify." See State v. Duplessis, 2000-2122, p. 13, 785 So.2d at 947.[FN12] Even assuming *arguendo* that Woods would testify that the defendant was at work at the time the burglary occurred, considering Haigler's aforementioned testimony together with the fact that items belonging to Rebecca Paz that had previously been reported stolen from her automobile were recovered in the defendant's bedroom, the defendant has not established that Woods' testimony would have indicated the possibility of a different result.

> [FN12] The State argues that the defendant failed to object to the trial court's denial of his continuance and that pursuant to La. C.Cr.P. art. 841, the issue is not preserved for appeal. However, the trial transcript evidences that defense counsel objected to the trial court's denial of the request for a continuance after the sidebar conference, during which time defense counsel indicated a need for a continuance to secure Woods' presence and testimony at trial.

Finally, even if the trial court abused its discretion in denying the defense's request for a continuance, it is subject to a harmless error standard of review because any error arguably did not contribute to the jury's verdict in this case. As the Louisiana Supreme Court noted in State v. Haddad:

> Harmless error analysis begins with the premise that the evidence is otherwise sufficient to sustain the conviction if viewed from the perspective of a rational factfinder and asks whether beyond a reasonable doubt the error could not have contributed to the verdict actually returned by the defendant's jury. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). In that case, the United States Supreme Court stated:
>
> > The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.
>
> Id. at 2081.

> State v. Haddad, 1999-1272 (La.2/29/00), 767 So.2d 682, 689. Given the testimony adduced at trial, the failure to grant the continuance did not contribute to the verdict.[15]

The Louisiana Supreme Court then denied petitioner's related writ application without assigning additional reasons.[16] For the following reasons, it is clear that the foregoing decision rejecting this claim was neither contrary to nor an unreasonable application of clearly established federal law.

As the United States Fifth Circuit Court of Appeals has explained:

> A motion for continuance is addressed to the sound discretion of the trial court and will not be disturbed on a direct appeal unless there is a showing that there has been an abuse of that discretion. United States v. Uptain, 531 F.2d 1281 (5th Cir. 1976); United States v. Gidley, 527 F.2d 1345 (5th Cir. 1976), cert. denied, 429 U.S. 841, 97 S.Ct. 116, 50 L.Ed.2d 110 (1977). When a denial of a continuance forms a basis of a petition for a writ of habeas corpus, not only must there have been an abuse of discretion but it must have been so arbitrary and fundamentally unfair that it violates constitutional principles of due process. See Gandy v. Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978); Shirley v. North Carolina, 528 F.2d 819, 822 (4th Cir. 1975).
>
> The Supreme Court addressed this subject in Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964):
>
> > The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. (Citations omitted.)

Hicks v. Wainright, 633 F.2d 1146, 1148-49 (5th Cir. 1981).

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[15] State v. Taylor, 123 So.3d 256, 265-70 (La. App. 4th Cir. 2013); State Rec., Vol. 4 of 4.
[16] State v. Taylor, 134 So.3d 1174 (La. 2014); State Rec., Vol. 4 of 4.

Here, defense counsel, acting with reasonable diligence, could have had Woods properly served prior to trial but failed to do so. Further, even if the requested recess had been granted, there was no reason to believe that Woods could be served and would be available to appear when the trial resumed – on the contrary, neither defense counsel nor Woods' own mother knew his whereabouts. Moreover, there is no evidence of what Woods would actually say if he ultimately testified under oath. In light of these considerations, it does not strike the undersigned as an abuse of discretion to deny the recess.

Nevertheless, even if there was an abuse of discretion, that alone would not warrant habeas relief; rather, as noted, a petitioner must also show that the error rendered his trial "fundamentally unfair." As the United States Fifth Circuit Court of Appeals has explained, "[t]he test applied to determine whether a trial error makes a trial fundamentally unfair is whether there is a reasonable probability that the verdict might have been different had the trial been properly conducted." Kirkpatrick v. Blackburn, 777 F.2d 272, 278-79 (5th Cir. 1985). Given the considerable evidence of petitioner's guilt, including the eyewitness identification by Haigler and the fact that the stolen property was found in petitioner's room, there is simply no reasonable probability that a different verdict would have resulted even if Woods had ultimately appeared and testified.

For all of these reasons, petitioner has not shown that the state court's decision denying his claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28

U.S.C. § 2254(d)(1). Accordingly, under the stringently deferential standards of review mandated by the AEDPA, this Court should likewise deny the claim.

"Other Crimes" Evidence

Petitioner also claims that his rights were violated when the trial court allowed the introduction of evidence concerning other crimes. On direct appeal, the Louisiana Fourth Circuit Court of Appeal denied that claim, holding:

> [T]he defendant argues that the trial court abused its discretion in allowing evidence of his other crimes before the jury that was introduced because the misdemeanor charges were being tried at the same time as the simple burglary charge.
>
> "Generally, evidence of other crimes, wrongs, or acts committed by the defendant is inadmissible due to the 'substantial risk of grave prejudice to the defendant.'" State v. Odenbaugh, 2010-0268, p. 52 (La. 12/6/11), 82 So.3d 215, 250, reh'g denied (Jan. 20, 2012), cert. denied, —— U.S. ——, 133 S.Ct. 410, 184 L.Ed.2d 51 (U.S. 2012) (quoting State v. Prieur, 277 So.2d 126, 128 (La. 1973)). With regard to the introduction of other crimes evidence, La. C.E. art. 404(B)(1) provides:
>
> > B. Other crimes, wrongs, or acts. (1) Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.
>
> The Louisiana Supreme Court has held that "the introduction of inadmissible other crimes evidence results in a trial error subject to harmless error analysis." State v. Johnson, 94-1379, p. 17 (La. 11/27/95), 664 So.2d 94, 102; see also State v. Smith, 2011-0091, p. 28 (La.App. 4 Cir. 7/11/12), 96 So.3d 678, 695, reh'g denied (Aug. 16, 2012); State v. Bentley, 2002-1564, p. 3 (La.App. 4 Cir. 3/12/03), 844 So.2d 149, 152. If an error is made by the trial court, a reviewing court will consider "whether the guilty verdict 'was surely unattributable to the error'" to determine whether the error is harmless. State v. Robertson, 2006-1537, p. 9 (La. 1/16/08), 988 So.2d 166, 172 (quoting State v. Johnson, 94-1379, p. 17

(La. 11/27/95), 664 So.2d 94, 102; Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)).

In this case, the defendant concedes in his brief that his only objection at trial to the similar crimes evidence was that the jury be instructed on the issue of other crimes evidence. The colloquy regarding the introduction of other crimes evidence occurred at trial as follows:

> [Counsel for the state]:
>
> The second issue, Judge, with regard to the trial, the State filed a Prieur notice long ago. The record did not reflect a ruling, and I just wanted to confirm that the – that that had been granted, seeking to introduce the res gestae of the possessions of stolen property at the house.
>
> [Counsel for defendant]:
>
> **And, Judge, the only objection I would have is that if evidence is allowed to come in that there be a limiting instruction specifically on the issue of the other crimes evidence.** [emphasis added]
>
> The Court:
>
> I will have that in my standard instruction.
>
> [Counsel for defendant]:
>
> Thank you, Judge.
>
> The Court:
>
> Well, 12/22/10, [the State] filed a [Prieur] notice. And I was closed as of December the 17th. So if you – you're saying there's no ruling because I wasn't here on December 22nd, right?
>
> * * * *
>
> I got you. Okay. All right. The Court's going to grant the State's intent to use evidence of similar crimes, that specifically being the other items [stolen from other automobiles]. And the Court will have a limiting instruction to the jury.

The State argues that the defendant's possession of stolen property from other vehicles was not introduced to establish the defendant's bad character, but was introduced to prove his commission of the misdemeanor charges that were tried in the same proceeding as the simple burglary charge. The State contends that the defendant did not object to the misdemeanor and felony charges being tried together or attempt to sever the misdemeanor charges. Because the evidence of stolen

property from other vehicles provides context of happenings near in time and place, the State argues that the trial court did not abuse its discretion in admitting the other crimes evidence.

In State v. Malvoisin, this Court quoted the Louisiana Supreme Court's holding in State v. Brewington that evidence of other crimes is properly admitted if such evidence is so intertwined to the charged offense that the State could not have accurately presented its case without reference to the other crimes:

> Evidence of other crimes is admissible when it is related and intertwined with the charged offense to such an extent that the State could not have accurately presented its case without reference to it. State v. Brewington, 601 So.2d 656 (La. 1992).
>
> The concomitant other crimes do not affect the defendant's character because they were done, if at all, as parts of a whole; thus, the trier of fact will attribute either all of the criminal conduct to the defendant or none of it. Id. Additionally, because of the close connection in time and location, the defendant is unlikely to be unfairly surprised. Id.

In State v. Brewington, 601 So.2d at 657, the Court stated:

> This court has approved the admission of other crimes evidence when it is related and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it. State v. Boyd, 359 So.2d 931, 942 (La. 1978); State v. Clift, 339 So.2d 755, 760 (La. 1976). In such cases, the purpose served by admission of other crimes evidence is not to depict the defendant as a bad man, but rather to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. McCormick, Law of Evidence 448 (2d ed. 1972). The concomitant other crimes do not affect the accused's character, because they were done, if at all, as parts of a whole; therefore, the trier of fact will attribute all of the criminal conduct to the defendant or none of it. And, because of the close connection in time and location, the defendant is unlikely to be unfairly surprised. 1 Wigmore, Evidence Sec. 218 (3d ed. 1940). State v. Haarala, 398 So.2d 1093, 1097 (La. 1981).

State v. Malvoisin, 2000-0485, pp. 5-6 (La.App. 4 Cir. 1/24/01), 779 So.2d 73, 77.

> Similarly, in this case, the similar crimes evidence was intertwined with the simple burglary charge, as the detectives' search of the defendant's room in his mother's home was conducted pursuant to the investigation of the stolen chainsaw recovered from the Magazine Street Pawn Shop. The detectives' search of the defendant's room revealed evidence of property that had been stolen from the victim in the instant case, Rebecca Paz, as well as property that had been reported stolen in numerous other burglaries. Thus, we do not find that the trial court abused its discretion in allowing the similar crimes evidence, and that even assuming the trial court had abused its discretion, the guilty verdict was, beyond a reasonable doubt, "surely unattributable" to the admission of such evidence, as evidence of Rebecca Paz's stolen property was discovered in the defendant's room. See State v. Robertson, 2006-1537, p. 9, 988 So.2d at 172.[17]

The Louisiana Supreme Court then denied petitioner's related writ application without assigning additional reasons.[18]

The United States Fifth Circuit Court of Appeals has held: "In habeas actions, [a federal court] does not sit to review the mere admissibility of evidence under state law." Little v. Johnson, 162 F.3d 855, 862 (5th Cir. 1998). Therefore, to the extent that petitioner is arguing that the state courts misapplied state law in allowing the "other crimes" evidence, his claim simply is not reviewable in this federal proceeding.

To the extent that petitioner is asserting a federal claim, he fares no better. Even if he could show that the evidence was in fact improperly admitted, which is questionable at best for the reasons explained by the Louisiana Fourth Circuit Court of Appeal, federal habeas relief still would not be warranted. The United States Fifth Circuit Court of Appeals has explained:

> We will not grant habeas relief for errors in a trial court's evidentiary rulings unless those errors result in a "denial of fundamental fairness" under the Due Process Clause. The erroneous admission of prejudicial evidence will justify habeas relief only if the admission was a crucial, highly significant factor in the defendant's conviction.

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[17] State v. Taylor, 123 So.3d 256, 270-72 (La. App. 4th Cir. 2013); State Rec., Vol. 4 of 4.
[18] State v. Taylor, 134 So.3d 1174 (La. 2014); State Rec., Vol. 4 of 4.

Neal v. Cain, 141 F.3d 207, 214 (5th Cir. 1998) (citations omitted); see also Little, 162 F.3d at 862 ("[O]nly when the wrongfully admitted evidence has played a crucial, critical, and highly significant role in the trial will habeas relief be warranted.").

Here, it cannot be said that the "other crimes" evidence played a crucial, critical, and highly significant role in petitioner's conviction. Rather, even aside from that evidence, there was considerable evidence of petitioner's guilt of the instant offense, including the eyewitness identification by Haigler and the fact that the stolen property was found in petitioner's room.

In summary, petitioner has failed to demonstrate that the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Accordingly, applying the AEDPA's deferential standard, this Court should likewise reject his evidentiary claim.

Confrontation Clause

Petitioner next claims that he was denied his right to confront and cross-examine his accusers. On direct appeal, the Louisiana Fourth Circuit Court of Appeal denied that claim, holding:

> The defendant argues that Officer Davis and Det. Barrere testified regarding the defendant's other crimes, but "[t]he alleged victims of these other crimes were never produced by the prosecution." The defendant further argues that with regard to Vo's testimony, "no one testified to ownership of any chainsaw, or that it was stolen" and that the jury was confused because "all of the crimes were tied together." The defendant also contends that because the State's case rested upon unproven other crimes and hearsay evidence, he was denied the right to receive a fair trial.
>
> For the reasons discussed in counseled assignment of error number two [concerning the admission of evidence of other crimes], this assignment of error lacks merit. Additionally, although the State was not obligated to produce testimony from the burglary victims, the State presented testimony of Rebecca Begtrup, one of the victims of an automobile burglary that is not the subject of this appeal. With regard to the chainsaw, Det. Barrere testified that the chainsaw

> reported stolen matched the chainsaw pawned by the defendant. Finally, contrary to the defendant's assertions, the State presented evidence and testimony regarding the simple burglary in the instant case, including testimony from the victim, Rebecca Paz. As for any alleged hearsay connected to the other burglaries, there was no objection to this evidence on the basis of hearsay. Thus, any alleged error was not preserved for appeal pursuant to La. C.Cr.P. art. 841.[19]

The Louisiana Supreme Court then denied petitioner's related writ application without assigning additional reasons.[20]

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. "[T]his bedrock procedural guarantee applies to both federal and state prosecutions." Crawford v. Washington, 541 U.S. 36, 42 (2004). Simply put, "the Confrontation Clause prohibits (1) testimonial out-of-court statements; (2) made by a person who does not appear at trial; (3) received against the accused; (4) to establish the truth of the matter asserted; (5) unless the declarant is unavailable and the defendant had a prior opportunity to cross examine him." United States v. Gonzales, 436 F.3d 560, 576 (5th Cir. 2006).

Here, it is beyond cavil that petitioner was able to confront his accusers with respect to the simple burglary charge: the eyewitness, Haigler, appeared at trial and was subject to cross-examination, as were the victim, Rebecca Paz, and the officers who conducted the search which resulted in the discovery of Paz's property in petitioner's room. However, petitioner's claim appears to be that, other than Begtrup, he was unable to confront the "accusers" with the respect to the "other crimes" evidence introduced at trial and to cross-examine those individuals as to whether the items in those crimes were in fact stolen. Nevertheless, the undersigned finds that,

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[19] State v. Taylor, 123 So.3d 256, 272-73 (La. App. 4th Cir. 2013); State Rec., Vol. 4 of 4.
[20] State v. Taylor, 134 So.3d 1174 (La. 2014); State Rec., Vol. 4 of 4.

even if such a claim falls within the scope of the Sixth Amendment, and even if there was a violation of the right to confrontation in that respect, petitioner's claim still fails because the error, if any, was ultimately harmless.

As the United States Fifth Circuit Court of Appeals has explained:

> Confrontation Clause violations are subject to harmless error analysis. In Brecht v. Abrahamson, the Supreme Court addressed the issue of harmless error in the context of collateral review and determined that "habeas petitioners ... are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (citation omitted). The test, which the court adopted from Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Id. (quoting Kotteakos, 328 U.S. at 776, 66 S.Ct. 1239).

Fratta v. Quarterman, 536 U.S. 485, 508 (5th Cir. 2008) (citations and footnote omitted). "[T]he overall strength of the prosecution's case" is clearly among the factors a court is to consider in making that determination. Hafdahl v. Johnson, 251 F.3d 528, 539-40 (5th Cir. 2001).

Here, as already noted, the prosecution's case against petitioner was particularly strong, including Haigler's eyewitness testimony and the fact that Paz's stolen property was found in petitioner's room. Therefore, even without the evidence of the "other crimes," petitioner's guilt of the simple burglary was obvious. Therefore, the fact that he was unable to confront his "accusers" with respect to the *other* crimes referenced at trial simply cannot reasonably be said to have had a substantial and injurious effect or influence in determining the jury's verdict with respect to his guilt of *this* crime. Accordingly, this claim should be denied.

Double Jeopardy

Petitioner also claims that his rights under the Double Jeopardy Clause were violated because he was prosecuted for two separate offenses which were both part of a continual scheme.

In the state post-conviction proceedings, the trial judge denied that claim, holding that it was "not supported by the record."[21] Without additional reasons assigned, his related writ applications were then likewise denied by the Louisiana Fourth Circuit Court of Appeal[22] and by the Louisiana Supreme Court.[23]

As a preliminary matter, the undersigned notes that petitioner has not briefed this claim in his federal application, and his statement of this claim in his state post-conviction application is vague at best. As the undersigned understands this claim, petitioner is arguing that his rights under the Double Jeopardy Clause were violated because he was tried both for burglary of Paz's vehicle and for possessing various items of allegedly stolen in other crimes. With respect to the burglary of Paz's vehicle, petitioner was tried and convicted, and it is that conviction which is challenged in this federal proceeding. However, at the same trial, he was apparently also on trial for four misdemeanor charges of possession of stolen property under a separate bill of information, and those charges were tried by the judge without a jury. Petitioner was apparently ultimately found guilty of one charge of possessing stolen property (i.e. the property belonging to Rebecca Begtrup, one of the witnesses who testified at trial), but he was acquitted on the three remaining counts.[24]

The federal protection against double jeopardy is enshrined in the Fifth Amendment and made enforceable against the states through the Fourteenth Amendment. Benton v. Maryland, 395

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[21] State Rec., Vol. 4 of 4, Judgment dated July 31, 2014.
[22] State v. Taylor, No. 2014-K-1057 (La. App. 4th Cir. Oct. 10, 2014); State Rec., Vol. 4 of 4.
[23] State *ex rel.* Taylor v. State, 178 So.3d 159 (La. 2015); State Rec., Vol. 4 of 4.
[24] Petitioner has provided no documentation concerning that separate prosecution, and there is scant information concerning those charges included in the state court record concerning the simple burglary conviction challenged herein. However, according to a "Motion for New Trial and for Post-Verdict Judgment of Acquittal" filed by defense counsel filed with respect to the instant conviction, see State Rec., Vol. 2 of 4, the stolen property at issue in the misdemeanor offenses was apparently the chainsaw and the stolen items (other than Paz's property) which were found during the search of his room.

U.S. 784, 794 (1969); Rogers v. Lynaugh, 848 F.2d 606, 611 (5th Cir. 1988). The United States Supreme Court has explained:

> That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted), overruled in part on other grounds, Alabama v. Smith, 490 U.S. 794, 802-03 (1989); see also Department of Revenue v. Kurth Ranch, 511 U.S. 767, 769 n. 1 (1994).

Here, petitioner argues that the federal Double Jeopardy protections were triggered because both the burglary of Paz's vehicle and the alleged possession of items stolen on other occasions were part of a "continual scheme." However, it is immaterial for federal double jeopardy purposes that two offenses arise from the same course of conduct, so long as the underlying offenses are in fact distinct. See, e.g., United States v. Morgan, 437 Fed. App'x 354, 355-56 (5th Cir. 2011); Johnson v. Terrell, No. 95-30339, 1995 WL 581839, at *1 (5th Cir. Sept. 6, 1995); Nyberg v. Cain, Civ. Action No. 15-98, 2015 WL 1540423, at *5 (E.D. La. Apr. 7, 2015). Because the offenses here were obviously distinct, this claim clearly fails.[25]

Probable Cause

Petitioner also claims that his rights were violated because he was not afforded a pretrial determination of probable cause before a neutral magistrate. In the state post-conviction

[25] The undersigned notes that *Louisiana* law provides independent protections against double jeopardy. La. Const. art. I, § 15; La. Code Crim. Proc. art. 596. However, this Court need not and does not reach the issue of whether petitioner's rights were violated under the state law protections against double jeopardy. Federal habeas corpus relief may be granted only to remedy violations of the federal Constitution and laws of the United States; mere violations of state law will not suffice. 28 U.S.C. § 2254; Engle v. Isaac, 456 U.S. 107, 119 (1983); Nyberg v. Cain, Civ. Action No. 15-98, 2015 WL 1540423, at *5 (E.D. La. Apr. 7, 2015); Brown v. Tanner, Civ. Action No. 11-1102, 2011 WL 4746563, at *4 (E.D. La. Aug. 29, 2011), adopted, 2011 WL 4746104 (E.D. La. Oct. 6, 2011)

proceedings, the trial judge denied that claim, holding that it was "not supported by the record."[26] Without additional reasons assigned, his related writ applications were then likewise denied by the Louisiana Fourth Circuit Court of Appeal[27] and by the Louisiana Supreme Court.[28]

This claim fails for a simple reason: Even if petitioner was detained pending trial without a judicial determination of probable cause, that fact alone does not render the resulting conviction illegal. Green v. Cain, Civ. Action No. 12-2090, 2015 WL 546711, at *6 (E.D. La. Feb. 10, 2015); Parker v. Cooper, Civ. Action No. 12-1672, 2012 WL 5613736, at *3 n.11 (E.D. La. Oct. 1, 2012), adopted, 2012 WL 5614511 (E.D. La. Nov. 14, 2012); Wright v. Lensing, Civ. Action No. 92-1753, 1993 WL 8327, at *2 (E.D. La. Jan. 14, 1993); accord Gerstein v. Pugh, 420 U.S. 103, 119 (1975) ("[A]lthough a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause."). Therefore, this claim should be rejected.

Evidentiary Error

Petitioner next claims that his rights were violated when, pursuant to La. Rev. Stat. Ann. § 15:436.1, the trial court allowed the state to introduce photographs and affidavits of value and ownership in lieu of the actual items of stolen property.[29] In the state post-conviction proceedings,

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[26] State Rec., Vol. 4 of 4, Judgment dated July 31, 2014.
[27] State v. Taylor, No. 2014-K-1057 (La. App. 4th Cir. Oct. 10, 2014); State Rec., Vol. 4 of 4.
[28] State *ex rel.* Taylor v. State, 178 So.3d 159 (La. 2015); State Rec., Vol. 4 of 4.
[29] The referenced statute provides:

> A. A photograph of property alleged to be the object of a theft, otherwise admissible, may be admitted as evidence without regard to the availability of the property itself.
>
> B. An affidavit of the value and ownership of property which is alleged to be the object of a theft shall be admissible in evidence under the following circumstances:

the trial judge denied that claim, holding that it was "not supported by the record."[30] Without additional reasons assigned, his related writ applications were then likewise denied by the Louisiana Fourth Circuit Court of Appeal[31] and by the Louisiana Supreme Court.[32]

However, as the undersigned noted in discussing petitioner's claim concerning the introduction of the "other crimes" evidence, this federal court "does not sit to review the mere admissibility of evidence under state law." Little v. Johnson, 162 F.3d 855, 862 (5th Cir. 1998). Therefore, to the extent that petitioner is simply arguing that the state courts misapplied state evidence law, his claim is not reviewable in this federal proceeding.

Moreover, as also noted in that discussion, even if petitioner could show that the evidence was in fact improperly admitted, federal habeas relief still would not be warranted unless "the admission was a crucial, highly significant factor in the defendant's conviction." Neal v. Cain, 141 F.3d 207, 214 (5th Cir. 1998); see also Little, 162 F.3d at 862 ("[O]nly when the wrongfully admitted evidence has played a crucial, critical, and highly significant role in the trial will habeas relief be warranted.").

> (1) The affidavit shall be upon personal knowledge and shall state the basis for such knowledge;
> (2) The affidavit shall be paraphed for identification with the photograph taken pursuant to Subsection A, and
> (3) The state shall give written notice of its intent to introduce the affidavit, along with a copy of the affidavit and photograph, not less than ten days prior to commencement of the trial.
>
> C. An affidavit admitted pursuant to Subsection B shall be deemed prima facie evidence of the value and ownership of the property alleged to be the object of a theft. Provided, however, that if the defendant files a written objection to the admission of the affidavit within three days prior to the commencement of trial, the affidavit shall not be admissible and shall not be deemed to be prima facie evidence of the value and ownership of the property.

La. Rev. Stat. Ann. § 15:436.1

[30] State Rec., Vol. 4 of 4, Judgment dated July 31, 2014.

[31] State v. Taylor, No. 2014-K-1057 (La. App. 4th Cir. Oct. 10, 2014); State Rec., Vol. 4 of 4.

[32] State *ex rel.* Taylor v. State, 178 So.3d 159 (La. 2015); State Rec., Vol. 4 of 4.

Here, it simply cannot be said that the evidentiary substitution played a crucial, critical, and highly significant role in petitioner's conviction. Rather, as already noted, there was substantial evidence of petitioner's guilt of the instant offense, and the substitution was a matter of no consequence. Therefore, to the extent that petitioner is also asserting a federal claim, he is not entitled to relief.

Ineffective Assistance of Counsel

Lastly, petitioner claims that he received ineffective assistance of counsel. In the state post-conviction proceedings, the trial judge denied that claim, holding that it was "not supported by the record."[33] Without additional reasons assigned, his related writ applications were then likewise denied by the Louisiana Fourth Circuit Court of Appeal[34] and by the Louisiana Supreme Court.[35]

Because an ineffective assistance of counsel claim presents a mixed question of law and fact, this Court must defer to the state court decision rejecting petitioner's claim unless that decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); Moore v. Cockrell, 313 F.3d 880, 881 (5th Cir. 2002). Moreover, the United States Supreme Court has explained that, under the AEDPA, federal habeas corpus review of an ineffective assistance of counsel claim is in fact *doubly* deferential:

> The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were

[33] State Rec., Vol. 4 of 4, Judgment dated July 31, 2014.
[34] State v. Taylor, No. 2014-K-1057 (La. App. 4th Cir. Oct. 10, 2014); State Rec., Vol. 4 of 4.
[35] State *ex rel.* Taylor v. State, 178 So.3d 159 (La. 2015); State Rec., Vol. 4 of 4.

> adjudicating a Strickland claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law. A state court must be granted a deference and latitude that are not in operation when the case involves review under the Strickland standard itself.
>
> A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision. Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). And as this Court has explained, "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Ibid. "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." Knowles v. Mirzayance, 556 U.S. ____, ____, 129 S.Ct. 1411, 1413-14, 173 L.Ed.2d 251 (2009) (internal quotation marks omitted).

Harrington v. Richter, 562 U.S. 86, 101 (2011) (citation omitted). The Supreme Court then explained:

> Surmounting Strickland's high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.
>
> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. *The standards created by Strickland and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.* The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). *When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.*

Id. at 105 (citations omitted; emphasis added). Therefore, on a habeas review of an ineffective assistance claim, "federal courts are to afford *both* the state court *and* the defense attorney the benefit of the doubt." Woods v. Etherton, 136 S. Ct. 1149, 1151 (2016) (emphasis added; quotation marks omitted). For the following reasons, the Court finds that, under those stringently deferential standards, it simply cannot be said that relief is warranted with respect to petitioner's ineffective assistance of counsel claim.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court established a two-prong test for evaluating claims of ineffective assistance of counsel. Specifically, a petitioner seeking relief must demonstrate both that (1) counsel's performance was deficient and (2) the deficient performance prejudiced his defense. Id. at 697. A petitioner bears the burden of proof on such a claim and "must demonstrate, by a preponderance of the evidence, that his counsel was ineffective." Jernigan v. Collins, 980 F.2d 292, 296 (5th Cir. 1993); see also Clark v. Johnson, 227 F.3d 273, 284 (5th Cir. 2000). If a court finds that a petitioner has made an insufficient showing as to either of the two prongs of inquiry, i.e. deficient performance or actual prejudice, it may dispose of the ineffective assistance claim without addressing the other prong. Strickland, 466 U.S. at 697.

To prevail on the deficiency prong of the Strickland test, a petitioner must demonstrate that counsel's conduct fails to meet the constitutional minimum guaranteed by the Sixth Amendment. See Styron v. Johnson, 262 F.3d 438, 450 (5th Cir. 2001). "Counsel's performance is deficient if it falls below an objective standard of reasonableness." Little v. Johnson, 162 F.3d 855, 860 (5th Cir. 1998). Analysis of counsel's performance must take into account the reasonableness of counsel's actions in light of all the circumstances. See Strickland, 466 U.S. at 689. "[I]t is

necessary to 'judge ... counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" Lockhart v. Fretwell, 506 U.S. 364, 371 (1993) (quoting Strickland, 466 U.S. at 690). A petitioner must overcome a strong presumption that the conduct of his counsel falls within a wide range of reasonable representation. See Crockett v. McCotter, 796 F.2d 787, 791 (5th Cir. 1986); Mattheson v. King, 751 F.2d 1432, 1441 (5th Cir. 1985).

In order to prove prejudice with respect to trial counsel, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In this context, a reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. In making a determination as to whether prejudice occurred, courts must review the record to determine "the relative role that the alleged trial errors played in the total context of [the] trial." Crockett, 796 F.2d at 793.

Here, petitioner argues that his counsel was ineffective for failing to subpoena alibi witnesses for trial. However, as the United States Fifth Circuit Court of Appeals has explained:

> Claims that counsel failed to call witnesses are not favored on federal habeas review because the presentation of witnesses is generally a matter of trial strategy and speculation about what witnesses would have said on the stand is too uncertain. For this reason, *we require petitioners making claims of ineffective assistance based on counsel's failure to call a witness to demonstrate prejudice by naming the witness, demonstrating that the witness was available to testify and would have done so, setting out the content of the witness's proposed testimony, and showing that the testimony would have been favorable to a particular defense.* This requirement applies to both uncalled lay and expert witnesses.

Woodfox v. Cain, 609 F.3d 774, 808 (5th Cir. 2010) (citations, quotation marks, and brackets omitted; emphasis added); accord Day v. Quarterman, 566 F.3d 527, 538 (5th Cir. 2009) ("[T]o prevail on an ineffective assistance claim based on counsel's failure to call a witness, the petitioner

must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense.").

Here, petitioner presented no evidence, such as affidavits from the uncalled witnesses, demonstrating that they would in fact have testified in a manner beneficial to the defense. Therefore, he obviously failed to meet his burden of proof with respect to this claim. See, e.g., United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983) (courts view "with great caution claims of ineffective assistance of counsel when the only evidence of a missing witness's testimony is from the defendant"); Buniff v. Cain, Civ. Action No. 07-1779, 2011 WL 2669277, at *3 (E.D. La. July 7, 2011); Anthony v. Cain, Civ. Action No. 07-3223, 2009 WL 3564827, at *8 (E.D. La. Oct. 29, 2009) ("This Court may not speculate as to how such witnesses would have testified; rather, a petitioner must come forward with evidence, such as affidavits from the uncalled witnesses, on that issue."); Combs v. United States, Nos. 3:08-CV-0032 and 3:03-CR-0188, 2009 WL 2151844, at *10 (N.D. Tex. July 10, 2009) ("Unless the movant provides the court with affidavits, or similar matter, from the alleged favorable witnesses suggesting what they would have testified to, claims of ineffective assistance of counsel fail for lack of prejudice."); Harris v. Director, TDCJ-CID, No. 6:06cv490, 2009 WL 1421171, at *7 (E.D. Tex. May 20, 2009) ("Failure to produce an affidavit (or similar evidentiary support) from the uncalled witness is fatal to the claim of ineffective assistance.").

In his state post-conviction application, petitioner also argued that counsel was ineffective for failing to investigate whether the police employed unduly suggestive procedures when having

Haigler identify petitioner.[36] Petitioner has also failed to meet his burden of proof with respect to this claim.

As an initial matter, petitioner has not established that counsel's investigation was in fact inadequate in this respect – on the contrary, petitioner has provided no evidence whatsoever as to what investigative steps counsel took or failed to take. Without such evidence, he cannot show that counsel performed deficiently.

Further, even if petitioner had made that showing, he would then additionally have to prove that prejudice *actually* resulted from the purportedly inadequate investigation. To make that showing, he must point to evidence in the record demonstrating that further investigation would have revealed information beneficial to the defense. See Moawad v. Anderson, 143 F.3d 942, 948 (5th Cir. 1998); see also Brown v. Dretke, 419 F.3d 365, 375 (5th Cir. 2005); Wilson v. Cain, Civ. Action No. 06-890, 2009 WL 2163124, at *22 (E.D. La. July 16, 2009), aff'd, 641 F.3d 96 (5th Cir. 2011); Davis v. Cain, Civ. Action No. 07-6389, 2008 WL 5191912, at *10 (E.D. La. Dec.11, 2008). Here, he has not shown that any such beneficial information would have been revealed by further investigation – for example, he has not even alleged, much less shown, that the identification procedure was *in fact* impermissibly suggestive. His bare speculation that it *might have been* suggestive in some unidentified manner obviously does not suffice to meet his burden of proof.

Based on the foregoing, it is clear that the state court ruling denying petitioner's ineffective assistance of counsel claim was neither contrary to, nor involved an unreasonable application of,

[36] The undersigned notes that a motion to suppress the identification was in fact filed, a hearing was held, and the motion was denied. State Rec., Vol. 2 of 4, transcript of April 7, 2010. Presumably, petitioner's claim is that his counsel did not adequately investigate the identification procedures in anticipation of that hearing.

clearly established federal law. Accordingly, under the doubly deferential standards of review mandated by the AEDPA, petitioner's claim should be denied.

RECOMMENDATION

It is therefore **RECOMMENDED** that the federal application for habeas corpus relief filed by Kevin Taylor be **DISMISSED WITH PREJUDICE**.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. 28 U.S.C. § 636(b)(1); Douglass v. United Services Auto. Ass'n, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).[37]

New Orleans, Louisiana, this eleventh day of July, 2016.

SALLY SHUSHAN
UNITED STATES MAGISTRATE JUDGE

[37] Douglass referenced the previously applicable ten-day period for the filing of objections. Effective December 1, 2009, 28 U.S.C. § 636(b)(1) was amended to extend that period to fourteen days.

Additional material from this filing is available in the Clerk's Office.