IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30378

A True Copy
Certified order issued Aug 02, 2018

Clerk, U.S. Court of Appeals, Fifth Circuit

JAMAL JAMES CARMOUCHE,

Petitioner-Appellant

v.

JASON KENT, WARDEN, DIXON CORRECTIONAL INSTITUTE,

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Louisiana

O R D E R:

Jamal James Carmouche, Louisiana prisoner # 471370, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition challenging his conviction and 40-year sentence for manslaughter. Carmouche argues that (1) the evidence was insufficient to support his conviction; (2) the trial court erred in instructing the jury regarding flight; (3) he received ineffective assistance of trial counsel based on several instances of allegedly deficient performance; and (4) his conviction was the result of malicious prosecution, including the withholding of exculpatory evidence and the knowing use of perjured testimony.

To obtain a COA, Carmouche must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). When, as here, constitutional claims have been rejected on the merits, such a showing requires

the petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Carmouche has not made the requisite showing. Accordingly, his motion for a COA is DENIED.

/s/ Priscilla R. Owen
PRISCILLA R. OWEN
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

JAMAL JAMES CARMOUCHE **D.O.C. # 471370**	:	**DOCKET NO. 15-cv-2760**
VERSUS	:	**JUDGE DOHERTY**
DARREL VANNOY	:	**MAGISTRATE JUDGE KAY**

JUDGMENT

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein, and after an independent review of the record including the objection filed by petitioner, and having determined that the findings and recommendation are correct under the applicable law;

IT IS ORDERED that the Petition for Writ of *Habeas Corpus* be and hereby is **DENIED,** and that the above captioned matter be and hereby is **DISMISSED WITH PREJUDICE.**

THUS DONE this 24 day of April, ~~2016.~~ 2017.

REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

JAMAL JAMES CARMOUCHE **D.O.C. # 471370**	:	**DOCKET NO. 15-cv-2760**
VERSUS	:	**JUDGE DOHERTY**
DARREL VANNOY	:	**MAGISTRATE JUDGE KAY**

REPORT AND RECOMMENDATION

Before the court is a pro se application for a writ of habeas corpus pursuant to 28 U.S.C § 2254 filed by Jamal James Carmouche ("petitioner"). Doc. 1. The petitioner is a prisoner in the custody of the Louisiana Department of Public Safety and Corrections. He is currently incarcerated at Dixon Correctional Institute in Jackson, Louisiana. Darrel Vannoy ("respondent"), former warden at Dixon Correctional Institute, opposes the application. Doc. 11.

This matter is referred to the undersigned for review, report, and recommendation in accordance with 28 U.S.C. § 636 and the standing orders of the court. For the following reasons **IT IS RECOMMEDED** that the application be **DENIED** and that the petition be **DISMISSED WITH PREJUDICE.**

I.
BACKGROUND

A. Conviction

The petitioner was indicted on one count of second degree murder in the Fifteenth Judicial District, Lafayette Parish, Louisiana, on January 12, 2011. Doc. 11, att. 10, p. 48. The charge related to the killing of Marcus Despanie ("victim") on September 18, 2010. *Id.* Following a jury

trial, the petitioner was convicted of manslaughter, a responsive verdict, on January 20, 2012. Doc. 11, att. 11, p. 38. The petitioner was originally sentenced to thirty-five years' imprisonment at hard labor. Doc. 11, att. 4, pp. 93–94.

The state filed an habitual offender bill which was heard on June 21, 2012. Doc. 11, att. 5, pp. 10–53. There the trial court found that the petitioner was a fourth felony offender. *Id.* at 51. Accordingly, it vacated the thirty-five year sentence and sentenced the petitioner to forty years' imprisonment, the minimum term for fourth felony offenders under the habitual offender statute. *Id.* at 52.

B. Direct Appeal

The petitioner filed a direct appeal through counsel in the Louisiana Third Circuit Court of Appeal. *State v. Carmouche*, 117 So.3d 136 (La. Ct. App 3d Cir. 2013). There he raised the following assignments of error:

1. The evidence adduced at trial was insufficient to support a conviction for either second degree murder or manslaughter.
2. It was error for the trial court to instruct the jury regarding flight.

Id. at 137–38. The Third Circuit reviewed both of these claims on the merits and denied relief on April 3, 2013. *Id.* at 138–47. It appears that review was sought in the Louisiana Supreme Court and denied on November 8, 2013.[1] The petitioner did not seek review in the United States Supreme Court. Doc. 1, p. 2.

C. State Post-Conviction Relief

The petitioner filed a pro se application for post-conviction relief in the trial court on or about February 26, 2014. Doc. 11, att. 4, pp. 15–34. There he raised the following claims for relief:

[1] The respondent and petitioner both contend that review was sought in the Louisiana Supreme Court and denied on November 8, 2013. Doc. 1, p. 2; doc. 11, att. 1, p. 2. However, the respondent does not indicate where this ruling can be found in the record. *See* doc. 11, att. 3, p. 2 (index to record, with entry for Louisiana Supreme Court's ruling but no corresponding page numbers). We accept the contention based on the parties' agreement to the ruling and date.

1. He received ineffective assistance of counsel due to multiple instances of allegedly deficient performance by trial counsel.
2. The evidence adduced at trial was insufficient to support a conviction of manslaughter.
3. The petitioner was convicted based on false testimony and was the subject of malicious prosecution.

Id. The trial court reviewed his claims on the merits, construing the second and third claims as the same argument, and denied relief. *Id.* at 12–14. The petitioner then sought review in the Third Circuit, which noted that the trial court had not erred in its ruling and denied the writ. *Id.* at 3. He then sought review in the Louisiana Supreme Court, which noted that the allegations of prosecutorial misconduct were unsupported and denied the writ on October 30, 2015. Doc. 11, att. 13, pp. 2–3.

D. Federal Habeas Petition

The instant petition was filed in this court on November 22, 2015. Doc. 1, p. 6. Here the petitioner renews all claims from his direct appeal and state application for post-conviction relief, alleging the following:

1. The evidence adduced at trial was insufficient to support a conviction for second degree murder or manslaughter.[2]
2. It was error for the trial court to instruct the jury regarding flight.
3. The petitioner received ineffective assistance of counsel based on numerous instances of allegedly deficient performance by trial counsel.
4. The petitioner was the victim of malicious prosecution, based on the state's withholding of exculpatory evidence and knowing introduction of false testimony.

Doc. 1, att. 2, pp. 8–26.

[2] This claim was briefed twice, as the petitioner renews it from both his post-conviction relief application and his direct appeal. *See* doc. 1, att. 2, pp. 8–13, 19–22. We have reviewed all of the arguments and address the claim as one.

II.
LEGAL STANDARDS ON HABEAS REVIEW

A. Timeliness

Federal law imposes a one-year limitation period within which persons who are in custody pursuant to the judgment of a state court may seek habeas review in federal court. 28 U.S.C. § 2244(d)(1). This period generally runs from the date that the conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). The time during which a properly-filed application for post-conviction relief is pending in state court is not counted toward the one-year limit. 28 U.S.C. § 2244(d)(2); *Ott v. Johnson*, 192 F.3d 510, 512 (5th Cir. 1999). However, any lapse of time before proper filing in state court *is* counted. *Flanagan v. Johnson*, 154 F.3d 196, 199 n. 1 (5th Cir. 1998).

A state application is considered pending both while it is in state court for review and also during intervals between a state court's disposition and the petitioner's timely filing for review at the next level of state consideration. *Melancon v. Kaylo*, 259 F.3d 401, 406 (5th Cir. 2001). The limitations period is not tolled, however, for the period between the completion of state review and the filing of the federal habeas application. *Mayle v. Felix*, 545 U.S. 644, 644 (2005). Accordingly, in order to determine whether a habeas petition is time-barred under the provisions of §2244(d) the court must ascertain: (1) the date upon which the judgment became final either by the conclusion of direct review or by the expiration of time for seeking further direct review, (2) the dates during which properly filed petitions for post-conviction or other collateral review were pending in the state courts, and (3) the date upon which the petitioner filed his federal habeas corpus petition.

B. Procedural Default and Exhaustion of State Court Remedies

Before proceeding to the merits of the issues raised in the petition, this court considers the doctrines of procedural default and exhaustion of state court remedies. Exhaustion and procedural

default are both affirmative defenses that may be waived by the state if not raised in its responsive pleadings. *See, e.g.*, *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1994). However, the federal district court may also consider both doctrines on its own motion. *Magouirk v. Phillips*, 144 F.3d 348, 357–59 (5th Cir. 1998). Therefore we consider any claims by respondent under these doctrines, in addition to conducting our own review.

1. Exhaustion of State Court Remedies

The federal habeas corpus statute and decades of federal jurisprudence require a petitioner seeking federal habeas corpus relief to exhaust all available state court remedies prior to filing his federal petition. 28 U.S.C. § 2254(b)(1); *e.g.*, *Whitehead v. Johnson,* 157 F.3d 384, 387 (5th Cir. 1998). This is a matter of comity. *Ex parte Royall*, 6 S.Ct. 734, 740–41 (1886). In order to satisfy the exhaustion requirement, the petitioner must have "fairly presented" the substance of his federal constitutional claims to the state courts "in a procedurally proper manner according to the rules of the state courts." *Wilder v. Cockrell,* 274 F.3d 255, 259 (5th Cir. 2001); *Dupuy v. Butler*, 837 F.2d 699, 702 (5th Cir. 1988). Each claim must be presented to the state's highest court, even when review by that court is discretionary. *E.g.*, *Wilson v. Foti*, 832 F.2d 891, 893–94 (5th Cir. 1987). Exhaustion is not satisfied if the petitioner presents new legal theories or entirely new factual claims in support of his federal habeas petition. *Brown v. Estelle*, 701 F.2d 494, 495 (5th Cir. 1983).

In Louisiana the highest court is the Louisiana Supreme Court. *See* LSA–Const. art. 5, § 5(a). Thus, in order for a Louisiana prisoner to have exhausted his state court remedies he must have fairly presented the substance of his federal constitutional claims to the Louisiana Supreme Court in a procedurally correct manner, supported by the legal theories and factual allegations that he raises now. *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997).

2. Procedural Default

When a petitioner has defaulted a claim by violating a state procedural rule which constitutes adequate and independent grounds to bar direct review in the United States Supreme Court, he may not raise that claim in a federal habeas proceeding absent a showing of cause and prejudice or actual innocence. *Coleman v. Thompson*, 111 S.Ct. 2546, 2554 (1991). Failure to satisfy state procedural requirements results in forfeiture of a petitioner's right to present a claim in a federal habeas proceeding. *Murray v. Carrier*, 106 S.Ct. 2639 (1986). This is not a jurisdictional matter; rather, it is grounded in concerns of comity and federalism. *Trest v. Cain*, 118 S.Ct. 478, 480 (1997).

Procedural default exists where (1) a state court clearly and expressly bases its dismissal of the petitioner's constitutional claim on a state procedural rule and that procedural rule provides an independent and adequate ground for the dismissal ("traditional" procedural default)[3] or (2) the petitioner fails to properly exhaust all available state court remedies and the state court to which he would be required to petition would now find the claims procedurally barred ("technical" procedural default). In either instance, the petitioner is considered to have forfeited his federal habeas claims. *Bledsue v. Johnson*, 188 F.3d 250, 254–5 (5th Cir. 1999). The grounds for traditional procedural default must be based on the actions of the last state court rendering a judgment. *Harris v. Reed*, 109 S.Ct. 1038, 1043 (1989).

C. General Principles

When a state court adjudicates a petitioner's claim on the merits, this court reviews the ruling under the deferential standard of 28 U.S.C. § 2254(d). *Corwin v. Johnson*, 150 F.3d 456,

[3] To serve as adequate grounds for a federally cognizable default the state rule "must have been firmly established and regularly followed by the time as of which it is to be applied." *Busby v. Dretke*, 359 F.3d 708, 718 (5th Cir. 2004) (internal quotations omitted).

471 (5th Cir. 1998). Section 2254(d) provides that a writ of habeas corpus shall not be granted unless the state court's adjudication on the merits resulted in a decision that was either (1) contrary to clearly established federal law or involved an unreasonable application of that law, or (2) based on an unreasonable determination of the facts in light of the evidence before the state court. 28 U.S.C. § 2254(d).

The first standard, whether the state court's adjudication was contrary to or involved an unreasonable application of clearly established federal law, applies to questions of law as well as mixed questions of law and fact. A petitioner must demonstrate that the "fair import" of the state court decision shows that the court failed to apply the controlling federal standard. *Early v. Packer*, 537 U.S. 3, 9 (2002) (per curiam). Furthermore, the decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 131 S.Ct. 770, 784 (2011). A decision is contrary to clearly established federal law "if the state court applies a rule that contradicts the governing law set forth [by the Supreme Court], or if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedents and arrives at a [contrary] result . . . ." *Bell v. Cone*, 543 U.S. 447, 452-53 (2005), quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (internal quotations omitted).

The second standard – whether the state court's adjudication was based on an unreasonable determination of the facts in light of the evidence – applies to questions of fact. It is insufficient for a petitioner to show that the state court erred in its factual determination but rather he must demonstrate that the factual determination was objectively unreasonable, a "substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different

conclusion in the first instance." *Wood v. Allen*, 130 S.Ct. 841, 849 (2010). Rather, the petitioner has to show that "a reasonable factfinder must conclude" that the determination of facts by the state court was unreasonable. *Rice v. Collins*, 546 U.S. 333, 341 (2006).

III.
LEGAL ANALYSIS

As a preliminary matter this court reviews the petitioner's application for timeliness, failure to exhaust state court remedies, and procedural default. If the claim is procedurally viable, its merits are considered under the general standards set forth in Section II.C.

A. Timeliness

The petitioner's conviction became final on February 6, 2014, when his time for seeking review in the United States Supreme Court on direct appeal expired. *See* Sup. Ct. R. 13. Thus **18 days** accrued toward his one year limit before he filed his application for post-conviction relief on or about February 26, 2014. The limitations period remained tolled from that time until October 30, 2015, when the Louisiana Supreme Court denied the petitioner's request for review of that application. An additional **23 days** accrued before the instant petition was filed on November 22, 2015. Accordingly, **41 days** have accrued against § 2244(d)'s one year limit and this matter is timely.

B. Exhaustion of State Court Remedies and Procedural Default

The claims raised in the instant petition were exhausted and rejected on the merits in the state courts. Therefore no basis for procedural default exists.

C. Substantive Analysis

Having determined that all claims are properly before this court, we now review them under the standards set out above.

1. The evidence adduced at trial was insufficient to support a verdict of second degree murder or manslaughter.

A defendant's constitutional right to due process is violated when he is convicted of a crime without the state having met its burden of proof on every element of the offense.[4] *Jackson v. Virginia*, 99 S.Ct. 2781, 2787 (1979) (citing *In re Winship*, 90 S.Ct. 1068, 1073 (1970)). Such claims are decided by determining whether, "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." *Donahue v. Cain*, 231 F.3d 1000, 1004 (5th Cir. 2000) (internal quotations omitted). This court must also defer to the trial court's findings on issues of conflicting testimony and the weight of the evidence. *Jackson*, 99 S.Ct. at 2789. Thus, under the standards of *Jackson* and § 2254(d), this court's review on sufficiency of evidence claims is "twice-deferential." *Parker v. Matthews*, 132 S.Ct. 2148, 2152 (2012).

In Louisiana second degree murder is defined in part as the killing of a human being "[w]hen the offender has a specific intent to kill or inflict great bodily harm." LA. REV. STAT. § 14:30.1(A)(1). Specific intent may be inferred from the circumstances. *State v. Ordodi*, 946 So.2d 654, 661 (La. 2006). Manslaughter, meanwhile, is a responsive verdict to second degree murder. *State v. Lombard*, 486 So.2d 106, 111 (La. 1986). It includes a homicide which would otherwise be first or second degree murder that is committed with certain mitigating factors. LA. REV. STAT. § 14:31(A)(1). Absent a contemporaneous objection to the responsive verdict, evidence is sufficient to support a verdict of manslaughter if it could sustain a verdict for second degree murder. *See State ex rel. Elaire v. Blackburn*, 424 So.2d 246, 251–52 (La. 1982) (holding that, when a defendant does not object to a legislatively responsive verdict, his conviction will not be

[4] On federal habeas review, a court defers to the substantive elements of the offense as defined by state law. *Weeks v. Scott*, 55 F.3d 1059, 1062 (citing *Alexander v. McCotter*, 775 F.2d 595, 598 (5th Cir. 1985)).

overturned based on insufficiency of the evidence as long as the evidence is sufficient to support the offense charged); *accord Bates v. Blackburn*, 805 F.2d 569, 574–75 (5th Cir. 1986) (abrogated on other grounds by *Harris v. Reed*, 109 S.Ct. 1038 (1989)).

Here the petitioner challenges the sufficiency of the evidence based on the lack of physical evidence, conflicts within the eyewitness testimony, and substance use by some of the eyewitnesses. Specifically, he points to the testimony of Jeremy Walker, Terrance Despanie (nephew of the victim), and Carlos Hamilton (another nephew of the victim).

At trial Walker testified that he had known the petitioner for about one month at the time of the shooting and that they spent the day leading up to the murder together. Doc. 11, att. 7, pp. 18–19, 27. Walker recalled that he was wearing a white or black shirt and the petitioner was wearing a blue shirt. *Id.* at 20, 23. He stated that he was walking down the street with the petitioner when the petitioner got into an "altercation" with a man unknown to Walker, near the corner of Ambrose Street and Pierce Street. *Id.* at 21–22. That person was the victim, who was standing with "[a]t least four or five" other people. *Id.* at 34–37. Walker heard scuffling and saw the petitioner fire his weapon. *Id.* at 21–22, 37. He then saw the victim lying on the ground. *Id.* at 21–22. Walker testified that he and the petitioner ran from the scene after the shooting and that they boarded a bus for New Orleans the following morning. *Id.* at 24–25. He also identified himself and the petitioner in surveillance footage of the street. *Id.* at 23–24.

Walker admitted that he had previously stated that he did not see the petitioner shoot the victim but also testified that he only made this statement out of fear for his safety and that of his family.[5] *Id.* at 22. He also admitted that he had smoked "a lot" of marijuana leading up to the shooting. *Id.* at 25, 29.

[5] Defense counsel also highlighted Walker's conflicting statements on this point during cross-examination. *See* doc. 11, att. 7, pp. 47–50. The petitioner contends that this exchange reflects that "Walker changed his testimony/statements

Terrance Despanie testified that he was at a gathering near the corner of Ambrose Street and Pierce Street, outside of a nightclub, on the night of the shooting. Doc. 11, att. 6, pp. 90–92. His uncle, the victim, was also in attendance. *Id.* at 91–92. Despanie observed the petitioner and Walker, whom Despanie only knew by his street name, approaching on foot. *Id.* at 93–94. He then saw that the petitioner was holding a gun and turned away. *Id.* at 95. He recalled hearing four gunshots and then seeing the victim lying dead on the ground. *Id.* He did not see the petitioner after the shots were fired but he did see Walker running from the scene. *Id.* at 97. At trial Despanie recalled that Walker was wearing a white shirt and the petitioner a blue shirt. *Id.* at 94. Despanie then pointed out the petitioner and Walker in the same surveillance footage, identifying them by their clothing. *Id.*at 98–100. He also recalled that the petitioner and his uncle had recently had a verbal altercation over a woman with whom Despanie and the petitioner were both somehow involved and who allegedly had some role in Despanie's recent incarceration. *Id.* at 96–97; doc. 11, att. 7, p. 1.

Despanie admitted that he had smoked marijuana prior to the shooting. Doc. 11, att. 7, p. 2. He also admitted that he did not see the shooting but concluded what had happened based on seeing the petitioner walk by with a gun in his hand and then hearing the gunshots. *Id.* at 10.

Carlos Hamilton testified that he was also at the gathering with the petitioner near the corner of Ambrose and Pierce on the night of the shooting. Doc. 11, att. 8, pp. 13–14. Hamilton was relieving himself outside a nearby funeral home when he heard three gunshots. *Id.* at 16–17, 35. When he heard the gunshots, Hamilton ran out to the scene and saw his uncle fall to the ground. *Id.* at 18. He did not see the petitioner until after the shots were fired when he witnessed him fleeing

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four times . . . ." Doc. 1, att. 2, p. 24. Walker only stated that he had originally told police that he saw the petitioner shoot the victim, then recanted that statement out of fear and instead told police that he had only seen the victim lying on the ground. Doc. 11, att. 7, pp. 47–49.

on foot.[6] *Id.* at 15–18. He stated that he did not see anyone else at the scene before or after the shooting. *Id.* at 18, 29–31. He also indicated that the petitioner was wearing a green shirt, then clarified that it was a blue shirt with green emblems and that his prior statement to police, saying that the shirt was "greenish," was inaccurate. *Id.* at 38–40.

Hamilton admitted that he was drinking alcohol in the time leading up to the shooting and that he had consumed "maybe a pint" of vodka mixed with cranberry juice that night. *Id.* at 14–15. He told police that he was so inebriated at the time of the shooting that he could barely stand. *Id.* at 25–26. He also admitted that he told the 911 operator that he did not know who the shooter was but stated that this was because he had his own plans to take revenge on the petitioner. *Id.* at 20–21.

All of the eyewitnesses had used or consumed marijuana or alcohol in the time leading up to the shooting. Walker and Hamilton disagreed over whether anyone else was at the scene at the time of the shooting. While Despanie recalled that Walker was wearing a white shirt, Walker could not remember whether his shirt was white or black. The witnesses also disagreed on the number of shots they heard and the number of people gathered at the scene either at the time of the shooting or immediately after. However, all three witnessed the petitioner, or someone matching the petitioner's description, either approaching with a gun, engaging in an altercation with the victim, or fleeing the scene immediately after the shots were fired and the victim fell.

Dr. Bruce Wainer testified for the state as an expert in forensic pathology. Doc. 11, att. 9, pp. 26–27. He performed an autopsy on the victim and reported that the victim had suffered two gunshot wounds, one to the chest and one to the head. *Id.* at 29–30. He offered his opinion, based

[6] He also admitted that his statement to police, stating that Walker was also running, was based on information from Terrance Despanie rather than Hamilton's own memory. Doc. 11, att. 8, pp. 37–38. However, he maintained that he had seen the petitioner running from the scene. *Id.* at 41.

on the autopsy findings, that the wound to the chest was inflicted at close range, which he measured at "several inches to about a foot." *Id.* at 32.

As the Third Circuit noted, specific intent to kill can be inferred under Louisiana law from the act of aiming a firearm directly at the victim or from firing at close range, when supported by other circumstances, including evidence of flight or motive. *Carmouche*, 117 So.3d at 146 (internal citations omitted). In this case, Walker's testimony and Wainer's autopsy findings established that the petitioner shot the victim at close range. Both Walker and Hamilton testified that the petitioner fled the scene immediately on foot after the shooting, with Walker admitting that he and the petitioner left town the following morning. Furthermore, Walker's testimony as to the fight preceding the shots and Despanie's recollection of his uncle's involvement in the conflict over the woman with whom he and the petitioner were involved provide evidence of acrimony between the petitioner and victim, a possible motive for the shooting.

As stated *supra*, determinations on the weight of evidence and credibility of witnesses are the province of the jury. On federal habeas review, all credibility choices and conflicting inferences must be drawn in favor of the verdict. *Ramirez v. Dretke*, 398 F.3d 691, 695 (5th Cir. 2005). Here, despite disagreement between witnesses on certain issues and the fact that all three had used some sort of intoxicating substance, there was enough within the testimony of the three witnesses, in conjunction with Wainer's expert opinion, to support finding the elements of the crime beyond a reasonable doubt. As the Third Circuit determined, the evidence adduced at trial adequately supports a verdict of second degree murder and the petitioner's conviction of the responsive verdict of manslaughter. Thus the petitioner has not shown that the state court's rejection of his claim was contrary to or involved unreasonable application of federal law, and he is not entitled to habeas relief.

2. It was error for the trial court to instruct the jury regarding flight

When a jury instruction is challenged under § 2254, "the only question . . . is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Weeks v. Scott*, 55 F.3d 1059, 1065 (5th Cir. 1995) (quoting *Estelle v. McGuire*, 112 S.Ct. 475, 482 (1991)) (internal quotations and alterations omitted). "[T]he instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *McGuire*, 112 S.Ct. at 482 (internal quotations and alterations omitted). Moreover, errors in jury instructions are generally subject to harmless error review. *See, e.g.*, *Harris v. Warden, Louisiana State Penitentiary*, 152 F.3d 430, 437 (5th Cir. 1998). Accordingly, even if a constitutional error is found in the instruction, the petitioner will only be entitled to habeas relief if that error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1714 (1993) (quoting *Kotteakos v. United States*, 66 S.Ct. 1239, 1253 (1946)).

In a state criminal trial, a jury instruction violates due process if it relieves the state of its burden of proving every element of the offense beyond a reasonable doubt. *Robertson v. Cain*, 324 F.3d 297, 302 (5th Cir. 2003) (citing *Sandstrom v. Montana*, 99 S.Ct. 2450, 2457–59 (1979)).

The petitioner contends that the trial court erred when it instructed the jury:

> If you find that the defendant fled immediately after a crime was committed or after he was accused of a crime, that flight alone is not sufficient to prove the defendant is guilty. However, flight may be considered, along with other evidence. You must decide whether such flight was due to consciousness of guilt or other reasons unrelated to guilt.

Doc. 11, att. 5, p. 63. After closing argument, defense counsel orally moved for a mistrial on the grounds that the state had not produced any evidence of flight. Doc. 11, att. 10, pp. 20–21. Alternatively, he requested that the instruction regarding flight be removed and the jury told to

disregard all argument concerning it. *Id.* at 21. The court denied both requests, noting, "There was evidence [of flight] offered. Whether it's sufficient evidence to prove it is for the jury to decide." *Id.* at 22–23.

Walker's testimony, cited under the previous claim, clearly indicated that he and the petitioner ran from the scene after the shooting. Hamilton corroborated this testimony by stating that he saw the petitioner fleeing the scene. Additionally, Walker testified and the petitioner admits that they left town a short time later. The petitioner's disagreement with the instruction arises from his own contention that his trip to New Orleans was "[n]ot behavior typically expected of a murderer trying to hide from Justice." Doc. 1, att. 2, p. 14. However, this argument does not override the jury's ability to draw inferences from the evidence presented, and the petitioner's disagreement with the inferences drawn does not determine whether the state produced any evidence of flight.

The state produced evidence that could support a finding that, either by running from the scene or traveling to New Orleans, the petitioner was fleeing immediately after the commission of a crime. Such a finding would be relevant in determining specific intent to commit second degree murder. *State v. Davies*, 350 So.2d 586, 588 (La. 1977). Accordingly, the petitioner does not show how the flight instruction impermissibly relieved the state of its burden of proof. Thus he fails to show that the state court adjudication of this claim was contrary to or involved an unreasonable application of federal law, and so he is not entitled to federal habeas relief under this claim.

3. Ineffective assistance of counsel

The petitioner contends that trial counsel, Harold Register, rendered constitutionally deficient performance based on the following allegations: 1) failure to object to the state's introduction of video and the state's error in not sequestering witnesses while the video was paid,

2) failure to object and file for a mistrial based on perjured testimony from witnesses, 3) failure to object to the state's withholding of exculpatory evidence, and 4) failure to object to state's error of not sequestering witnesses for the purpose of cross-examination.

Claims of ineffective assistance of counsel are gauged by the guidelines set forth by the Supreme Court in *Strickland v. Washington*, 104 S.Ct. 2052 (1984). Under *Strickland*, a petitioner must demonstrate: (1) that his counsel's performance was deficient, requiring a showing that the errors were so serious such that he failed to function as "counsel" as guaranteed by the Sixth Amendment, and (2) that the deficiency so prejudiced the defendant that it deprived him of a fair trial or of a dependable verdict. *Id.* at 2064. The first prong does not require perfect assistance by counsel; rather, petitioner must demonstrate that counsel's representation fell beneath an objective standard of reasonableness. *Id.* Judges have been cautioned towards deference in their review of attorney performance under *Strickland* claims in order to "eliminate the potential distorting effect of hindsight." *Rector v. Johnson*, 120 F.3d 551, 563 (5th Cir. 1997) (quoting *Strickland*, 104 S.Ct. at 1065). Accordingly, the court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

The second prong requires the petitioner to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 104 S.Ct. at 2055–56. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 2056. In other words, the petitioner must show prejudice great enough to create a substantial, rather than conceivable, likelihood of a different result. *Pape v. Thaler*, 645 F.3d 281, 288 (5th Cir. 2011) (quoting *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011)).

"Both of [Strickland's] prongs must be proven, and the failure to prove one of them will defeat the claim, making it unnecessary to examine the other prong." *Williams v. Stephens*, 761 F.3d 561, 566–67 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1735, 191 L. Ed. 2d 706 (2015). Therefore we will examine each alleged error to determine whether *Strickland* is satisfied. We will also examine whether the cumulative effect of any prejudice found could satisfy *Strickland*. *E.g.*, *Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009).

a. Surveillance video

The petitioner first alleges that the trial counsel was ineffective because he failed to review a video submitted as evidence by the state, failed to object to to the playing of that video at trial, and failed to object to the state's witnesses not being sequestered while that video was played.

The video in question was surveillance footage from the date of the shooting, taken from a utility pole camera near the scene. Doc. 11, att. 6, pp. 65, 72. It was introduced at trial by state's witness Detective Larry Theriot, whose testimony established the origin of the footage and the chain of custody for the flash drive on which it was contained. *Id.* at 65–76. After the video was played, Register stated that he had had no objection to the video itself but that, after seeing it played, he wished to have it excluded as irrelevant:

> The only thing that you see on the video are some figures moving about. I don't know what connection, if any, it has to this case. Perhaps Mr. Magee is going to connect it later.
>
> But, right now, the only thing that the jury see [*sic*] is just some people running. There's nothing associating, obviously, my client with this particular video. So we would simply ask that it be excluded, based on its relevancy.

Id. at 76–77. The court denied the motion, noting that Register had offered no objection to the video when it was introduced and had now waived his right to object, despite Register's contention that he only meant that he had no objection to the foundation rather than substance. *Id.* at 77–78.

Leaving aside the potential merits of any objection, we note that the petitioner can only satisfy *Strickland*'s second prong if he shows that the video content was prejudicial enough that its introduction at trial, and/or the failure to request or order sequestration of witnesses while it was played, created a reasonable probability of a different outcome in his case. Here the petitioner makes no allegations regarding the content of the video and its impact on the verdict. Furthermore, as discussed *infra*, he has not shown that any state's witnesses were in the courtroom when the video was played. Accordingly, he demonstrates no right to relief under this claim.

b. Perjured testimony

The petitioner next alleges that Register performed deficiently by failing to object to the state's alleged use of perjured testimony during the trial.

Under this claim petitioner fails to specifically allege which witnesses committed perjury, what the substance of the perjury was, or how Register was to have known that the witnesses were lying under oath. We therefore assume that this claim relates to his contention under other claims that the eyewitnesses – Jeremy Walker, Terrance Despanie, and Carlos Hamilton – made false statements in their accounts of the night, and that state's witness Bruce Wainer made false statements in his medical report.

However, the petitioner has not shown which witness, if any, lied. For the eyewitnesses he only shows differences in their recollections and that Walker had recanted earlier statements made to police. Meanwhile, he does not explain his allegation of false statements in Wainer's report. Accordingly, he does not show how Register could have challenged any of their testimony as perjury. Because the petitioner does not show any basis for challenging the testimony, he cannot show deficient performance under *Strickland*'s first prong and is therefore not entitled to federal habeas relief under this claim.

c. Failure to object to withholding of exculpatory evidence

The petitioner next contends that Register performed deficiently by not objecting to the state withholding exculpatory evidence.

The only exculpatory evidence petitioner points to in this petition is under his briefing for a different claim and relates to "Ms. Babin's second statement," which he alleges "[negated] her ability to positively identify the defendant in a line up." Doc. 1, att. 2, pp. 25–26. However, we can find no record that anyone by the name of Babin testified. *See* doc. 11, att. 6, pp. 35–36 (index). The petitioner does not indicate how her identification of the petitioner was introduced at trial, what this "second statement" was, or how it would or should have been known to Register. Therefore he has not alleged sufficient facts for us to analyze this claim under either of *Strickland*'s prongs.

d. Sequestration

The rule of sequestration was not formally invoked until midway through the trial. Doc. 11, att. 7, pp. 13–14. However, as both attorneys stated at that time and as the trial court noted in ruling on the petitioner's application for post-conviction relief, both sides had voluntarily excluded their witnesses from the courtroom up to that point. *Id.*; *see* doc. 11, att. 4, p. 13. The petitioner does not make any showing to contradict these statements, beyond vague and self-serving statements that various unidentified witnesses were allowed in the courtroom while others were testifying. Therefore he cannot show any prejudice in satisfaction of *Strickland*'s second prong.

e. Cumulative error

The petitioner has not made any showing of prejudice under the above claims. Accordingly, the cumulative effect of any deficient performance would still fail to satisfy *Strickland*'s second prong. Thus the petitioner has not shown that the state court's denial of his ineffective assistance

claims was contrary to or involved an unreasonable application of federal law, and shows no right to federal habeas relief under any of his ineffective assistance claims.

4. Malicious Prosecution

The petitioner also claims that he is entitled to federal habeas relief due to *Brady* and *Napue* violations committed by the state, which he contends amounted to prosecutorial misconduct or malicious prosecution.

In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosection." 83 S.Ct. 1194, 1196–97 (1963). In order to prevail on such a claim, the petitioner must show 1) that the evidence at issue was favorable to the accused, either because it was exculpatory or impeaching; 2) that the evidence was either willfully or inadvertently suppressed by the prosecution; and 3) that prejudice ensued. *Medellin v. Dretke*, 371 F.3d 270, 280–81 (5th Cir. 2004) (citing *Banks v. Dretke*, 124 S.Ct. 1256, 1272 (2004)). In *Napue v. Illinois*, the Supreme Court held that a defendant's right to due process is violated when the state knowingly uses false testimony to obtain a conviction. 79 S.Ct. 1173, 1177 (1959). To demonstrate such a violation, the petitioner must show that "1) the testimony was actually false, 2) the state knew it was false and 3) the testimony was material." *Pyles v. Johnson*, 136 F.3d 986, 996 (5th Cir. 1998) (quoting *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996)).

Here the petitioner makes no showing of what evidence, exculpatory or impeaching, was suppressed by the state. He only points to a statement purporting to undermine an identification made by a "Ms. Babin," but, as explained *supra*, does not show how her identification was used against him, what this statement was, or how it would have undermined the strength of her

identification. He alleges that forensic expert Dr. Bruce Wainer made false statements, but again fails to allege what those statements were or to offer any proof of their falsity. Finally, as explained *supra*, he has not shown any falsity—only disagreements in their recollections—in the statements offered at trial by the eyewitnesses.[7] Accordingly, he has not shown that the state court's rejection of this claim was contrary to or based on unreasonable application of federal law. He thus demonstrates no right to federal habeas relief.

IV.
CONCLUSION

Based on the foregoing, **IT IS RECOMMENDED** that the instant application be **DENIED** and **DISMISSED WITH PREJUDICE**.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days from receipt of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge prior to a final ruling.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days following the date of its service shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1429–30 (5th Cir. 1996).

In accordance with Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, this court must issue or deny a certificate of appealability when it enters a

[7] The petitioner contends that Walker "was coming to trial to say he never saw the petitioner shoot the victim, but, before trial started, he was coerced and pressured by [the prosecutor] and the police to say that the petitioner fired the weapon." Doc. 1, att. 2, p. 24. We have reviewed the 41 pages of trial transcript he cites for this statement, and can find no support for the allegation.

final order adverse to the applicant. Unless a Circuit Justice or District Judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. Within fourteen (14) days from service of this Report and Recommendation, the parties may file a memorandum setting forth arguments on whether a certificate of appealability should issue. *See* 28 U.S.C. § 2253(c)(2). A courtesy copy of the memorandum shall be provided to the District Judge at the time of filing.

THUS DONE this 21 November 2016.

KATHLEEN KAY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

JAMAL JAMES CARMOUCHE **D.O.C. # 471370**	:	**DOCKET NO. 15-cv-2760**
VERSUS	:	**JUDGE DOHERTY**
DARREL VANNOY	:	**MAGISTRATE JUDGE KAY**

SUPPLEMENTAL REPORT AND RECOMMENDATION

Before the court is a pro se application for a writ of habeas corpus pursuant to 28 U.S.C § 2254 filed by Jamal James Carmouche ("petitioner"). Doc. 1. The petitioner is a prisoner in the custody of the Louisiana Department of Public Safety and Corrections. He is currently incarcerated at Dixon Correctional Institute in Jackson, Louisiana. Darrel Vannoy ("respondent"), former warden at Dixon Correctional Institute, opposes the application. Doc. 11.

This matter has been referred to the undersigned for review, report, and recommendation in accordance with 28 U.S.C. § 636 and the standing orders of the court. We have already issued a Report and Recommendation [doc. 14] recommending that the petition be denied and dismissed with prejudice. In his objections to that filing, the petitioner clarified that his malicious prosecution claim included an allegation that the prosecution committed a *Brady* violation by failing to disclose surveillance footage to the defense. Doc. 18. The district judge therefore referred the matter to us once more for the issuance of a supplemental report and recommendation to deal with that portion of the petitioner's claim. Doc. 19.

I.
BACKGROUND

The full background and procedural history of this case can be found in our original report and recommendation. *See* doc. 14, pp. 1–3. Relevant to this claim, the petitioner complains about the manner in which the prosecution introduced surveillance footage of him in a homicide trial.

The video in question contained surveillance footage from the date of the shooting, taken from a utility pole camera near the scene. Doc. 11, att. 6, pp. 65, 72. After the video was played, defense counsel stated that he had had no objection to the video itself but that, after seeing it played, he wished to have it excluded as irrelevant:

> But, right now, the only thing that the jury see [*sic*] is just some people running. There's nothing associating, obviously, my client with this particular video. So we would simply ask that it be excluded, based on its relevancy.

Id. at 76–77. The court denied the motion noting that the defense had offered no objection to the video when it was introduced and had now waived his right to object, despite defense counsel's contention that he only meant that he had no objection to the foundation. *Id.* at 77–78.

II.
LEGAL ANALYSIS

In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosection." 83 S.Ct. 1194, 1196–97 (1963). In order to prevail on such a claim, the petitioner must show 1) that the evidence at issue was favorable to the accused, either because it was exculpatory or impeaching; 2) that the evidence was either willfully or inadvertently suppressed by the prosecution; and 3) that prejudice ensued. *Medellin v. Dretke*, 371 F.3d 270, 280–81 (5th Cir. 2004) (citing *Banks v. Dretke*, 124 S.Ct. 1256, 1272 (2004)).

Brady's prejudice factor is tied to the materiality of the suppressed evidence. *Banks v. Thaler*, 583 F.3d 295, 309–10 (5th Cir. 2009) (citing *Banks v. Dretke*, 124 S.Ct. at 1272)). Thus a petitioner will only be entitled to federal habeas relief if he can show that the suppressed evidence was material. Suppressed evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defendant, the result of the proceeding would have been different." *Id.* (quoting *Strickler v. Greene*, 119 S.Ct. 1936, 1948 (1999)). This does not mean that the petitioner must show by a preponderance of the evidence that disclosure of the suppressed evidence would have ultimately led to his acquittal. Rather, he must demonstrate that the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."*Sholes v. Cain*, 370 Fed. App'x 531, 533 (5th Cir. 2010) (unpublished) (quoting *Youngblood v. West Virginia*, 126 S.Ct. 2188, 2190 (2006)). A materiality determination is "a fact-intensive inquiry done on a careful, case-by-case basis." *Id.* (quoting *Banks v. Thaler*, 583 F.3d at 322).

The Fifth Circuit has long held that there can be no *Brady* violation if the defendant received the suppressed evidence in time to put it to effective use at trial. *United States v. Martinez*, 151 F.3d 384, 391 (5th Cir. 1998) (citing *United States v. McKinney*, 758 F.2d 1036, 1049–50 (5th Cir. 1985)). When the prosecution is alleged to have delayed in surrendering *Brady* material, the petitioner must show that he was prejudiced by the tardy disclosure. *McKinney*, 758 F.2d at 1050. Accordingly, here the petitioner must show a reasonable probability that, had the defense received the footage earlier, the outcome of the case would have been different.

The surveillance footage, though apparently of poor quality, was used at the petitioner's trial in the examination of eyewitnesses. *See* doc. 14, pp. 10–12. In his original petition, the petitioner only briefly mentioned the video under the *Brady* claim but did not argue how it fit under

the *Brady* factors. Doc. 1, att. 2, p. 23. However, he did complain about the video's introduction under other claims. Namely, he asserted that the video was insufficiently probative because its quality did not allow one of the witnesses to identify which of the two figures in the footage was him nor could the detective who introduced the footage state whether the figures in the footage were male or female, white or black. *Id.* at 11, 22. He also alleged that his trial counsel was ineffective for failure to object to the video being played before he had reviewed it. *See id.* at 15–16.

In his objections to the original Report and Recommendation the petitioner expands on his belief that the video was suppressed and offers letters from his trial attorney seeking discovery of video evidence in January and September 2011, before the petitioner's January 2012 trial. Doc. 17, att. 1, pp. 3–4. Petitioner, however, continues to fail to clarify how the video falls within *Brady*. He does not explain how the video qualifies as exculpatory or impeaching evidence and, therefore, has not shown that the evidence was *Brady* material. He also makes no showing of what delay occurred before the video was received by the defense.[1]

Assuming *arguendo* that the video did qualify as *Brady* material and that the prosecution did impermissibly delay production, we still cannot find that the petitioner has met his burden. He does not explain how the video footage might have been put to **better** use at his trial but for the alleged delay. He therefore does not show to what extent, if any, the defense was prejudiced. Accordingly, he has not shown error in the state court's ruling or a right to federal *habeas* relief.

[1] Detective Larry Theriot, who introduced the video, testified that there were two dates printed on the envelope containing the flash drive on which the video was stored: September 18, 2010 (the date the footage was taken), and November 11, 2011, reflecting when the envelope had been opened and resealed. Doc. 11, att. 6, pp. 72–73.

III.
CONCLUSION

Based on this and the preceding Report and Recommendation, **IT IS RECOMMENDED** that the instant application be **DENIED** and **DISMISSED WITH PREJUDICE.**

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days from receipt of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge prior to a final ruling.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days following the date of its service shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1429–30 (5th Cir. 1996).

In accordance with Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, this court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Unless a Circuit Justice or District Judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. Within fourteen (14) days from service of this Report and Recommendation, the parties may file a memorandum setting forth arguments on whether a certificate of appealability should issue. *See* 28 U.S.C. § 2253(c)(2). A courtesy copy of the memorandum shall be provided to the District Judge at the time of filing.

THUS DONE this 5th day of April, 2017.

KATHLEEN KAY
UNITED STATES MAGISTRATE JUDGE