FILED
United States Court of Appeals
Tenth Circuit

June 22, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WILLIAM DAVENPORT,

Petitioner - Appellant,

v.

JOHN CHAPDELAINE; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 17-1316
(D.C. No. 1:16-CV-01270-PAB)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **PHILLIPS**, **McKAY**, and **McHUGH**, Circuit Judges.

Petitioner William Davenport seeks a certificate of appealability to appeal the district court's dismissal of his § 2254 habeas corpus petition.

Petitioner was charged with one count of first-degree murder and five counts of attempted first-degree murder. His first trial ended in a hung jury, but he was convicted of all charges in his second trial, at which the prosecution presented additional corroborating evidence that had not been introduced in his

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Appendix A

first trial. His direct appeal and state post-conviction challenges were unsuccessful.

In this federal habeas petition, Petitioner raised five claims for relief, relating to (1) the admission of DNA evidence from a glove found at the scene of the crime; (2) the admission of a bartender's testimony that two African-American males agreed that they were "going to do this" as they left his bar at about 2 a.m., shortly before the crime occurred at a different bar located less than a block away[1] (State Tr. CD at 3282); (3) the trial court's refusal to give two requested jury instructions; (4) the allegedly suggestive identification of Petitioner by a prosecution witness for the first time at trial; and (5) alleged ineffective assistance of counsel based on defense counsel's failure to call an expert witness to undermine the reliability of eyewitness identification at the second trial.

The district court held that Petitioner's challenges to the DNA evidence and the bartender's testimony were procedurally defaulted because his state-court arguments on these issues had been based entirely on state law, not federal law,

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[1] Although the bartender did not testify that he recognized Petitioner from the bar, a detective testified that he had identified Petitioner and his brother on the bar's surveillance video from that night. The jury also viewed this surveillance video, which is part of the record on appeal. The video shows that one of the African-American men was wearing gloves inside the bar, consistent with the bartender's testimony that one of the men—the one who asked if they were "going to do this"—was wearing gloves.

and his brief citation to the Fifth and Fourteenth Amendments at the conclusion of his state-law arguments was insufficient to put the state court on notice that he was raising a federal constitutional claim. *See, e.g.*, *Zuniga v. Falk*, 618 F. App'x 407, 411 (10th Cir. 2015). As for Petitioner's other claims, the district court considered each of them in detail and ultimately concluded that Petitioner was not entitled to relief under § 2254. *See Frost v. Pryor*, 749 F.3d 1212, 1223 (10th Cir. 2014) ("We may issue the writ only when the petitioner shows there is *no possibility* fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents. . . . If this standard is difficult to meet—and it is—that is because it was meant to be." (internal quotation marks and brackets omitted)).

After thoroughly reviewing Petitioner's brief and the record on appeal, including Petitioner's state-court filings and the transcripts of both jury trials, we are persuaded that reasonable jurists would not debate the correctness of the district court's rulings. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For substantially the same reasons given by the district court, we **DENY** Petitioner's request for a certificate of appealability and **DISMISS** the appeal. Petitioner's motion to proceed *in forma pauperis* on appeal is **GRANTED**.

Entered for the Court

Monroe G. McKay
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 16-cv-01270-PAB

WILLIAM DAVENPORT,

Applicant,

v.

JOHN CHAPDELAINE, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER DISMSISING § 2254 APPLICATION

Applicant William Davenport has filed an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, Docket No. 1, challenging the validity of a conviction and sentence imposed in the District Court for the City and County of Denver, Colorado, Case No. 05CR1165. Respondents have filed an Answer to the Application, Docket No. 26, and Applicant was afforded an opportunity to file a Reply. Based upon the Court's review of the Application, Answer and state court record filed in this case, the § 2254 Application will be denied.

I. BACKGROUND AND STATE COURT PROCEEDINGS

Mr. Davenport's first trial ended in a hung jury. At a second trial, he was convicted of one count of first-degree murder (after deliberation), four counts of attempted first-degree murder (after deliberation), and one count of attempted first-degree murder (extreme indifference). Docket No. 13-1 at 5-8; No. 13-9. Applicant was sentenced on

Appendix B

March 21, 2007 to a term of life without parole on the first degree murder conviction, plus five consecutive 48-year terms on the attempted murder convictions. *Id.*

On direct appeal, the Colorado Court of Appeals summarized the facts as follows:

> According to the prosecution's evidence, [Applicant] and his brother, two African-Americans, were involved in a bar fight with some former members of a Hispanic gang. After the fight was broken up, the two men left the bar and went to a nearby lounge, where one was overheard asking the other, "Are we going to do this? Are we going to do this?" and the other was overheard responding, "Yeah. Yeah. Let's do this." The two men, one of whom was wearing a pair of black and white gloves, then left the lounge.
>
> Four of the five people at the bar testified that they saw [Applicant] try to re-enter the bar and, when confronted at the door by the victim, pull out a gun and repeatedly fire it at the victim and into the bar. A sixth witness, a bystander on the street, identified [Applicant] for the first time in court as the shooter.
>
> At trial, [Applicant] asserted that he was innocent of the charged crimes because (1) he was not present at the scene of the shooting and (2) the witnesses had mistakenly identified him as the shooter.
>
> In addition to the five eyewitness identifications of [Applicant], the People presented expert testimony that a glove found at the scene of the shooting contained a DNA mixture to which [Applicant] may have contributed.

People v. William Lee Davenport, III (*Davenport I*), No. 07CA878 (Colo. App. June 24, 2010) (unpublished) (*Davenport I*). Docket No. 13-9.

Applicant's convictions were affirmed on direct appeal in *Davenport I*. *Id.* The Colorado Supreme Court denied Applicant's petition for certiorari review on January 11, 2011. Docket No. 13-7.

Mr. Davenport then filed a motion for post-conviction relief pursuant to Colo. Crim. P. Rule 35(c), which was supplemented by court-appointed counsel and denied by the

state district court. The Colorado Court of Appeals affirmed in *People v. William Lee Davenport, III* (*Davenport II*), No. 13CA607 (Colo. App. July 6, 2015) (unpublished). Docket No. 13-4. Applicant's petition for certiorari review was denied by the Colorado Supreme Court on January 19, 2016. Docket No. 13-2.

On May 26, 2016, Mr. Davenport filed his federal application under 28 U.S.C. § 2254. The Court has construed the *pro se* Application liberally to assert the following claims:

1. Applicant was denied his constitutional right to a fair trial because the trial court admitted DNA evidence that was inadmissible under CRE 403 and 702, Docket No. 1 at 5-6;

2. Applicant was denied his constitutional right to a fair trial because the court admitted irrelevant evidence of statements made by two African-American males in the presence of a bartender as *res gestae*, *id.* at 7-9;

3. Applicant was denied a fair trial, in violation of due process, because the trial court refused to give the jury: (a) his tendered "identity instruction," which would have instructed the jury against convicting unless it found that Applicant was the person who committed the crimes beyond a reasonable doubt, *id.*, at 9-10; and (b) his tendered "missing witness" instruction, which would have instructed the jury that it should assume that the testimony of Applicant's brother would have been favorable to the defense, *id.* at 10-11.

4. Applicant was denied his constitutional right to due process when a prosecution witness identified Applicant for the first time at trial in circumstances rendering that identification unduly suggestive, *id.* at 12; and,

5. Applicant was denied his constitutional right to due process when the state post-conviction court rejected his ineffective-assistance-of-counsel claim (based on the failure to call an expert witness to undermine the reliability of eyewitness identification) without conducing an evidentiary hearing, *id.* at 13-14.

In the Pre-Answer Response, Respondents conceded that the Application is timely under the one-year limitation period set forth in 28 U.S.C. § 2244(d). Docket No. 13 at 6. Respondents further conceded that Applicant exhausted state court remedies for claims 3(a) and 4. *Id.* at 22, 28. Respondents argued, however, that Applicant committed an anticipatory procedural default of claims 1 and 2; that claim 3(b) was not exhausted, rendering the entire Application a mixed petition; and that, although claim 5 failed to state a cognizable constitutional claim, Applicant had nonetheless exhausted an ineffective assistance claim based on defense counsel's decision not to call an expert to undermine the reliability of eye witness identification. *Id.* at 14-22, 23-29.

In an April 12, 2017 Order, Docket No. 22, the Court dismissed claims 1 and 2 of the Application as procedurally defaulted and dismissed claim 5 to the extent Applicant challenged the state district court's failure to hold an evidentiary hearing in the state post-conviction proceeding. The Court rejected Respondents' assertion of the failure-to-exhaust defense as to claim 3(b). Respondents were directed to file an Answer to properly exhausted claims 3(a), 3(b), 4 and 5 (allegation that counsel was ineffective in failing to call an expert to undermine the reliability of eyewitness identification). *Id.*. The Court addresses the merits of those claims below under the AEDPA standard of review.

II. LEGAL STANDARDS

A. 28 U.S.C. § 2254

Title 28 U.S.C. § 2254(d) provides that a writ of habeas corpus may not be issued with respect to any claim that was adjudicated on the merits in state court unless the state

court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The applicant bears the burden of proof under § 2254(d). *See Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam).

The court reviews claims of legal error and mixed questions of law and fact pursuant to 28 U.S.C. § 2254(d)(1). *See Cook v. McKune*, 323 F.3d 825, 830 (10th Cir. 2003). The threshold question the court must answer under § 2254(d)(1) is whether the applicant seeks to apply a rule of law that was clearly established by the Supreme Court at the time his conviction became final. *See Williams v. Taylor*, 529 U.S. 362, 390 (2000). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. Furthermore,

> clearly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*. Although the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.

House v. Hatch, 527 F.3d 1010, 1016 (10th Cir. 2008). If there is no clearly established federal law, that is the end of the court's inquiry pursuant to § 2254(d)(1). *See id.* at 1018.

If a clearly established rule of federal law is implicated, the court must determine whether the state court's decision was contrary to or an unreasonable application of that

clearly established rule of federal law. *See Williams*, 529 U.S. at 404-05.

> A state-court decision is contrary to clearly established federal law if: (a) "the state court applies a rule that contradicts the governing law set forth in Supreme Court cases"; or (b) "the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from [that] precedent." *Maynard* [*v. Boone*], 468 F.3d [665,] 669 [(10th Cir. 2006)](internal quotation marks and brackets omitted) (quoting *Williams*, 529 U.S. at 405). "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Williams*, 529 U.S. at 405 (citation omitted).
>
> A state court decision involves an unreasonable application of clearly established federal law when it identifies the correct governing legal rule from Supreme Court cases, but unreasonably applies it to the facts. *Id.* at 407-08. Additionally, we have recognized that an unreasonable application may occur if the state court either unreasonably extends, or unreasonably refuses to extend, a legal principle from Supreme Court precedent to a new context where it should apply.

House, 527 F.3d at 1018.

The federal court's inquiry pursuant to the "unreasonable application" clause is an objective inquiry. *See Williams*, 529 U.S. at 409-10. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." *Id.* at 411. "[A] decision is 'objectively unreasonable' when most reasonable jurists exercising their independent judgment would conclude the state court misapplied Supreme Court law." *Maynard*, 468 F.3d at 671. In addition,

> evaluating 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. [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 [the Supreme] Court.

Harrington v. Richter, 562 U.S. 86, 101 (2011) (internal quotation marks and citation omitted). In conducting this analysis, the court "must determine what arguments or theories supported or . . . could have supported[ ] the state court's decision" and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.*

Under this standard, "only the most serious misapplications of Supreme Court precedent will be a basis for relief under § 2254." *Maynard*, 468 F.3d at 671; *see also Richter*, 562 U.S. at 88 (stating that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable").

> 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.

Richter, 562 U.S. at 102.

"[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

The court reviews claims asserting factual errors pursuant to 28 U.S.C. § 2254(d)(2). *See Romano v. Gibson*, 278 F.3d 1145, 1154 n. 4 (10th Cir. 2002). Section 2254(d)(2) allows the federal court to grant a writ of habeas corpus only if the relevant state court decision was based on an unreasonable determination of the facts in light of the evidence presented to the state court. Pursuant to § 2254(e)(1), the court must presume that the state court's factual determinations are correct and the petitioner

bears the burden of rebutting the presumption by clear and convincing evidence. "The standard is demanding but not insatiable . . . [because] '[d]eference does not by definition preclude relief.'" *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

B. Pro Se Litigant

Applicant is proceeding *pro se*. The court, therefore, "review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted); *see also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that an applicant can prove facts that have not been alleged, or that a respondent has violated laws in ways that an applicant has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). *Pro se* status does not entitle a litigant to application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

III. ANALYSIS

A. Claim 3

In his third claim, Applicant asserts that he was denied a fair trial, in violation of due process because the trial court refused to give the jury: (a) his tendered "identity instruction," which would have instructed the jury against convicting unless it found that Applicant was the person who committed the crimes beyond a reasonable doubt (Docket

No. 1 at 9-10); and (b) his tendered "missing witness" instruction, which would have instructed the jury that it should assume that the testimony of Applicant's brother would have been favorable to the defense. *Id.* at 10-11.

An error in a state trial proceeding must render the trial fundamentally unfair in order to constitute a due process violation. *See Estelle v. McGuire*, 502 U.S. 62, 73 (1991). In the context of jury instructions, fundamental fairness requires that a criminal defendant be provided a meaningful opportunity to present a complete defense; incorrect jury instructions may divest a defendant of this opportunity. *See Mathews v. United States*, 485 U.S. 58, 63 (1988). However, federal habeas relief is available only when "'the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Estelle*, 502 U.S. at 71 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). The significance of an omitted jury instruction should be evaluated by comparison with the instructions that were given. *See Henderson v. Kibbe*, 431 U.S. 145, 156 (1977). The failure to give a proffered jury instruction "is less likely to be prejudicial than a misstatement of the law." *Id.* at 155. Where the jury's determination of an issue under the omitted instruction would not be different from its actual resolution under the instructions given, it is logical to conclude that the omitted instruction would not have affected the verdict. *Id.*

If the trial court committed constitutional error in omitting a jury instruction, the federal habeas court must determine whether the error is harmless under the standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). *California v. Roy*, 519 U.S. 2, 5-6 (1996). An error is harmless if it did not have a

"substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638. "[A]n error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* at 634 (quotations and internal citation omitted).

1. Failure to give "identity" instruction

Applicant asserts in claim 3(a) that his due process rights were violated when the trial court refused his tendered instruction that the prosecution must prove identification beyond a reasonable doubt. Docket No. 1 at 9.

In *Davenport I*, the Colorado Court of Appeals rejected Applicant's claim on the following grounds:

> Applicant tendered, but the trial court rejected, an instruction which stated:
>
> > The prosecution has the burden of proving identification beyond a reasonable doubt; you must be satisfied beyond a reasonable doubt that the identification was accurate; that you should consider the witness' capacity and opportunity to observe the offender, including the duration of the observation, the proximity of the offender, the lighting conditions and previous familiarity with the offender; that you must be satisfied that the identification was made from the witness' own recollection; that you should consider the strength of the identification and the circumstances under which it was made; that you should consider the time span between the offense and the witness' next opportunity to observe the defendant' and that you must consider the credibility of the eyewitness. [sic] [1]
>
> This instruction closely parallels that approved for use in *United States v. Telfaire*, 469 F.2d 552 (D.C.Cir. 1972). Our appellate courts have long held, however, that a *Telfaire*-type instruction is unnecessary where, as here, the jury is given the standard instruction on witness credibility and otherwise instructed on the prosecution's burden of proving defendant's guilt beyond a reasonable doubt. [State case law citations omitted].

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[1] Court R. (hereinafter "R State."), Court File, at 991.

> Accordingly, in rejecting defendant's tendered instruction on eyewitness identification, the court committed no error.

Docket No. 13-9 at 23-25.

In *Telfaire*, the Court of Appeals for the District of Columbia established a model instruction to be given when the evidence demonstrates a danger of misidentification. *See Telfaire*, 469 F.2d at 558-559 (D.C. Circuit Model Jury Instructions provide that "[i]f the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care."). The Supreme Court has never held that a *Telfaire* instruction is constitutionally required under any circumstances. Instead, the controlling federal law applicable to Applicant's claim is set forth in *Estelle* and *Henderson* -- whether the omission of the tendered instruction, in the context of the entire trial, denied the Applicant a fundamentally fair trial in violation of due process.

At the close of the evidence at trial, the jurors were instructed that they must find all of the elements of the charged offenses beyond a reasonable doubt.[2] Each of the charged offenses included an element that it was the Applicant who committed the crime. *Id.* The jurors were also instructed about the credibility of witnesses.[3] Because the content of Applicant's tendered instruction on identity was encompassed in other jury instructions, the instructions that were given protected the defendant's right to a fair trial and to conviction only upon proof beyond a reasonable doubt. Consequently, the state appellate court's determination that the trial court did not err in rejecting the instruction was not contrary to, or an unreasonable application of, *Estelle* and *Henderson*. *See also*

[2] R., Court File at 950, 959-67.
[3] *Id.* at 953.

Wall v. Moriarty, No. 90-2268, 1991 WL 270000 at *6 (10th Cir. Dec. 17, 1991) (unpublished) (rejecting petitioner's claim that his due process rights were violated when the state trial court refused a tendered jury instruction concerning the reliability of witness identification testimony where the jury was instructed specifically on the credibility of witnesses as well as on the burden of proof); *see also Cotton v. Armontrout*, 784 F.2d 320, 322 (8th Cir. 1986) (recognizing that "failure to give a *Telfaire* instruction concerning witness identification is not constitutional error if the issue is adequately covered by other instructions").

However, even if the state trial court's failure to give a cautionary instruction concerning eyewitness identification was constitutional error, Applicant cannot show that the error had a substantial and injurious effect on the jury's verdict. The trial court instructed the jury concerning the defense theory of the case -- that "the witnesses who have identified him are inaccurate."[4] The defense vigorously cross examined the witnesses who identified Applicant as the shooter and emphasized in closing statement that the prosecution's identification witnesses were incorrect.[5] In addition, there was other corroborating evidence of the Applicant's guilt including evidence that he was wearing dark gloves at the bar prior to the shooting; a glove found at the scene tested positive for gunshot residue; and DNA found on the glove was consistent with Applicant's DNA.

add to #7

Accordingly, Applicant is not entitled to federal habeas relief for claim 3(a).

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[4] R. Court File at 946.

[5] R., 2/27/17 Trial Tr., Robert Williamson cross exam, at 138-172; 2/26/07 Trial Tr., Jeremy Lambert cross exam, at 40-47; 2/28/07 Trial Tr., Naomi Bolts cross exam, at 171-184; 3/1/17 Trial Tr., Orlando Rodriguez cross exam, at 37-72; and Francisco Castro cross exam, at 218-245. *See also* 3/5/18 Trial Tr. (defense closing statement), at 20-49.

2. Failure to give a "missing witness" instruction

Applicant asserts in claim 3(b) that his due process rights were violated when the trial court rejected his tendered "missing witness" instruction, which would have instructed the jurors that they should assume the testimony of Applicant's brother would have been favorable to the defense. Docket No. 1 at 10-11.

In *Davenport I*, the Colorado Court of Appeals determined the following:

> [Applicant] also contends that the trial court erred in refusing to give the jury his tendered instruction concerning the absence of his brother as a witness.
>
> [Applicant's] brother entered into a plea agreement which, as relevant here, prevented him from taking the stand and giving false testimony. More specifically, the plea agreement stated that if [Applicant's] brother chose to testify inconsistently with his sworn statement, which placed [Applicant] at the scene of the shooting, he would be lying on the witness stand in violation of his probation. The People agreed not to call [Applicant's] brother at trial; [Applicant] did not call him either.
>
> Defendant tendered the following instruction:
>
> It was particularly within the power of the government to produce [Applicant's brother], who could have given material testimony on an issue in the case. The government's failure to call [Applicant's brother] may give rise to an inference that his testimony would be unfavorable to it.
>
> ✳ You should bear in mind that the law does not impose on a defendant in a criminal case that burden or duty of calling any witnesses or producing any evidence.[6]
>
> In rejecting this instruction, the court ruled that the People did nothing more than acknowledge to [Applicant's] brother "the consequences of what would have happened if he chose to take the stand and testify falsely."

[6] R., Court File, at 992.

Argument is not about who had the decision to call brother or whether or not People or applicant should have called him but that a instruction to the jury about brother being a missing witness and that the jury should * pg 13

> The trial court went on to say that [Applicant] "was left with the decision of either calling his brother, putting him on the stand to testify to something that would have been false, according to his brother, or not to call him at all. That's not something that's created solely by the People."
>
> . . . .
>
> Here, it was not solely within the power of the prosecution to call [Applicant's] brother to testify, and the absence of [Applicant's] brother from trial was not solely due to the actions of the prosecution. [Applicant] could have called his brother to testify, and the People did not prohibit the brother from testifying. Rather, they put him on notice (via the terms of the plea agreement) that if he testified in a way that was inconsistent with his sworn statement, he would face perjury charges. This fact could not support an inference that the People had chosen not to have this witness testify because that testimony would be unfavorable to them, or that the brother's absence was due solely to the actions of the prosecution. Under these circumstances, the trial court did not err in refusing to given an instruction of the nature requested.

Docket No. 13-9 at 25-27.

The Supreme Court has not held that a trial court must give a missing witness instruction under any circumstances. but under these particular circumstances Therefore, the state trial court's failure to give the instruction did not violate the Constitution unless the omission rendered Applicant's trial fundamentally unfair. *See Henderson*. The Tenth Circuit has recognized that whether to give a missing witness instruction to the jury is a matter of the trial court's discretion, *see United States v. Montoya*, 676 F.2d 428, 431 (10th Cir. 1982), and that the trial court should only give a missing witness instruction if the witness is solely within the prosecution's power to call. *See United States v. Hoenscheidt*, 7 F.3d 1528, 1531 (10th Cir. 1993).

The state court's factual findings that it was not solely within the prosecution's power to call Applicant's brother as a witness and that the brother's absence was not due solely to the prosecution's actions are presumed correct and are supported by the state

court record.[7] Nothing prevented Applicant from calling his brother as a witness. The fact that the brother, if called, would not have provided exculpatory testimony that contradicted the terms of his own plea agreement does not alter the analysis. The Court finds that the Colorado Court of Appeals' determination that the trial court did not err in refusing to give a missing witness instruction was consistent with *Henderson* because the trial court's ruling did not render Applicant's trial fundamentally unfair.

However, even if the failure to give the Applicant's missing witness instruction was constitutional error, the error was harmless under *Brecht*. Applicant was arrested, in part, based on the bartender's statement to the police that the shooter had identified himself to the bartender earlier in the evening as a rapper named Billy the Kid. The police located a new CD by that artist, who was the Applicant.[8] Further, as discussed in detail in Section III.C, *infra*, the prosecution presented additional substantial evidence of the Applicant's guilt, including the testimony of four eyewitnesses, who had the opportunity to observe the Applicant at the bar earlier in the evening and then witnessed the shooting when Applicant returned to the bar later.

Consequently, Applicant is not entitled to federal habeas relief for claim 3(b).

B. Claim Four

In his fourth claim, Applicant asserts that he was denied his constitutional right to due process when a prosecution witness identified him as the shooter for the first time at trial in circumstances rendering that identification unduly suggestive. Docket No. 1 at 12.

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[7] R, Court File, at 993-1000;3/2/07 Trial Tr., at 84.

[8] R., 2/22/07 Trial Tr., Lambert testimony, at 224-230; 3/1/07 Trial Tr., Toni Trujillo testimony, at 96-99.

Well-established Supreme Court law holds that when the police have used a suggestive eyewitness identification procedure, "reliability is the linchpin" in determining whether an eyewitness identification may be admissible, with reliability determined according to factors set out in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *See Manson v. Brathwaite,* 432 U.S. 98, 114 (1977). Under *Brathwaite,* the court's ultimate task is to decide whether, "under all the circumstances of [the] case, there is 'a very substantial likelihood of irreparable misidentification.'" *Id.* at 116 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). *See also Kirby v. Illinois*, 406 U.S. 682, 691 (1972) (only when a pre-trial identification procedure is so unnecessarily suggestive that it is "conducive to irreparable mistaken identification" does the procedure violate due process). If a petitioner meets his burden to show that a police identification procedure was unduly suggestive, the government must demonstrate that the identification was reliable despite the suggestive procedure. *Brathwaite*, 432 U.S. at 114.

Neil and *Brathwaite* involved allegedly suggestive pretrial identifications arranged by police officers. The Supreme Court has "not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers." *Perry v. New Hampshire*, 565 U.S. 228 (2012).[9] Because Applicant does not

[9] In *Perry*, the Supreme Court held that the *Neil/Brathwaite* line of cases does not extend to circumstances where the police have not arranged unnecessarily suggestive pretrial identifications. 565 U.S. at 232. The Court reasoned that the *Neil/Brathwaite* cases "turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose," including "vigorous cross-examination." *Id.* at 233, 241-42 ("This deterrence rationale [of *Neil/Brathwaite* line of cases] is inapposite in cases . . . in which the police engaged in no improper conduct"); *see also id.* at 245-48.

assert that an eyewitness's identification was tainted by an allegedly unreliable police procedure, *Neil* and *Brathwaite* are inapposite for purposes of review § 2254(d)(1). *See Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (where no Supreme Court case addresses "the specific question presented by" a habeas claim and the circumstances of the claim "are only similar to" Supreme Court precedents, then the state court's decision cannot have been "contrary to" any Supreme Court case."); *see also White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) (rejecting the idea that habeas relief may be granted based on a state court's failure to extend a Supreme Court case to facts to which the applicant thinks the case should apply).

These aren't the only case laws used

Generally, when a criminal defendant challenges the reliability of evidence admitted at his trial, the Due Process Clause is implicated only when the evidence "is so extremely unfair that its admission violates fundamental conceptions of justice." *Dowling v. United States*, 493 U.S. 342, 352 (1990) (internal quotation marks and citation omitted). *See, e.g., Napue v. Illinois*, 360 U.S. 264, 269 (1959) (due process prohibits the State's "knowin[g] use [of] false evidence" because such use violates "any concept of ordered liberty.").

This is not beyond the limited operation of the due process clause of the federal constitution enumerated in the Bill of Rights.
The fact that other evidence regarding witness's credibility was introduced did not remove the taint.

Perry was decided after Applicant's direct appeal proceeding concluded and therefore does not provide controlling federal law in Applicant's habeas proceeding. *See Stevens v. Ortiz*, 465 F.3d 1229, 1235-38 (10th Cir.2006) (recognizing that a federal habeas court must identify and apply the clearly established Supreme Court precedent existing at the time the defendant's conviction became final). However, no Supreme Court case prior to *Perry* extended the holdings of *Neil* and *Braithwaite* to a witness's in-court identification of the defendant.

1. State Court Decision

In *Davenport I*, the Colorado Court of Appeals rejected Applicant's claim on the following grounds:

> At [Applicant's] first trial, the bystander who witnessed the shooting from the street identified [Applicant] for the first time in court as the shooter. During a break in his testimony, the witness had volunteered to the district attorney that he felt he could identify [Applicant], and [Applicant] did not object to the witness's identification testimony. The courts could not find witness for over 9 years. A warrant was put out for him to testify
>
> Prior to the second trial, [Applicant] objected to the witness again identifying him in court. The trial court ruled that (1) the earlier identification was not "a suggestion by the District Attorney, wasn't even a request by the District Attorney to ask [the witness] to identify anyone," and (2) despite the witness's identification being 'pretty remote from" the date of the crime and certain discrepancies between the witness's original description and [Applicant's] appearance at trial, there was not a substantial likelihood or irreparable misidentification based on the witness's viewing [Applicant] in court.
>
> On appeal, [Applicant] contends that, because of the inherent suggestiveness of the trial setting, his due process rights were violated by the witness's first-time, in-court identification of him. However, an in-court identification of a witness who has not participated in an out-of-court procedure, and to whom no suggestive remarks have been made, is not impermissibly suggestive merely because the physical arrangement of the courtroom may demonstrate to the witness that it is the defendant who is charged with a crime. [State case law citation omitted].
>
> In such circumstances, a defendant may request the use of various procedural safeguards to alleviate concerns arising from the suggestiveness of the courtroom setting. Here, [Applicant], who was represented by a lawyer in both trials, did not request any of these safeguards, and we decline to find any error now. [State case law citations omitted].

Docket No. 13-9 at 16-18.

2. *Application of AEDPA standard of review*

The state appellate court's factual findings are presumed correct under 28 U.S.C. § 2254(d)(2) and are supported by the state court record.[10] The Court finds that that the state appellate court's implicit determination that the witness's in-court identification did not require a *Neil/Braithwaite* analysis was not contrary to, or an unreasonable application of, Supreme Court law, given that those cases pertain specifically to unduly suggestive police identification procedures. Further, the Colorado Court of Appeals' conclusion that the in-court identification was not impermissibly suggestive was a reasonable application of Supreme Court cases holding that the admission of evidence violates due process only if it renders the trial fundamentally unfair. The bystander's description of the shooter to the police immediately after the murder was not inconsistent with Applicant's physical appearance on that day.[11] And Applicant's counsel conducted a thorough cross-examination of the witness about the reliability of his in-court identification,[12] which the jury considered in determining Applicant's guilt.

Moreover, even if the trial court committed a constitutional error in admitting the witness's in-court identification, the error did not have a substantial and injurious effect on the verdict. As discussed in detail in Section III.C, *infra*, the prosecution presented substantial evidence of the Applicant's guilt. Where there is independent evidence of the defendant's guilt and defense counsel is able to challenge the credibility and reliability of the witness's in court identification on cross exam, any error in admitting the in court

Applicant has presented substantial evidence of a trial infected by many errors and violations of law and constitution.

[10] R, 1/25/06 Trial Tr. at 72-96, 129-30, 133-34 (first trial); 2/21/07 Trial Tr. at 270-72, 279-82 (second trial).

[11] R., 2/27/07 Trial Tr., Williamson testimony, at 117-18.

[12] R., 2/22/17 Trial Tr., Williamson testimony, at 138-72.

Federal court has unreasonably applied the facts of this case rendering
identification is harmless under *Brecht*. *See Parson v. Keith*, No. 08-6146, 310 F. App'x
an unreasonable decision
271, 274 (10th Cir. Feb. 5, 2009) (unpublished) (citing *Kenaugh v. Miller*, 289 F.3d 36, 48 (2d Cir. 2002)). Consequently, the Court finds that any constitutional error in the trial court's admission of the first-time in-court identification of Applicant by the bystander did not have a substantial and injurious effect on the verdict. *Brecht*, 507 U.S. at 638.

Applicant is not entitled to federal habeas relief for claim four.

C. Claim Five

In claim five, Applicant asserts that he was denied his constitutional right to due process when the state post-conviction court rejected his ineffective assistance claim (based on the failure call an expert witness to undermine the reliability of eyewitness identification) without conducing an evidentiary hearing. Docket No. 1 at 13-14. The Court addresses below the merits of Applicant's underlying allegation that defense counsel was ineffective in failing to call an expert witness to undermine the reliability of eyewitness identification because Applicant exhausted the claim in the state courts.[13]

The Sixth Amendment generally requires that defense counsel's assistance to the criminal defendant be effective. *See Strickland*, 466 U.S. at 685-86. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show both that (1) his counsel's performance was deficient (i.e., that identified acts and omissions were outside the wide range of professionally competent assistance), and (2) he was prejudiced by the deficient performance (i.e., that there is a reasonable probability that but for counsel's

[13] In the Order to Dismiss in Part, the Court dismissed the allegations challenging the state district court's failure to hold an evidentiary hearing as raising an issue of state law not cognizable on federal habeas review. Docket No. 22 at 12-13.

unprofessional errors the result would have been different). *Id.*

"A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689). "With respect to prejudice, . . . '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). "The likelihood of a different result must be substantial, not just conceivable." *Strickland*, 466 U.S. at 693. A court need not address the first prong of the *Strickland* inquiry if the claim fails on the prejudice prong. *See Smith v. Robbins*, 528 U.S. 259, 286 n. 14 (2000) (citing *Strickland,* 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.")).

"Surmounting *Strickland*'s high bar is never an easy task." *Richter*, 562 U.S. at 105 (internal quotation omitted). "Establishing that a state court's application of *Strickland* was unreasonable under §2254(d) is all the more difficult." *Id.*

1. State Court Decision

In *Davenport II,* the Colorado Court of Appeals applied a state law standard similar to the two-part inquiry set forth in *Strickland*, 466 U.S. 668, Docket No. 13-4 at 8-9, and resolved Applicant's ineffective assistance claim as follows:

> We conclude that the evidence of [Applicant's] guilt at his second trial was overwhelming. This conclusion leads us to another: [Applicant] did not satisfy the second prong of the *Strickland* test. He did not establish a reasonable probability, meaning a probability sufficient to undermine our confidence in the guilty verdict, that, but for the public defender's putative ineffective assistance, the jury's verdict would have been different. [State case law citation omitted].

(the same) 21

The evidence in 1st trial was used in 2nd trial with regard to the exception of Res gestae statements made by _____. Applicant did establish a reasonable probability sufficient to undermine the confidence in the outcome of the 2nd trial when the result of the 1st trial was a mistrial due to a hung jury. Counsel here used and Id expect with the defense of misidentification. Counsels putative ineffective assistance is clear when counsel chose not to use this defense again strategy against Applicants will with no other strategy to replace. Juries verdict was different.

At the second trial, the prosecution presented the testimony of the same five eyewitnesses who identified [Applicant] as the shooter in the first trial.[14]

[Applicant's] girlfriend testified, as she had during the first trial, that (1) she was with [Applicant] on the night of the shooting, but that she had fallen asleep around 10:00 p.m.; (2) [Applicant] was not with her when she woke up the next morning around 8:00 a.m.; (3) [Applicant] had asked her to tell the police that he had been with her all night; (4) [Applicant] had told her that he had been at Sebastian's with his brother, that he had gotten into a fight over spilled beer, that he had gotten hit, and that he had left; and (5) Applicant told her that he had returned to Sebastian's because "he felt he got punked" or disrespected, but when a bunch of guys "came at him," he had turned around and left.[15]

The prosecution also presented evidence at the second trial that it had not offered in the first one.

- There was testimony about a glove that had been left at the crime scene.[16] There was a small amount of gunshot residue on it,[17] and it contained DNA that was consistent with [Applicant's] DNA.[18]

- A bartender at the Skylark Lounge testified that (1) two African-American men had come in around 1:50 a.m. and that they had ordered two beers and then two shots of cognac; (2) the men had left the bar around 2:00 a.m.; and (3) as they left the bar, he had overheard the one with the gloves ask the other, "Are we going to do this? Are we going to do this?", and the other man had responded, "Yeah. Yeah. Let's do this."[19]

- A detective testified that (1) the Skylark Lounge was less than a block from Sebastian's; (2) he had identified [Applicant] on the Skylark Lounge surveillance video that was recorded shortly

[14] R., 2/22/07 Trial Tr., Williamson testimony, at 119-20; *Id.*, Lambert testimony, at 224-25, 255-62, 267; 2/28/07 Trial Tr., Bolts testimony, at 114-16; 3/1/07 Trial Tr., Orlando Rodriguez testimony, at 26-27; and, *id.*, Castro testimony, at 198-99, 214.

[15] R., 2/27/07 Trial Tr., Kyssandra Clevinger testimony, at 280-85; 2/28/07 Trial Tr. at 7-13.

[16] R., 2/26/07 Trial Tr., Robert Widmayer testimony, at 114-15.

[17] R., 2/27/07 Trial Tr., Clark Smith testimony, at 15.

[18] R., 2/26/07 Trial Tr., Susan Berdine testimony, at 205-06, 209.

[19] R., 2/27/07 Trial Tr., Barry Zimmer testimony, at 90-114.

before the murder; and (3) [Applicant] had been wearing dark-colored gloves in the video.[20]

- Another detective testified that he had received a call from dispatch about the shooting around 2:25 a.m.[21]

- The jury watched the video recordings [of] the eyewitnesses when they had identified [Applicant] in photographic lineups. These videos showed the witnesses' reactions to seeing [Applicant's] photograph.[22]

    - Although one eyewitness had been unable to identify [Applicant] as the shooter during this process and had stated that the shooter was Hispanic, he had not seen the shooting. But he had heard gunshots, and he had seen a man run past him.[23]

    - In contrast, four of the eyewitnesses who identified [Applicant] had seen him before the shooting when he had been in Sebastian's earlier that night. They had also witnessed the shooting.[24]

There reason stated still do not deny the violation of counsel performance and were also issued in last & 2nd trial. Yet still the last trial was a hung jury

Docket No. 13-4 at 9-12). Based on [Applicant's] failure to satisfy the prejudice prong of the *Strickland* inquiry, the state appellate court affirmed the trial court's denial of the state post-conviction motion.

2. *Application of AEDPA Standard of Review*

Upon careful review of the state court record, the Court finds that the Colorado Court of Appeals' factual determinations in support of its conclusion that there was

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[20] R., 2/22/07 Trial Tr., Michael Martinez testimony, at 183-84, 188-90.

[21] R., 3/1/07 Trial Tr., Trujillo testimony, at 85-86.

[22] R., People's Trial Exs. 206, 207, 208 and 209.

[23] R., 3/2/07 Trial Tr., Terry Smith testimony, at 8-18, 25-26, 28.

[24] R., 2/22/07 Trial Tr., Lambert testimony, at 224-45, 255-62, 294; 2/28/07 Trial Tr, Bolts testimony, at 109-16, 122-23, 130-33; 3/1/07 Trial Tr., Orlando Rodriguez testimony, at 19-32, 36-37; and, *id.*, Castro testimony, at 185-204, 214. Although Orlando Rodriguez did not identify Applicant in the police photo array, he told the police following the shooting that the shooter was the same person he had seen in an altercation at the bar earlier in the evening. Two people were involved in an earlier altercation. There was more the one altercation that same night. A group of hispanic males were involved in more the one of the altercations. Witnesses say hispanic male was the shooter.

overwhelming evidence of Applicant's guilt are supported by the evidence presented at trial. The Court therefore finds and concludes that the state appellate court's determination that Applicant was not prejudiced by defense counsel's failure to call an expert witness on eyewitness identification was consistent with *Strickland* and was reasonable in light of the evidence presented in the state court proceeding.

Applicant is not entitled to federal habeas relief for his fifth claim.

IV. ORDERS

For the reasons discussed above, it is

ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket No. 1), filed by Applicant William Davenport on May 26, 2016 is DENIED. The Application is DISMISSED WITH PREJUDICE. It is further

ORDERED that no certificate of appealability shall issue because Applicant has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Fed. R. Governing Section 2254 Cases 11(a); *Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000). It is further

ORDERED that leave to proceed *in forma pauperis* on appeal is denied. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith *See Coppedge v. United States*, 369 U.S. 438 (1962). If Applicant files a notice of appeal, he must also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

Dated August 2, 2017 at Denver, Colorado.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge