No. 18-9571

In the Supreme Court of the United States

Willie Carl Jones, Jr.,
Petitioner

vs.

Daniel Vannoy, Warden, Louisiana State Penitentiary,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION BY THE STATE OF LOUISIANA

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QUESTIONS PRESENTED

The State submits that, after correcting erroneous legal and factual assertions in petitioner's questions, the proper questions presented are these:

1) Whether the petitioner has established a Fourth Amendment violation where the state courts found the search of his car to be reasonable, and if so, is the violation sufficient to overcome both AEDPA's demanding standards and the limitations of Fourth Amendment habeas relief established by *Stone v. Powell*, 428 U.S. 465 (1976)?

2) Whether the petitioner has established a violation of his right to trial by an impartial jury where a state court found that the jury was *not* improperly influenced?

3) Whether petitioner has established that the evidence at trial was insufficient to convict him, in light of AEDPA's twice-deferential standard for such a challenge and where numerous courts have concluded otherwise?

4) Whether petitioner can point to any specific actions by prosecutors that violated Supreme Court precedent, as required by AEDPA, 28 U.S.C. § 2254(d)(1), when prosecutors did not introduce false testimony or improperly interact with any witnesses?

5) Whether petitioner has established that his trial counsel provided ineffective assistance by failing to object to the indictments and to ask for a continuance,

in light of the deference due to trial counsel's strategic decisions under both AEDPA and *Strickland v. Washington*, 466 U.S. 668 (1984)?

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INTRODUCTION

Petitioner Willie Carl Jones was convicted of two counts of second-degree murder in 2010. He was the last person seen alive with both of the two victims, and he had previously engaged in drug activity with both of them. He was placed in the location of both murders by cell phone records, and statements from two witnesses asserted that he had confessed to the crimes. Bullets found in his car were consistent with those used to kill the victims. In spite of the overwhelming circumstantial evidence, petitioner has since sought to overturn his conviction on both direct appeal and in post-conviction proceedings. He has filed scattershot petitions that raise numerous issues, but issues that are fact-specific and resolvable only by looking at the details of petitioner's individual case. Having failed in state courts of all levels, in federal district court, and in the Fifth Circuit on the precise claims advanced here, he now asks this court for relief.

But the questions presented by his petition are, in fact, simple allegations of error by the lower courts in applying established rules of law. Petitioner has failed to present any real constitutional *questions* at all, instead stating vague, high-level constitutional principles and arguing that they were wrongly applied in this case. The questions presented in this petition are not broadly applicable questions of constitutional law. They amount to requests for error correction in Jones's particular case. But the Supreme Court is "not a court of error correction." *Martin v. Blessing*, 134 S. Ct. 402, 405 (2013) (Statement of Alito, J., respecting the denial of certiorari);

see Cavazos v. Smith, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* § 5.12(c)(3), p. 351 (9th ed. 2007)). None of the questions presented demonstrates a split in authority between circuit courts. *See* Supreme Court Rule 10(a), (b). Petitioner does not even examine the detailed facts of any other circuit case in an attempt to show such a conflict. None of the questions raises a novel issue of law that requires decisive settling by this Court. *See* Supreme Court Rule 10(c). Instead, Jones's challenges are very specific to his case, and many of them involve factual issues that are particularly unsuited for Supreme Court review. *See* Supreme Court Rule 10 (allegations of "erroneous factual findings or the misapplication of a properly stated rule of law" generally do not merit review); *see also Vasquez v. United States*, 454 U.S. 975, 977 (1981) (Opinion of Stevens, J., respecting the denial of certiorari) ("It is often appropriate to decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases."); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (per curiam) (when this Court determined that factual issues would control in a case and that "review would be of no importance save to the litigants themselves," the writ of certiorari was dismissed as improvidently granted).

In addition, the lower courts' denials of habeas relief were correct on the merits. The petition mischaracterizes, at various times, the law, the facts of this case, and the proceedings at petitioner's trial in an effort to appear worthy of relief. But petitioner repeatedly ignores and fails to distinguish precedent that forecloses relief on his claims, and he also fails to grapple with the impressive circumstantial evidence

supporting the jury's guilty verdict at his trial. He alleges that prosecutors solicited "false" testimony which, in reality, was not false. And he alleges that the prosecutors "conspired" with witnesses to block testimony when petitioner simply failed to call those witnesses in his defense. Thus, the lower courts got it right on the merits, and this Court need not intervene. Petitioner has already had not one, but several bites at the apple; his case is not worthy of another.

STATEMENT OF THE CASE

I. THE MURDERS AND INVESTIGATION

Mark Lioy, the first victim, was observed getting into a car with petitioner and Amy Foster, a prostitute and petitioner's second victim, on the afternoon of March 20, 2009. *State v. Jones*, 81 So.3d 236, 239 (La. App. 2d Cir. 2011), *writ denied*, 88 So.3d 462 (La. 2012). A surveillance video later showed the three of them leaving a pawn shop in Shreveport around 6:00 pm. *Id.* Later that evening, police were called to investigate a corpse found lying off a gravel road near Lake Bostineau, which was determined to be Lioy. He had been shot 7 times. *Id.* at 239. After identifying Lioy, and hearing from a witness that Lioy was last seen with petitioner and Foster, police searched for the two of them for questioning. *Id.* By this time, is was after 3:00 am. Foster never answered her phone when officials attempted to contact her. Petitioner answered his phone, but upon hearing that the police wanted to talk about a murder, he swore and hung up. *Id.* at 240.

Petitioner eventually met with a group of detectives. *Id.* After being read his *Miranda* rights, petitioner explained that he drove Foster and Lioy to a park for a sexual encounter, returned to town, dropped Lioy off, and then took Foster to perform sexual favors for a group of immigrant men. *Id.* A search of the immigrants' house yielded no sign of Foster, however. *Id.* A search of a motel room jointly rented by petitioner and Foster revealed marijuana, but no evidence connected to any killings. *Id.* Finding nothing conclusive at the time to support holding petitioner, officials released him. *Id.* The next morning, however, a woman was found lying dead on Wyche Street in Bossier City. It was Foster. She had been shot five times and stabbed four times. *Id.* at 241–42.

At this point, officers sought and received a warrant to search the house and lot at 714 Kings Highway, where petitioner lived with his mother. *Id.* at 240–41. They also searched petitioner's car, which was parked on the vacant lot next door at 716 Kings Highway, and they found six bullets in the trunk. *Id.* at 241. A forensic analyst confirmed that these bullets were consistent with those used to kill Lioy and "distinctively similar" to the bullets used to kill Foster. *Id.*

II. THE TRIAL AND DIRECT APPEAL

Petitioner was indicted for first-degree murder, but the indictments were later amended to second-degree murder. *Id.* He moved before trial to suppress the bullets as evidence, but his motion was denied. *Id.* He was tried and convicted in 2010 for the second-degree murders of Mark Lioy and Amy Foster, and he was sentenced to

life imprisonment. To prove second-degree murder, the state was required to establish either that petitioner acted with intent to kill or to inflict great bodily harm, or that the killings occurred in the context of committing another serious crime—here, the armed robbery of Lioy, whose body had been stripped of valuables when it was discovered. *Id.* at 239; *see* La. Rev. Stat. § 14:30.1. Under Louisiana law, "specific intent to kill may be inferred from the act of pointing a gun and firing at a person in close proximity." *State v. Lewis*, 2009-1404 (La. 10/22/10), 48 So. 3d 1073, 1076. And the prosecution argued that both victims' numerous bullet wounds qualified petitioner for conviction of second-degree murder. At trial, two witnesses—Benito Vasquez via recorded testimony and Marcus Lige live in the courtroom—asserted that petitioner had confessed to the murders. *See Jones*, 81 So.3d at 241–42. According to Lige, Jones had said that he "lost his temper" with Lioy, "overreacted," and later dumped the body in a cemetery. *Id.* at 242. According to Vasquez's recorded testimony, Jones said to Vasquez that Lioy and Foster "ain't the only two people he's killed." *Id.* at 241.

Cell phone location records also placed petitioner in the areas where the murders occurred. *Id.* And petitioner was the last person seen alive with both of the victims. *Id.* at 239. He admitted to having been with them on the evening before the murders, allegedly for the purpose of arranging an illicit sexual encounter. *Id.* at 239–40. Another witness, Amber Thorn, stated that a few days before the killings, Jones had said that Lioy owed him money for drugs. *Id.* As countervailing evidence, Jones argued that no murder weapon was found in his possession, none of Lioy's personal

effects were found on him, and no blood from either victim was found on him. *Id.* at 243.

A graphic video of the victims' bodies was shown during the trial, after which several jurors were overheard discussing the video in the women's restroom. One juror revealed that she had told her husband about the video. *Id.* at 242. The judge admonished the jury to not discuss the case with anyone. *Id.* The jury found petitioner guilty on both counts.

Petitioner's convictions and sentence were affirmed on direct appeal. *Id.* at 239. In considering a sufficiency-of-the-evidence challenge, the appellate court said that "[t]he suggestion that somebody else might have intervened in this sordid sequence of events and shot Lioy is simply not sufficiently reasonable to dissuade a reasonable jury from its finding of Jones's guilt." *Id.* at 245. In response to petitioner's appeal of the denial of the motion to suppress, the appellate court held that the officers had acted reasonably given the physical layout and circumstances of 714 Kings Highway and the adjoining vacant lot. *Id.* at 246. The Supreme Court of Louisiana denied certiorari without opinion. *State v. Jones*, 2012-0147 (La. 5/4/12), 88 So.3d 462.

III. POST-CONVICTION PROCEEDINGS

Petitioner sought state post-conviction relief, which was denied. *See State v. Jones*, no. 5:14-cv-02734 (26th Dist. La. 9/17/13) (Exhibit A.A-1 to petitioner's amended federal habeas petition). With regard to petitioner's prosecutorial misconduct claims, the state habeas court found that "nothing in the record indicates

that the accusations made by Petitioner in his application bear any truth." Regarding petitioner's claim that witnesses were deterred from testifying, the court found that the claim "[was] not supported by any factual basis, documentation, or sworn affidavit" and amounted to "an unsupported conclusion." Similarly, the court found that petitioner's ineffective assistance of counsel claims, based on counsel's failure to move for a continuance before trial and on counsel's failure to object to petitioner's indictments, were meritless. The denial of habeas relief was upheld by the Supreme Court of Louisiana without opinion. *See State ex rel. Jones v. State*, 2013-2344 (La. 5/2/14), 138 So.3d 1242; *State ex rel. Jones v. State*, 2014-0310 (La. 10/24/14), 151 So.3d 593.

Petitioner then sought federal habeas relief, alleging that his Fourth, Fifth, Sixth, and Fourteenth Amendment rights had been violated. As relevant here,[1] he alleged that a motion to suppress evidence filed before his trial should not have been denied, that the jury was tainted by discussing the case with outsiders, that insufficient evidence supported his convictions, that prosecutors worked with witnesses to solicit false testimony and deny petitioner due process, and that petitioner received ineffective assistance of counsel. Adopting a magistrate judge's recommendations, the Western District of Louisiana denied relief on all claims. *Jones v. Cain*, No. CV 14-2734, 2017 WL 4324540 (W.D. La. Sept. 28, 2017). The magistrate

[1] Petitioner raised various other claims at the district court level, but he abandoned them at the circuit court level and he does not press them here. *See Jones v. Vannoy,* No. 17-30861 (5th Cir. 2018) (unpublished) (Oldham, J., denying COA request) (citing *Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1993)).

found specifically that (1) the state court's review of the sufficiency of the evidence claims was not unreasonable under *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); (2) petitioner's fourth amendment claim was barred by *Stone v. Powell*, 428 U.S. 465, 494 (1976); (3) it was proper to defer to the trial court's finding that the jury was not improperly affected by conversations; (4) it was proper to defer to the state court's findings that petitioner's prosecutorial misconduct claims lacked any support in the record, and (5) petitioner's ineffective assistance of counsel claims failed under *Strickland v. Washington*, 466 U.S. 668 (1984).

The Fifth Circuit denied petitioner's ensuing motion for a certificate of appealability. That court ruled that petitioner had failed to make "a substantial showing of the denial of a constitutional right." *Jones v. Vannoy*, No. 17-30861 (5th Cir. 2018) (unpublished) (Oldham, J., denying COA request). Jones now petitions this Court to grant a writ of certiorari.

REASONS FOR DENYING THE PETITION

Petitioner identifies no circuit splits with regard to any of his questions presented, and does not discuss the facts of the cases he cites in any detail sufficient to guide an investigation into whether such a split exists. His allegations of error by the lower court involve the application of well-settled principles of law to petitioner's individual case. Granting certiorari would lead to a large investment of this Court's resources in a case where no significant principle of law is at stake.

To the extent this Court considers the merits of petitioner's claims in determining whether to grant review, petitioner is subject to the demanding

requirements of AEDPA. Petitioner cannot qualify for federal habeas relief unless he can show that his state habeas application either "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 "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). To the extent that petitioner's claims turn on issues of fact, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Petitioner cannot satisfy AEDPA's standards on any claim, as will be explained below. Thus, the denial of relief below was correct on the merits, and no corrective action is needed from this Court.

I. PETITIONER'S FOURTH AMENDMENT CLAIM BASED ON THE DENIAL OF HIS MOTION TO SUPPRESS IS MERITLESS, TIED TO THE FACTS OF THIS CASE, AND UNWORTHY OF REVIEW.

First, petitioner argues that evidence introduced at his trial—bullets—should have been suppressed. While investigating the two murders, police obtained a warrant to search the house where petitioner lived with his mother, as well as any vehicles on the premises. At the time of the search, petitioner's car was parked not on the lot described in the search warrant, but on an adjacent vacant lot. Police searched the car and found bullets, which turned out to be consistent with the bullets used to kill Lioy and Foster. Defense counsel moved before trial to suppress the

evidence, but the motion was denied on the grounds that "the layout of the two lots support[ed] the officer's reasonable inference that the [car] was parked on a portion of the property described in the warrant." *See State v. Jones*, 81 So.3d at 246 (upholding this decision on direct appeal). Petitioner argues that the denial of his motion to suppress violated his Fourth Amendment rights, as the scope of the officers' search exceeded the exact terms of the search warrant.

This claim does not merit Supreme Court review, for four reasons. First, the facts underlying the denial of petitioner's motion, such as the precise layout of the two lots and the location of his car on the vacant lot, are case-specific and present no broad question of law applicable to many cases. The reasonableness of the officer's actions must be judged based on not only the language of the search warrant, but also on the "physical layout of the premises and their use." *United States v. Prout*, 526 F.2d 380, 388 (5th Cir. 1976), *cert. denied*, 429 U.S. 840 (1976). Any action by the Supreme Court on this issue would therefore be mere error correction. And to decide this issue, if certiorari is granted, the Court will have to wade into the physical details of the two lots and the exact position of the parked car, which are all details that will not transfer to other Fourth Amendment cases.

Second, petitioner can point to no analogous case from which the Fifth Circuit split by denying relief here. He cites *Maryland v. Garrison* for the unremarkable principle that search warrants must be particularized, and that warrants may not be issued to authorize "general searches." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). But *Garrison* concerned an alleged defect in a search warrant itself, not a police

search that allegedly exceeded the scope of the warrant. He raises no claim that the warrant issued in his case authorized an impermissible "general search." Moreover, the defendant in *Garrison* was ultimately denied relief because "the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment." *Id.* at 88. If any portion of *Garrison* is applicable here, it is that analysis, which undermines petitioner's argument.

Third, this Court has held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 494 (1976).[2] Petitioner's claim is therefore squarely barred by precedent, and the petition for certiorari makes no argument to the contrary. Thus, the denial of federal habeas relief on this claim was correct on the merits; the lower courts applied well-settled law.

Finally, this claim fails on its merits for the reasons stated by the Louisiana appellate court on direct review. As that court found, there was no clear boundary marking the limit of the lot described in the warrant. "The layout of the two lots supports the officers' reasonable inference that the [car] was parked on a portion of the property described in the warrant." *State v. Jones*, 81 So.3d at 246. Petitioner

[2] The court has since limited *Stone* as it applies to claims of ineffective assistance of counsel relating to improper litigation of fourth amendment issues. *See Kimmelman v. Morrison*, 477 U.S. 365, 382–83 (1986). *Stone* remains good law with respect to direct Fourth Amendment habeas claims, however.

does not describe the geography of the two lots in his petitions, and gives no reason to believe that this finding by the state court was incorrect. In the absence of a compelling argument against this finding (for example, a clear boundary line separating the vacant lot from the lot described in the warrant), the lower courts acted appropriately by not disturbing the state courts' decisions. Moreover, a policeman testified at trial that, after his first interrogation, when the police searched petitioner's and Foster's motel room, petitioner also gave consent to a search of his car. *Jones*, 81 So.3d at 240–41. Petitioner does not argue before this Court that he withdrew that consent. This provides an alternative ground for concluding that the lower courts were correct to deny relief. Even if the search was not permissible under the warrant, it was permissible based on consent. Thus, even if the Court wished to address some area of Fourth Amendment law at issue here, this case makes a poor vehicle.

II. PETITIONER'S SIXTH AMENDMENT CLAIM THAT THE JURY WAS TAINTED IS SPECIFIC TO HIS CASE AND BASED ON FACTUAL CLAIMS CONTRARY TO FINDINGS BY THE STATE COURT

Second, petitioner claims that multiple jurors at his trial improperly discussed the case with one another, and that one juror discussed the case with her husband. After a video showing the murder victims in graphic detail had been shown to the jury, one juror reported overhearing other jurors discuss the video in the women's restroom. According to the reporting juror, her fellow jurors were discussing how disturbing they had found the video and how it was keeping them awake at night.

And one juror said she had needed to talk about the video with her husband to work through her emotions. The trial judge, upon hearing this report, admonished the jury and reiterated that they were not allowed to discuss the case, but took no further action. Petitioner argues that the trial judge was constitutionally required to either declare a mistrial or investigate the entire jury to ensure that no extraneous influence had crept in. The judge's failure to conduct such an investigation, says petitioner, violated petitioner's Sixth Amendment right to an impartial jury.

This claim, like the first, does not merit review. First, it is built upon fact-specific assertions, including what exactly the reporting juror overheard the other jurors saying. At best, petitioner is asking for error correction, not for the Court to resolve a split among lower courts. Second, although petitioner has alleged that improper conversations took place, he has not alleged that any of those conversations (either amongst the jurors or between a juror and her husband) influenced the jury on the question of guilt versus innocence. There is nothing in the record about what the husband said to his juror wife; petitioner has not alleged that he attempted to push her toward a guilty verdict. When this alleged juror misconduct was raised as an issue on direct appeal, the state court denied relief on this ground. *State v. Jones*, 81 So.3d at 248 ("Simply put, there is no showing of influence" on the jury.)

Third, the standard of review here is nearly insurmountable, and so petitioner's claim must fail on the merits. On direct review in federal court, "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed

presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954). But on habeas review, whether the jury was improperly influenced is a factual issue, and so federal courts must defer to a state court's findings unless the petitioner puts forward "clear and convincing evidence" to the contrary. *See Oliver v. Quarterman*, 541 F.3d 329, 342 (5th Cir. 2008) (quoting 28 U.S.C. § 2254(e)(1)). "[T]he factual findings arising out of the state courts' post-trial hearings are entitled to a presumption of correctness. The substance of the ex parte communications and their effect on juror impartiality are questions of historical fact entitled to this presumption." *Rushen v. Spain*, 464 U.S. 114, 120 (1983);[3] *see also Young v. Trombley*, 435 F. App'x 499, 505 (6th Cir. 2011) ("The question of whether a trial court has seated a fair and impartial jury is a factual one, involving an assessment of credibility."). Petitioner has not put forward any convincing evidence that these conversations actually affected the jury's determination of guilt. Thus, denial of habeas relief was correct on the merits.

III. PETITIONER'S DUE PROCESS CLAIMS BASED ON A LACK OF SUFFICIENT EVIDENCE ARE SPECIFIC TO HIS CASE, BASED ON AN ERROR OF LAW, AND MERITLESS

Third, petitioner alleges that insufficient evidence supported both of his murder convictions. His petition alleges that the State failed to put forward enough evidence to establish "all the elements of the offense charged." But petitioner does not

[3] Note that *Rushen* was decided before AEDPA became law. If deference was due to state court findings on jury influences then, *a fortiori* the same is true now.

say whether the evidence fails to support a particular element of his convictions or even a particular murder. All petitioner says is that his conviction violated the due process clause. He cites *Fiore v. White* for the proposition that "the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." 531 U.S. 225, 228–29 (2001). Petitioner leans heavily on the fact that much of the evidence against him was circumstantial, claiming that there was "no physical evidence" proving who had killed the victims. Specifically, he points to the lack of a murder weapon and to the fact that no blood from either victim was discovered on him or his possessions. He also states that no DNA evidence was introduced at trial. Finally, he claims that the cell phone evidence introduced at trial supported a later time death for Foster than that alleged by the prosecutor because her phone "pinged" off of a cell tower after the supposed time of her death.

This claim does not merit review. First, as is true for any sufficiency-of-the-evidence claim, it is highly fact-specific. No major principle of law is at stake, and petitioner is asking for error correction. The lower courts applied the correct standard: "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The habeas court's inquiry "does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit." *Herrera v. Collins*, 506 U.S. 390, 402 (1993).

At best, petitioner is alleging a "misapplication of a properly stated rule of law," which is not a compelling argument for Supreme Court review. *See* Supreme Court Rule 10.

Moreover, petitioner has not identified any Supreme Court or circuit case with similar facts in which a sufficiency-of-the-evidence challenge succeeded. There is no conflict of authority that requires resolution by this Court. Petitioner cites only *Jackson* and *Fiore* to establish the legal framework for this issue; he does not allege that those cases involved similar facts or that the cases cannot be distinguished.

Third, petitioner makes an error of law by arguing that "[w]hen a conviction is based on circumstantial evidence . . . [the circumstantial evidence] must exclude every reasonable hypothesis of innocence." That rule was expressly rejected by this Court in the federal habeas context. *See Jackson*, 443 U.S. at 326 ("Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the Court has rejected in the past. We decline to adopt it today." (citation omitted)).

The argument about Foster's cell phone data is even more fact-specific. And petitioner raises no argument for why a cell phone could not have "pinged" a cell tower after the owner of that phone was dead. A cell phone could register on a tower's log because someone else had called the phone, or another person could have picked up the phone and used it. This claim is tied to the facts of the case, not well-developed, and not worthy of review.

Finally, the denial of habeas on this point was correct on the merits. Review of sufficiency-of-the-evidence challenges under AEDPA is "twice-deferential," and the state court's decision to deny relief will not be displaced unless it was "objectively unreasonable." *Parker v. Matthews*, 567 U.S. 37, 43 (2012). Petitioner's statements that his conviction was based upon circumstantial rather than direct evidence do not come close to establishing that the state court was "objectively unreasonable" in denying relief—and he does not grapple with the fact that two witnesses stated that he *confessed*, which is highly significant evidence. Other relevant evidence included cell phone records placing petitioner in the right location to commit both murders, the bullets found in petitioner's car, witness testimony and a surveillance video showing petitioner and both victims leaving a pawn shop together on the evening before the murders, and another witness testifying that petitioner had talked about killing Lioy a few days before the crime. The jury was properly placed to weigh all evidence, circumstantial and otherwise, and it ultimately found that evidence weighty enough to convict. A habeas court, by contrast, is ill-placed to second-guess the jury's decision, and the lower courts here acted appropriately by not doing so.

IV. PETITIONER'S DUE PROCESS CLAIMS BASED ON PROSECUTORIAL MISCONDUCT MISCHARACTERIZE THE TRIAL PROCEEDINGS AND RAISE NO ISSUES WORTHY OF REVIEW BY THIS COURT

a. Amber Thorn's testimony was not false

Fourth, petitioner argues that prosecutorial misconduct violated his right to due process under the Fifth and Fourteenth Amendments on four separate occasions. First, he argues that the state solicited false testimony from witness Amber Thorn—specifically a statement that she had "never had any kind of [criminal] charges." Petitioner alleges that, according to a local Sheriff's Office Offense Report, Thorn was listed as a suspect in the armed robbery of Mark Lioy (one of petitioner's two victims). Because "a conviction obtained through use of false evidence, known to be such by representatives of the State" is forbidden by the Fourteenth Amendment—*see Napue v. Illinois*, 360 U.S. 264, 269 (1959)—petitioner alleges that the state violated his rights by offering such testimony from Thorn. This challenge is very easily rebutted: Thorn did not give false testimony. Asked if she had faced criminal charges, Thorn responded truthfully that she had not. As the magistrate judge below noted, "[b]eing listed in an investigative report is a long way from being arrested or formally charged with a crime." This claim by petitioner fails on the merits. And as with several claims discussed previously, petitioner fails to point to any Supreme Court or circuit case with comparable facts that came out the other way; he does not even allege a circuit split. Thus, even if Thorn had given false testimony, this issue would be mere error correction.

b. Brian Griffith's testimony was not false, and petitioner only raises a fact-specific claim not worthy of review

Next, petitioner alleges that the state put forward false testimony from detective Brian Griffith. Griffith testified that witnesses living near where Foster's

body was found described a white car leaving the area just before 4:00 a.m., around the time that Foster was killed. Petitioner's argument on this point is not perfectly clear. He appears to argue that, according to a Police Incident Report, no one was able to give a description of any white vehicle in that area around 4:00 a.m.; but one witness did mention a brown vehicle, and so Griffith's testimony must have been false. Petitioner does not cite to any specific language from the report to support his claim, nor does he claim that the report represented all possible information about the investigation into Foster's murder.

This claim is once again fact-specific and unique to petitioner's individual case. Petitioner has not drawn parallels to any other circuit case in which an alleged conflict arose between a witness's testimony and a separate report. The one case he does cite, *Napue v. Illinois*, concerned a witness who testified on the stand that he (the witness) had "received no consideration in return for his testimony." *Napue*, 360 U.S. at 265. In fact, the prosecutor had promised the witness consideration. *Id.* The failure to correct this false testimony resulted in reversible error. *Id.* at 272. *Napue* did not involve the witness's testimony being allegedly inconsistent with some other piece of evidence—by definition, witnesses in contested cases often proffer testimony that contradicts other evidence. Instead, a key component of the witness's *motive* for testifying was at issue. In this case, by contrast, petitioner has not alleged any improper motive for Griffith's testimony. Nor has he established the truth of any contradiction between Griffith's testimony and the report. The state habeas court, when considering this claim, stated that "nothing in the record indicates the

accusations made by Petitioner in his application bear any truth." Thus, this claim fails on the merits and is unworthy of review.

c. Petitioner can show no Constitutional violation with regard to witnesses who were not present

Petitioner's next assertion of a due process violation is illogical on its face. Petitioner attacks the state for *not* introducing the testimony of certain witnesses (Lisetta Robinson, Eric Churchwell, Jessica Espanza, and Cassandra Hernandez). He asserts that these witnesses could have given testimony favorable to his defense. Petitioner does not at all explain what Robinson and Hernandez might have said had they been called to testify. He alleges that Espanza would have stated that no DNA evidence connected petitioner to the crime. It is not clear from the record what effect that testimony might have had on the jury, given that the state was not attempting to rely on DNA evidence. He alleges that Churchwell would have testified to hearing gunshots near where Foster's body was found, and seeing a brown car (not a silver car, as driven by petitioner) quickly leaving the area. The alleged time at which Churchwell heard these bullets, however, was between 4:30 and 4:45 a.m., at least half an hour after the Bossier City Police first received a call reporting gunshots in the area. *See Jones*, 81 So.3d at 240 (putting the time "about ten minutes" after a cell phone call that occurred at 3:48 a.m.).

But critically, petitioner can cite to no authority that a prosecutor has a constitutional duty to introduce witnesses that might undermine his own case. Why

petitioner himself did not call these witnesses is left unexplained. He can therefore show no constitutional violation worthy of federal habeas relief. The case petitioner cites to support his argument, *Chambers v. Mississippi*, is easily distinguishable from the present case. In *Chambers*, various witnesses had heard another man—not the defendant—confess multiple times to the crime for which defendant was charged. *See* 410 U.S. 284, 289 (1973). That confessor then recanted his confessions before trial. *Id.* at 288. When defendant attempted to bring in witnesses to testify to the other man's previous confessions, their testimony was blocked as hearsay. *Id.* at 292–93. This was a due process violation because, by blocking this critical testimony, the trial court prevented Chambers from defending himself. *Id.* at 294. Here, there is no assertion that petitioner attempted to call these witnesses and was blocked by the court; he rather alleges that the *state* had a duty to call them. This argument is meritless. Petitioner also fails to allege any conflict between the circuits on this issue or any novel question of law demanding review by this Court. And once again, the hypothetical impact of these witnesses' testimony on the verdict is tied to the totality of the evidence in this specific case. Review of this issue by this Court would amount to error correction at best.

d. Benito Vasquez's testimony was not improperly bolstered.

Petitioner's final alleged due process violation fares no better. Petitioner alleges that the prosecutor at his trial improperly bolstered the testimony of another witness, Benito Vasquez. Vazquez, himself incarcerated for an unrelated crime, gave a recorded statement before petitioner's trial. In that statement he said that

petitioner had confessed to the crime, and he gave several details that a person who had not spoken with the killer would be unlikely to know. However, as the Magistrate Judge explained below, Vasquez refused to repeat this testimony at trial, allegedly because the police did not "do anything" for Vasquez (presumably meaning, anything to reward him for testifying against petitioner). The prosecutor then introduced the recorded testimony at trial. The prosecutor stated in closing that, if Vasquez had *not* actually heard a confession from petitioner, "psychic shops need to hire him or else they'll be out of business, because he's the best dang psychic I know, because he knew it all" in his recorded testimony. Petitioner argues in his petition that this statement amounted to the prosecutor telling the jury that he believed the witness to be credible, in violation of *United States v. Young*, 470 U.S. 1, 17 (1985) (explaining that the prosecutor should not have given his own "personal impression" about the witness's credibility and the weight of the evidence).[4]

This claim does not merit review for multiple reasons. First, witness-bolstering claims can be decided only by looking at the actual words used by the prosecutor; thus, they are fact-specific and demand individual inquiries. Petitioner is once again asking for error correction on a settled principle of law, which is not the function of this Court. *Martin*, 134 S. Ct. at 405 (Statement of Alito, J.). He is not asking for this Court to articulate any novel principle of law or to expand on existing precedent.

[4] Note that the defendant in *Young* did not receive relief in spite of this finding of error. The issue was reviewed for plain error at the circuit level, and the Supreme Court was not "persuaded that the challenged argument seriously affected the fairness of the trial." *Young*, 470 U.S. at 20.

Second, this claim was waived. Petitioner in his federal habeas petition to the district court argued that the prosecutor presented false testimony by introducing the recorded testimony, which is not the argument he raises here. The original habeas petition did not make a clear bolstering argument. Petitioner mentioned in passing that the prosecutor "made indications/comments" that the recorded statement was true. Petitioner did not allege that the prosecutor asserted a personal belief in Vasquez's credibility as a witness. Although pro se filings are construed liberally, pro se litigants still must raise issues to avoid waiving them. *See, e.g.*, *McGhee v. Watson*, 900 F.3d 849, 853 (7th Cir. 2018) (even with the benefit of liberal construction, pro se arguments were still held waived when not presented to the district court); *Zimmermann v. United States Nat'l Labor Relations Bd.*, 749 F. App'x 148, 150 (3d Cir. 2019) (citing *Emerson v. Thiel Coll.*, 296 F.3d 184, 190 n.5 (3rd Cir. 2002)) ("[A]lthough we construe pro se filings liberally, this policy has not prevented us from applying the waiver doctrine to pro se appeals."). Habeas arguments not raised at the district court level are considered waived on appeal. *See Harmon v. Sharp*, No. 16-6360, ___ F.3d ___, 2019 WL 4071870, at *32 n.2 (10th Cir. Aug. 29, 2019) (Holmes, J. concurring) (collecting circuit court cases) ("[o]ther circuits largely appear to agree that a petitioner waives arguments that he or she has failed to advance before the district court in a § 2254 petition"; also acknowledging some confusion in terminology between waiver and forfeiture within circuit precedent).

Finally, denial of habeas relief below was correct on the merits. The prosecutor was not claiming that everything that Vasquez said was true. He did not assert that

he perceived Vasquez to be truthful. He said that the details of the crime provided by Vasquez—which Vasquez said had come from petitioner—matched up with the actual evidence discovered by investigators. Pointing out that a witness's statement is consistent with other evidence is far different from baldly asserting that one believes the witness. The prosecutor "neither gave explicit personal assurances that his witnesses were trustworthy, nor indicated that information not presented to the jury supported his witnesses' testimony." *See United States v. Lewis*, 10 F.3d 1086, 1089 (4th Cir. 1993). The issue at trial was not whether Vasquez had been truthful, but rather whether Vasquez had revealed enough details about the crime that it was reasonable to infer that he had received those details from the killer. This defeats petitioner's bolstering claim on the merits.

V. PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RAISE NO NOVEL ISSUES OF LAW, ARE FACT-SPECIFIC, AND FAIL ON THE MERITS UNDER *STRICKLAND V. WASHINGTON*.

Fifth and last, petitioner alleges ineffective assistance of counsel in violation of the Sixth Amendment. He brings two arguments. First, he argues that his indictments for second-degree murder were never presented to a grand jury, making them invalid. Counsel's failure to object to the indictments was therefore ineffective assistance, argues petitioner. But this argument fails at the first step. The grand jury requirement is binding in federal trials, but not in state trials. *See Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (citing *Hurtado v. California*, 110 U.S. 516

(1884)). So petitioner fails to show any constitutional violation here to which his lawyer would have been obligated to object.[5]

Second, petitioner argues that his counsel was ineffective by failing to move for a continuance after a lengthy police report was released giving details about investigation of Foster's murder. Petitioner baldly asserts that counsel's decision not to interview certain witnesses mentioned in that report was unreasonable. Once again, this allegation is highly fact-specific and tied to the details of petitioner's case and the police report. Petitioner is not asking this Court to clarify an important principle of Sixth Amendment law; he is asking for correction of an application of settled law. Petitioner does not draw analogies to any other case involving a failure to request a continuance, and so he has not shown a conflict between the decision below and any other court decision.

In addition, petitioner's statements do not meet the high bar required for ineffective assistance claims under *Strickland v. Washington*, 466 U.S. 668 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. Petitioner has failed to make such a showing. It is almost always true that more investigation could

[5] Below, petitioner also appears to have argued that Louisiana state law requires indictment by a grand jury in criminal cases. This argument was abandoned in petitioner's petition here. And in any event, this Court "ha[s] stated many times that federal habeas corpus relief does not lie for errors of state law." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (quoting *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)).

yield more facts relevant to the case, but petitioner has not shown that his counsel acted unreasonably. The trial date had been set months earlier, allowing ample time for investigation of witnesses; a continuance was not necessary for counsel to prepare adequately for the case.

As the state habeas court found, "[p]etitioner has failed to show that the performance of his counsel was not reasonably effective considering all the circumstances."[6] And petitioner has likewise failed to show that a continuance, allowing for marginally more investigation, would have had a reasonable likelihood of changing the verdict. Such a showing of prejudice is required for an ineffective assistance claim. *See Strickland*, 466 U.S. at 696 ("[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."). Out of the numerous pieces of circumstantial evidence suggesting petitioner's guilt, the witnesses mentioned in the report would only have been positioned to address one relevant detail: the color of a car they saw leaving the area in which Foster's body was found on the night of her death. It is not alleged that any witness could have personally identified another killer. Testimony that a witness saw a car in the area which did not match petitioner's car—which appears to be the best testimony that petitioner could hope for—would not have been reasonably likely to clear petitioner

[6] Note that this language underscores another reason to deny review on this claim: To properly judge whether counsel's strategy was reasonable, this court would have to wade into the totality of facts of this case, and the resulting decision would be either affirmance or error correction, not an announcement of a new principle of law.

in light of the other evidence against him. Two witnesses testified that he confessed to the murders. Petitioner's claim is meritless.

CONCLUSION

Petitioner has raised no issues worthy of review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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