IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 24, 2020
Lyle W. Cayce
Clerk

No. 18-31166

MARCUS VERNELL COLEMAN,

Petitioner–Appellant,

versus

DARREL VANNOY, Warden, Louisiana State Penitentiary,

Respondent–Appellee.

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

Before SMITH, HIGGINSON, and ENGELHARDT, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

A Louisiana jury convicted Marcus Coleman of armed robbery with a firearm. Coleman thinks that his trial lawyer rendered ineffective assistance in failing to object to testimony that supposedly violated the Confrontation Clause. He seeks a writ of habeas corpus on that basis. The state courts denied relief, and the district court did too. Because the state adjudication was reasonable, we affirm.

APPENDIX "D"

I.

A.

The victim, Jill Dozart, testified to the events as follows: While driving to a restaurant, she stopped at a drive-through ATM, where she noticed a gray Saturn in front of her whose passengers were "messing with the machine." Dozart withdrew cash, continued to the restaurant, parked, and started walking toward it. She heard someone, approaching quickly from behind, who grabbed her, at which point she "[f]reaked" and started screaming and kicking, hoping someone in the restaurant might hear.

The assailant—a man—displayed a gun and threatened to shoot if she did not quiet down. He ordered her to walk away from the restaurant along an adjacent street. The assailant followed, continuing to struggle with her as he tried to dig through her purse.

Finally, a car drove up and stopped next to them. It appeared to be a gray Saturn. The car's occupants yelled at the assailant to get inside and leave. Dozart started resisting again. The assailant wrested away Dozart's purse—which included her cell phone—and jumped into the car, which drove off.

Dozart memorized the license plate as the car sped away. She ran back to the restaurant and found her friends, who called the police. Dozart described the robber as a black male, about 5'7", with longer hair. She gave police the number for her pilfered phone.

Shortly after the robbery, while at home with her husband, Dozart saw a picture on television of the person who looked like her assailant. She told her husband that the man was the robber. The news program stated that the man was a suspect in the robbery. At trial, the husband identified Coleman, sitting in the courtroom, as the person whose image had been displayed.

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At trial, Dozart also identified Coleman as the robber. She stated that, at the time of the robbery, Coleman's hair had been longer and arrayed in "little pieces." She also recalled that Coleman's hair had appeared longer in the picture on television than it was on the day of trial.

B.

Dozart's testimony was not the only evidence that linked Coleman to the crime. The detective who investigated—David Rupf—testified about his probe, and, in so doing, summarized statements that another suspect, Hillary Bonita, had made to him, some of which inculpated Coleman as the robber. The defense lawyer's failure to object to those statements is the basis for this appeal.

After Rupf learned that Dozart's phone had been stolen, Rupf called it. After multiple tries, Hillary picked up. Rupf eventually met with Hillary, who stated that she had purchased the phone from Coleman, describing him as a "black male, light build, with long bushy hair." A confidential informant verified that Rupf would "know" Coleman "by his hair." Officers confirmed that the phone was the one stolen from Dozart. Later, Hillary agreed to provide a statement to police and to view a photographic lineup, in which she correctly identified Coleman.

In her statement—as Rupf summarized it—Hillary admitted that she had been present with Coleman the night of the robbery. She said that she, Coleman, and another man had gone to Lake Charles in a gray-colored car. They drove around until they saw "a white female" in the restaurant parking lot. Coleman told the other man to stop the car and let him out. After Coleman exited, the man drove the car around the block.

As the car returned, Hillary saw Coleman pulling Dozart to the road as Dozart fought for her purse or for something. Hillary yelled at Coleman to get

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into the car, but Coleman continued to struggle with Dozart. Eventually, Coleman secured Dozart's purse and jumped into the car.

Rupf also testified that records showed that after the robbery, Dozart's stolen phone had been used to call a residence affiliated with Coleman. And Rupf's investigation independently confirmed that Coleman had been in a silver Saturn that night.

C.

The jury convicted Coleman of armed robbery with a firearm. The conviction was affirmed, *State v. Coleman*, No. 10-301, 2010 WL 3903831 (La. App. 3d Cir. Oct. 6, 2010), and the Louisiana Supreme Court denied review.

Coleman applied for state post-conviction relief. Among other claims, he asserted that his lawyer's failure to challenge Rupf's testimony about Hillary's out-of-court, inculpatory statements amounted to ineffective assistance of counsel ("IAC"), because the testimony violated the Confrontation Clause of the Sixth Amendment and was supposedly central to the state's case.

The trial court denied relief. The court of appeal, over a dissent, vacated and remanded for a new trial. The Louisiana Supreme Court reversed, reinstating the denial. The court held that, even if counsel was deficient, Coleman had not established prejudice.

Coleman petitioned for federal habeas. The district court, accepting the magistrate judge's recommendation, denied and dismissed with prejudice. This court granted a certificate of appealability limited to whether the lawyer was ineffective in failing to object to Rupf's testimony that summarized the inculpatory statements.

II.

In addressing a denial of habeas relief, we review the district court's

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factual findings for clear error and legal issues *de novo*. *United States v. Gonzalez*, 943 F.3d 979, 982 (5th Cir. 2019), *petition for cert. filed* (U.S. Feb. 28, 2020) (No. 19-7825).

A.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), Coleman "must show that counsel's performance was [1] objectively unreasonable and [2] prejudiced him." *Howard v. Davis*, 959 F.3d 168, 171 (5th Cir. 2020). We "strongly presume that the performance was good enough." *Id.*

To prove prejudice, "[i]t is not enough . . . that the errors ha[ve] some conceivable effect on the outcome of the proceeding." *Washington*, 466 U.S. at 693. Instead, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Andrus v. Texas*, No. 18-9674, 2020 U.S. LEXIS 3250, at *24 n.5 (U.S. June 15, 2020) (per curiam). "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Harrington v. Richter*, 562 U.S. 86, 104 (2011), for which "[t]he likelihood of a different result must be substantial," *Dorsey v. Stephens*, 720 F.3d 309, 321 (5th Cir. 2013).

B.

"Surmounting [*Washington*'s] high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). That is "doubly" true when AEDPA deference applies. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *see* 28 U.S.C. § 2254(d). We cannot grant relief unless, among other things, the state adjudication "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." 28 U.S.C. § 2254(d)(1).

For us to grant relief, "[t]he state court decision must be so lacking in

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justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (per curiam) (quotation marks removed). And "because the [*Washington*] standard . . . is a general [one], a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Richards v. Quarterman*, 566 F.3d 553, 561 (5th Cir. 2009).

C.

We assume, without deciding, that a competent lawyer would have objected to Rupf's testimony about Hillary's out-of-court statements on the basis of confrontation.[1] "The pivotal question is" thus "whether the state court's application of" *Washington*'s prejudice prong "was unreasonable." *Richter*, 562 U.S. at 101. It was not.

There was other persuasive evidence linking Coleman to the robbery.

- After Dozart's phone was stolen, it was used to call a residence associated with Coleman.
- At trial, Dozart recounted in detail the attack, her assailant, and his appearance, and identified Coleman, sitting in the courtroom, as the perpetrator.
- Dozart's husband testified that when Coleman's picture appeared on TV, Dozart had immediately recognized Coleman as the robber.
- The husband identified Coleman in court as the person whose

[1] *See Skinner v. Quarterman*, 576 F.3d 214, 217 (5th Cir. 2009) ("If the petitioner fails to prove the prejudice component, the court need not address the question of counsel's performance."); *United States v. Wines*, 691 F.3d 599, 604 (5th Cir. 2012) (assuming without deciding that performance prong was met and affirming based on lack of prejudice).

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picture had been shown on the television.

- Rupf's investigation revealed that, consistent with Dozart's memory, Coleman and his associates had been in a silver Saturn the night of the robbery.

That evidence easily proves that the state court's conclusion—no prejudice—was at least a reasonable one.[2]

Coleman points to cases that have found certain Confrontation Clause errors to be non-harmless because of a lack of evidence otherwise supporting the prosecution's case. *See, e.g., United States v. Kizzee*, 877 F.3d 650, 662–63 (5th Cir. 2017). But the harmless-error doctrine differs in important ways from IAC prejudice. In the former, it is the state's burden to prove harmlessness beyond a reasonable doubt[3]; in the latter, it is the defendant's burden to prove a reasonable probability that the result would have been different.[4]

Moreover, unlike confrontation errors, IAC claims "by their nature require a showing of prejudice with respect to the trial as a whole." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). Confrontation has no *inherent* trial-

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[2] *See, e.g., Paredes v. Quarterman*, 574 F.3d 281, 287–88 (5th Cir. 2009) (per curiam) (holding that, even assuming that lawyer ineffectively failed to object to testimony barred by the Confrontation Clause, the defendant did not prove prejudice, because there was plenty of other evidence that linked the defendant to the crime); *Carson v. Collins*, 993 F.2d 461, 466 (5th Cir. 1993) (holding that there was no prejudice to the defendant from the lawyer's failure to object to certain evidence).

[3] *United States v. Alvarado-Valdez*, 521 F.3d 337, 341 (5th Cir. 2008).

[4] *See Washington*, 466 U.S. at 694; *see also* Daniel J. Capra & Joseph Tartakovsky, *Why* Strickland *Is the Wrong Test for Violations of the Right to Testify*, 70 WASH. & LEE L. REV. 95, 141–42 (2013) (articulating several major differences between harmless-error analysis and IAC prejudice); Richard L. Gabriel, Comment, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1278 (1986) (criticizing *Washington* on the ground that "placing the burden of proving prejudice on the defendant . . . effectively shifts the burden of proving harmless error from the state to the defendant").

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outcome prejudice component.[5] Instead, a court asks whether a confrontation error was innocuous only after finding an error. *See Van Arsdall*, 475 U.S. at 681–82; *United States v. Jones*, 930 F.3d 366, 379 (5th Cir. 2019).

That is not to say that harmless-error precedents are categorically irrelevant. For the same facts that pertain to harmless error often also relate to *Washington* prejudice.[6] After all, defined at a high level of generality, both doctrines ask the same question: Did the mistakes affect the outcome?[7]

In any event, in the cases that Coleman cites, "the defendant's involvement was hotly contested, and the prosecution depended on out-of-court testimony to identify the defendant as a participant in the crime."[8] Here, however, there was plenty of other evidence linking Coleman to the offense, as detailed above.[9]

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[5] *See Van Arsdall*, 475 U.S. at 680 (contrasting IAC with confrontation on the ground that IAC has an inherent prejudice inquiry); *see also id.* ("It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to confrontation because use of that right would not have affected the jury's verdict." (cleaned up)).

[6] *See Dorsey*, 720 F.3d at 321 ("[T]he [state court] could have reasonably concluded that any Confrontation Clause violation was not harmful error for the same reasons that the federal district court concluded that any such error did not result in prejudice."); *Paredes*, 574 F.3d at 288 n.6.

[7] *See* Capra & Tartakovsky, *supra*, at 141; *Alvarado-Valdez*, 521 F.3d at 341 (harmless error); *Washington*, 466 U.S. at 694 (IAC prejudice).

[8] *United States v. Sarli*, 913 F.3d 491, 496–97 (5th Cir.), *cert. denied*, 139 S. Ct. 1584 (2019); *see Kizzee*, 877 F.3d at 662–63; *United States v. Duron-Caldera*, 737 F.3d 988, 996–97 (5th Cir. 2013); *United States v. Jackson*, 636 F.3d 687, 697 (5th Cir. 2011); *United States v. Rodriguez-Martinez*, 480 F.3d 303, 308 (5th Cir. 2007) (per curiam); *Favre v. Henderson*, 464 F.2d 359, 365–66 (5th Cir. 1972).

[9] *See Westley v. Johnson*, 83 F.3d 714, 722–23 (5th Cir. 1996) (concluding that failure to object to certain evidence did not prejudice the defendant, given other evidence of guilt); *cf. Lyons v. McCotter*, 770 F.2d 529, 532 n.5 (5th Cir. 1985) (noting that there was prejudice only because the state had little evidence outside that which the lawyer should have objected to—the state had "offered no corroborati[on]," and two witnesses had testified that the defendant had been elsewhere at the time of the robbery).

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Coleman's best case is *Mason v. Scully*, 16 F.3d 38, 45 (2d Cir. 1994), in which the defendant was prejudiced by his lawyer's failure to object to testimony that violated confrontation. But there, unlike here, it "was hotly contested"[10] whether the eyewitnesses to the offense had correctly identified the defendant as the perpetrator. *Id.* And the eyewitnesses did not "specify any distinguishing characteristic that would have permitted them to identify" the defendant. *Id.*

Dozart, by contrast, identified Coleman unequivocally both on the television program and during trial, noting his long hair as a distinguishing feature. But the defense failed to cast doubt on those identifications. Defense counsel asked Dozart only a few questions, on cross-examination, about her identifications, at the conclusion of which Dozart implored, "when somebody has you and you think you are fixing to die and your life is in their hands, you know. You don't forget." And, in any event, unlike the evidence in *Mason*, *id.*, there was plenty of other persuasive evidence implicating Coleman, such as the call from Dozart's stolen phone to a residence associated with Coleman.

Coleman suggests that it is problematic that in targeting him as a suspect, the police relied on Hillary's statements. He complains that, had Hillary never divulged, he might not have been arrested, let alone tried and convicted. But the Confrontation Clause certainly does not bar the police from using out-of-court accusations to investigate a suspect.[11] So any objection on such a theory would have been spurious.

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[10] *Sarli*, 913 F.3d at 496.

[11] *See Barber v. Page*, 390 U.S. 719, 725 (1968) ("[C]onfrontation is basically a trial right."); *United States v. Morgan*, 505 F.3d 332, 338–39 (5th Cir. 2007) (per curiam).

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III.

Coleman complains that the district court should have held an evidentiary hearing. Because Coleman is *pro se*, we will consider that argument, even though he first raises it in his reply brief.[12] "A district court may refuse an evidentiary hearing where there is not a factual dispute which, if resolved in the prisoner's favor, would entitle him to relief. Because that is the situation here, the court did not abuse its discretion[.]" *Norman v. Stephens*, 817 F.3d 226, 235 (5th Cir. 2016) (cleaned up).

* * * * *

Because "the state court's application of the [*Washington*] standard was [ ]reasonable," *Richter*, 562 U.S. at 101, the denial of habeas relief and the denial of an evidentiary hearing are AFFIRMED.

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[12] *See, e.g.*, *United States v. Reece*, 938 F.3d 630, 633 n.2 (5th Cir. 2019). Coleman includes other arguments in his reply brief that we cannot consider because they are outside the scope of the certificate of appealability. *See, e.g.*, *Simmons v. Epps*, 654 F.3d 526, 535 (5th Cir. 2011) (per curiam). These include Coleman's objections as to his lawyer's research into the evidentiary basis for Dozart's television identification, the strength of Dozart's memory of Coleman's appearance based on the police report, and Hillary's alleged lies about one "Chris Williams."

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

MARCUS VERNELL COLEMAN #322817	**CASE NO. 2:18-CV-00563 SEC P**
VERSUS	**JUDGE ROBERT R. SUMMERHAYS**
DARRYL VANNOY ET AL	**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, determining that the findings are correct under the applicable law, and considering the objection to the Report and Recommendation in the record;

IT IS ORDERED that the petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254 is **DENIED** and **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that a certificate of appealability is hereby **DENIED**, as Petitioner has failed to make a substantial showing of the denial of a constitutional right.

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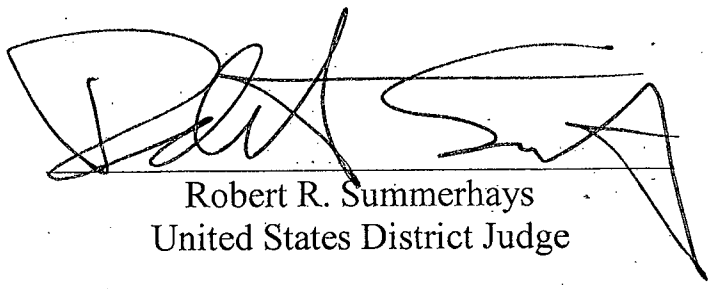
THUS DONE in Chambers on this 9th day of October, 2018.



Robert R. Summerhays
United States District Judge

APPENDIX "C"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

MARCUS VERNELL COLEMAN **D.O.C. # 322817**	:	**DOCKET NO. 2:18-cv-0563** **SECTION P**
VERSUS	:	**UNASSIGNED DISTRICT JUDGE**
DARRYL VANNOY, ET AL.	:	**MAGISTRATE JUDGE KAY**

REPORT AND RECOMMENDATION

Before the court is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Marcus Vernell Coleman, who is proceeding pro se in this matter. Coleman is an inmate in the custody of the Louisiana Department of Public Safety and Corrections and is currently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. Darryl Vannoy, warden of that facility, opposes the petition. Doc. 13. Coleman has also filed a reply. Doc. 16.

This petition 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 petition for writ of habeas corpus be **DENIED** and **DISMISSED WITH PREJUDICE**.

I.
BACKGROUND

A. Conviction

Coleman was charged by bill of information in the Fourteenth Judicial District, Calcasieu Parish, Louisiana, with one count of armed robbery, later amended to one count of armed robbery with a firearm, a violation of Louisiana Revised Statute §§ 14:64 & 14:64.3. Doc. 13, att. 1, p. 41.

The charge related to an allegation that Coleman had taken victim Jill Dozart's purse at gunpoint after accosting her while she was walking toward a restaurant. *State v. Coleman*, 2010 WL 3903831, at *1–*2 (La. Ct. App. 3d Cir. 2010). Coleman proceeded to trial by jury and was convicted as charged on April 3, 2007. Doc. 13, att. 1, pp. 195–97. He was then billed as a habitual offender.[1] On October 17, 2007, a habitual offender hearing was held. There Coleman admitted to being a fourth felony offender and was sentenced to a mandatory minimum prison term of 99 years, without benefit of probation or suspension of sentence. Doc. 13, att. 2, pp. 207–19.

B. Direct Appeal

Coleman sought review in the Louisiana Third Circuit Court of Appeal, raising the following assignments of error:

1. There was insufficient evidence to support the convictions.
2. The use of hearsay testimony at his trial violated Coleman's rights under the Confrontation Clause.

Coleman, 2010 WL 3903831, at *1–*4. The court reviewed both of these claims, as well as an error patent relating to the trial court's failure to specify that the sentence be served without benefit of parole. *Id.* It determined that there was no merit to the sufficiency of evidence claim, that the hearsay claim could not be addressed because it was not objected to at trial, and that the error patent, although rendering the sentence illegally lenient, did not warrant relief because it had not been raised as error. *Id.* Coleman sought writs in the Louisiana Supreme Court, which denied same on March 4, 2011. *State v. Coleman*, 58 So.3d 474 (La. 2011). He did not file a petition for writ of certiorari in the United States Supreme Court. Doc. 1, p. 3.

[1] The habitual offender bill is not contained in the state court record available at the given docket number. Doc. 17, p. 8 n. 1.

C. State Collateral Review

Coleman filed a pro se application for post-conviction relief in the trial court on February 13, 2012.[2] *See* doc. 13, att. 4, pp. 162–85 (memorandum in support of application). There he claimed ineffective assistance of counsel, based on trial counsel's failure to object to statements violating his rights under the Confrontation Clause and failure to use a police report to impeach a witness. *Id.* He filed a supplement to the application on May 28, 2013, claiming that his right to due process was violated when (1) the state knowingly presented false testimony (*Napue* violation) and (2) he was convicted based on an unconstitutional statute/improper jury instructions. *Id.* at 70–84. The trial court denied the application on June 20, 2014, concluding that Coleman had already raised these issues on appeal and noting that the court had denied an application for post-conviction relief in November of 2008 while the petitioner's appeal was pending. *Id.* at 105. Coleman sought review in the Third Circuit which granted the writ on November 5, 2014, and remanded the case for a ruling on the merits of Coleman's claims. *Id.* at 112.

The trial court ruled on April 13, 2016, noting that a hearing was scheduled for the following month but that the court no longer deemed it necessary. Doc. 13, att. 5, pp. 93–94. It then determined that Coleman failed to show a basis for relief under any of his claims. *Id.* Coleman sought review in the Third Circuit, which granted the writ and determined that the trial court had erred and that Coleman had shown that he had received ineffective assistance on his failure to object to Confrontation Clause violation claim. *Id.* at 184. Accordingly, it set aside Coleman's conviction and sentence and remanded the matter for a new trial. *Id.* It made no statement regarding the other claims. *Id.* The state sought review with the Louisiana Supreme Court, which reversed the Third Circuit's ruling on April 16, 2018, because it determined that Coleman could not

[2] For pro se filings by an inmate, this court uses the date that the pleading was surrendered for mailing, if available, as the date of filing. If that date is not provided, we look to the date that the pleading was received by the court.

demonstrate adequate prejudice from counsel's performance. *State v. Coleman*, 241 So.3d 297 (La. 2018). Accordingly, it reinstated the petitioner's conviction and the trial court's ruling on his application for post-conviction relief. *Id.*

D. Federal Habeas Petition

Coleman filed the instant petition in this court on April 22, 2018. Doc. 1; *see id.* at 15 (providing date of mailing). Here he raises the following claims:

1. Ineffective assistance based on counsel's failure to object to statements introduced in violation of Coleman's rights under the Confrontation Clause.
2. Evidence was insufficient to sustain the verdict.
3. His rights under the Confrontation Clause were violated.
4. Counsel was ineffective for failing to impeach a witness.
5. The state knowingly presented false evidence.
6. The statute creating the offense is unconstitutional.

Doc. 1, att. 2.[3]

II.
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. *Id.* The

[3] Coleman phrases these claims differently in his petition and appears to assert different grounds for relief there. Doc. 1. The allegations cursorily asserted there, however, have not been briefed. As this court has held, "[s]imply listing a habeas claim and not briefing it is an abandonment or waiver of that claim." *Williams v. Warden, Louisiana State Penitentiary*, 2013 WL 3894003, at *3 (W.D. La. Jul. 26, 2013). Furthermore, some of the allegations made in the complaint do not appear to relate to the claims exhausted by Coleman in the state courts. Accordingly, we look to the claims as raised and characterized in the memorandum to determine the grounds on which Coleman seeks relief in this court.

time during which a properly-filed application for post-conviction relief is pending in state court is not counted toward the one-year limit. *Id.* at § 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. *Rhines v. Weber*, 125 S.Ct. 1528 (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. Exhaustion and Procedural Default

Exhaustion and procedural default are both affirmative defenses that may be considered waived if not asserted in the respondent's responsive pleadings. *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 assertions 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 that a petitioner seeking federal habeas corpus relief exhaust all available state court remedies before 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. *Wilson v. Foti*, 832 F.2d 891, 893–94 (5th Cir. 1987). The exhaustion requirement 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, based on the same general legal theories and factual allegations that he raises in his § 2254 petition.

2. Procedural Default

When a petitioner's claim is dismissed by the state court based on state law grounds, and those grounds are independent of the federal question and adequate to support the judgment, he may not raise that claim in a federal habeas proceeding absent a showing of cause and prejudice or that review is necessary "to correct a fundamental miscarriage of justice." *Coleman v.*

Thompson, 111 S.Ct. 2546, 2553–54, 2564 (1991) (internal quotations omitted). 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) 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). This is not a jurisdictional matter, but instead a doctrine "grounded in concerns of comity and federalism." *Trest v. Cain*, 118 S.Ct. 478, 480 (1997). 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). 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).

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). *E.g.*, *Corwin v. Johnson*, 150 F.3d 467, 471 (5th Cir. 1998). That statute provides that a writ of habeas corpus shall not be granted unless the state court's adjudication resulted in a decision that was (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). Where a habeas court is faced with an unexplained decision on the merits, it "looks through" that decision to the last related state court decision that provides a relevant rationale and

presumes that the unexplained decision adopts the same reasoning. The respondent may rebut the presumption by showing that the unexplained decision most likely relied on different grounds than the reasoned decision below. *Wilson v. Sellers*, 138 S.Ct. 1188 (2018). Our review, however, ultimately encompasses "only a state court's decision, and not the written opinion explaining that decision." *Maldonado v. Thaler*, 625 F.3d 229, 239 (5th Cir. 2010) (internal quotations omitted); *see also Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) ("The statute compels federal courts to review for reasonableness the state court's ultimate decision, not every jot of its reasoning.") Even if the state court issues a summary denial of the claim, "the habeas petitioner's burden still must be met be showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 131 S.Ct. 770, 784 (2011).

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. The petitioner must demonstrate that the state court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 131 S.Ct. at 786–87. A decision is only 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 precedent and arrives at a [contrary result]." *Bell v. Cone*, 125 S.Ct. 847, 851 (2005) (quotations and citations omitted). As the Court recently emphasized, "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.' . . . Nor, of course, do state-court decisions, treatises, or law review articles." *Kernan v. Cuero*, 138 S.Ct. 4, 9 (2017) (internal citation 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 only to questions of fact. It is insufficient for a petitioner to show that the state court erred in its factual determination. Instead, he must demonstrate that the factual determination was objectively unreasonable, a "substantially higher threshold." *Schriro v. Landrigan*, 127 S.Ct. 1933, 1939 (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). Instead, a presumption of correctness attaches to the state court's factual determinations and the petitioner must rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

III.
LEGAL ANALYSIS

A. Timeliness

Coleman's conviction became final on June 2, 2011, when his 90-day window for seeking review in the United States Supreme Court expired. S. Ct. R. 13. Accordingly, **256 days** accrued against § 2244(d)'s one year limitations period before he filed his application for post-conviction relief in the trial court on February 13, 2012. The limitations period was then tolled until the Louisiana Supreme Court's decision on April 16, 2018, and an additional **six days** accrued against the one year limit before Coleman filed his federal habeas petition on April 22, 2018. Therefore only **262 days** have accrued against the one-year limit and the matter is timely.

B. Exhaustion and Procedural Default

The respondent asserts that all claims with the exception of the first one "were either never presented to the Louisiana Supreme Court and therefore are not exhausted, and/or the claims are procedurally barred . . . ." Doc. 17, p. 16. We disagree with respect to the sufficiency of evidence

claim, noting that it was clearly exhausted on the merits as described above, but consider grounds for lack of exhaustion/procedural default of claims three through six below.

Claim 3, the Confrontation Clause violation raised in the direct appeal, was denied by the Third Circuit under Article 841(a) of the Louisiana Code of Criminal Procedure, which bars review of errors that were not objected to at the time of trial, and Uniform Rules of the Courts of Appeal Rule 1-3, which defines the scope of review for Louisiana appellate courts. *Coleman*, 2010 WL 3903831 at *4. The Louisiana Supreme Court denied review without comment. *Coleman*, 58 So.3d at 474.

The United States Supreme Court has upheld a contemporaneous objection rules as basis for procedural default and the Fifth Circuit has specifically recognized Article 841(A) as an adequate and independent state procedural rule. *Wainwright v. Sykes*, 97 S.Ct. 2497, 2506–07 (1977); *Procter v. Butler*, 831 F.3d 1251, 1253 (5th Cir. 1987). Coleman fails to assert a basis for excusing default of this claim. Accordingly, he is barred from presenting it on habeas review and we consider it only to the extent that it is raised in his first ineffective assistance claim.

Claims 4, 5, and 6 (ineffective assistance/failure to impeach, *Napue* violation, and unconstitutional statute/jury instructions) were all presented in Coleman's original and supplemental applications for post-conviction relief to the trial court, as described above. However, it does not appear that any of these claims were presented to the Louisiana Supreme Court – the Third Circuit had only granted the writ as to the ineffective assistance/Confrontation Clause claim, and had not ruled as to the other claims. Doc. 13, att. 5, p. 184. Coleman did not raise his other claims in his response to the state's writ application and the Louisiana Supreme Court did not address the other claims in its decision. *See* doc. 13, att. 5, pp. 193–200; *Coleman*, 241 So.3d at 298. The petitioner's time for seeking supervisory writs of the trial court's ruling or

filing a second application for post-conviction relief has passed unless he can show exceptional circumstances not applicable in this case. *See* Uniform Rules, Courts of Appeal – Rule 4.3 (providing that the return date, within which the application must be filed in the appellate court, shall not exceed thirty days from the date a written judgment in a criminal case is signed); La. C. Cr. P. art. 930.8(A). Accordingly, these claims are subject to technical procedural default. Coleman provides no basis for excusing a default of these claims, and so he is barred from obtaining federal habeas review on their merits.

C. Merits Consideration

1. Ineffective assistance – failure to object to Confrontation Clause violation

Coleman first raises the claim on which the Third Circuit had reversed his conviction: that he received ineffective assistance when counsel failed to object to statements introduced in violation of his rights under the Confrontation Clause. Because the Louisiana Supreme Court's reversal of that decision was the last decision on the merits, it is the one under § 2254(d) review in this matter. That court stated that Coleman "fail[ed] to show that his counsel's performance prejudiced him to the extent that the trial was rendered unfair and the verdict suspect." *Coleman*, 241 So.3d at 298.

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. *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) (quotations omitted). 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).

This claim relates to trial counsel's failure to object to statements that allegedly violated Coleman's rights under the Confrontation Clause. The Sixth Amendment's Confrontation Clause, made binding on the states through Fourteenth Amendment, grants a defendant "the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, the Supreme Court held that this clause bars the admission of out-of-court testimonial statements against the accused unless (1) the declarant is unavailable and (2) the defendant had a prior opportunity to cross-examine the declarant, regardless of whether the statements might be deemed reliable. 124 S.Ct. 1354, 1374 (2004). Under *Crawford* the category "testimonial statements"

"applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

Coleman alleges that counsel failed to object to testimony by Detective David Rupf violating his rights under the Confrontation Clause. Doc. 14, att. 2, pp. 11–26. Rupf testified and gave the complained-of statements (1) at the preliminary examination and (2) during trial. We examine each occasion and then determine whether the Louisiana Supreme Court's decision, that Coleman could not satisfy *Strickland*'s second prong through these alleged deficiencies, was contrary to or involved an unreasonable application of clearly established federal law.

Rupf first testified at the preliminary examination as to statements made by co-defendants Bonita Hillary and Kenyon Budwine, who were both charged with being accessories after to the fact to the petitioner's crime. Doc. 13, att. 2, pp. 36–64; *see* doc. 13, att. 1, p. 41. At that hearing Rupf, a detective with the Lake Charles Police Department, described his involvement with the investigation, beginning with hearing of an armed robbery outside of a local restaurant on October 9, 2004. Doc. 13, att. 2, pp. 36–37. The victim listed her cell phone among the stolen items and gave the number to police. *Id.* Rupf began calling the phone, which was eventually answered by a woman who identified herself as Kim and said that she was in Beaumont, Texas. *Id.* at 37–38. Kim denied any knowledge of the armed robbery and agreed to meet Rupf at a store in Vinton, Louisiana. *Id.* at 38–39. Soon thereafter Rupf met up with Kim, whom he was then able to identify as Bonita Hillary, at a motel in Vinton. *Id.* at 39–40. Hillary told Rupf that she bought the phone from Marcus Coleman, a Vinton resident who spent a lot of time in Lake Charles, for $80.00. *Id.* at 40. She also stated that Coleman was with another man she could not identify. *Id.*

Rupf soon began to view Hillary as a person of interest, however, based on the victim's statement that a woman had watched the robbery from the passenger seat of the perpetrator's car

and that Hillary matched that description. *Id.* at 43–46. Rupf Mirandized Hillary and interviewed her at the Vinton Police Department. *Id.* at 46–47. During that interview she admitted that she had been with Coleman and the other male, Kenyon Budwine, on the day of the robbery and that they had gone into Lake Charles to buy drugs. *Id.* at 47. Hillary told Rupf that they had all been taking drugs that night, and that she was aware that Coleman had a gun with him in the vehicle. *Id.* at 47–48. Budwine, who was driving, pulled up to a restaurant parking lot at Coleman's direction and let him out, then continued to make a loop around the block. *Id.* When they came back, Hillary stated to Rupf, they saw Coleman struggling with the victim and Hillary screamed at Coleman to stop. *Id.* Coleman then got in the car with the victim's purse and the three sped off. *Id.* Hillary told Rupf that Coleman admitted on the way back that he put his gun against her face when she started fighting him. *Id.*

Rupf then interviewed Budwine, who was also *Mirandized. Id.* at 50. Budwine told Rupf that he had been taking a lot of pills that night and did not have clear recollections, but that he recalled letting Coleman out at the restaurant parking lot and then, when he completed circling the block, seeing Coleman struggling with a white woman over her purse. *Id.* at 52. He then recalled that Coleman jumped in the car with the purse. *Id.* Budwine did not see Coleman with a gun but stated that "had heard something about [it]." *Id.* at 53.

At trial Rupf was called by the state and summarized the statements made to him by Hillary. *Id.* at 153–58. Rupf only testified that Budwine had initially denied knowing Coleman, and confirmed on cross-examination that he had also interviewed Budwine. *Id.* at 149, 170. The defense made no objections to Rupf's testimony about either codefendant's statements, and neither Budwine nor Hillary appeared at trial or at the preliminary examination.

The Confrontation Clause does not give defendants a right of access to adverse witnesses before trial; it is "a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination" rather than "a constitutionally compelled rule of pretrial discovery." *Pennsylvania v. Ritchie*, 107 S.Ct. 989, 999 (1987) (plurality opinion) (emphasis in original); *see also id.* at 999 n. 10 and accompanying text (collecting examples of the Court upholding a Confrontation Clause infringement claim only where the violation occurred at trial). "[I]t is this literal right to 'confront' the witness **at the time of trial** that forms the core of the values furthered by the Confrontation Clause." *California v. Green*, 90 S.Ct. 1930, 1934–35 (1970) (emphasis added); *see also United States v. Morgan*, 505 F.3d 332, 337–39 (5th Cir. 2007) (Confrontation Clause did not apply to grand jury testimony used to authenticate business records at a preliminary proceeding). As the respondent asserts, Coleman cannot show that there was any merit to a Confrontation Clause objection at the preliminary examination. Therefore he cannot demonstrate prejudice from that alleged deficiency.

As for trial, however, the record does not reflect whether Coleman had any opportunity to cross-examine Hillary and Budwine. Their statements to Rupf, investigating officer on this case, would certainly appear to qualify as testimonial under *Crawford*, however. Accordingly, we assume for the sake of argument that there was a basis for objection under *Crawford* and that counsel might have performed deficiently by failing to raise the issue. We instead look to whether the petitioner can satisfy *Strickland*'s second prong.

The respondent maintains that sufficient prejudice cannot be shown because exclusion of Hillary and Budwine's statements would not have changed the result in his trial. Furthermore, under both federal and Louisiana law, a Confrontation Clause violation is subject to harmless error analysis. *State v. Mullins*, 188 So.3d 164, 171 (La. 2016) (citing *State v. Welch*, 760 So.2d 317,

321–22 (La. 2000)); *see, e.g.*, *United States v. Alvarado-Valdez*, 521 F.3d 337, 341 (5th Cir. 2008). On direct appeal, therefore, the Third Circuit would have analyzed the error "by assuming that the damaging potential of the error was fully realized, then asking whether the reviewing court could conclude that the error was nevertheless harmless beyond a reasonable doubt." *Mullins*, 188 So.3d at 171 (citing *Welch*, 760 So.2d at 321–22). Under this standard, "[t]he importance of the testimony . . . in the state's case, whether it is cumulative, the presence or absence of evidence corroborating or contradicting the testimony, the extent of the cross-examination permitted, and the overall strength of the state's case are factors to be considered in determining whether the error was harmless." *Welch*, 760 So.2d at 322. Accordingly, we also determine whether failure to raise the objection deprived Coleman of a chance of reversal on appeal as part of our *Strickland* analysis.

The victim, Jill Dozart, testified at Coleman's trial as the state's first witness. Doc. 13, att. 2, p. 121. She stated that she had plans to go out to dinner with several friends at a local restaurant on the night of October 9, 2004. *Id.* at 122–23. On the way she stopped at a drive-through ATM and noticed people in a gray Saturn in front of her. *Id.* at 123–24. She was on the phone with a friend at the time and asked the friend to stay on the line, because she found the way that the people in the car ahead of her were "messing with the machine" suspicious. *Id.* at 124–25. Eventually the gray Saturn drove off and Dozart pulled up to the ATM. *Id.* She withdrew forty dollars and continued to the restaurant, then got off the phone with her friend while she looked for a parking space. *Id.* at 125–26. She searched for a while, not wanting to park behind the restaurant because it was already dark, and ultimately pulled into the lot next to the restaurant. *Id.* at 126–27. Then, as she walked from the lot to the restaurant, she heard someone running up behind her. *Id.* at 128. The person grabbed her and she began to scream and kick even as her assailant threatened to shoot her. *Id.* at 128–29. He took her purse and began to march her away from the restaurant while she

pleaded with him and attempted to fight him, and he pulled a gun on her. *Id.* at 129–32. She then saw a car pull up and believed the people inside would help her, but they began shouting to the assailant instead. *Id.* at 132. The assailant got in the car with Dozart's purse and Dozart ran off. *Id.* at 132–33. As the car drove away, she identified it as a gray Saturn. *Id.*

Dozart identified Coleman, sitting in the courtroom, as her assailant. *Id.* at 128–29. She admitted that she did not identify Coleman from a photo line-up (because none was provided to her), but stated that she immediately recognized him when his image was shown on television a few days later, in a report relating to the robbery. *Id.* at 136. She stated that she was in the kitchen while her husband was watching television in the living room and that she was not paying attention to the television until she saw a picture of a man whom she instantly recognized as the perpetrator. *Id.* Her husband corroborated this statement, recalling that when the program showed a picture of Coleman, she told him, "[T]urn that up, that's the guy that robbed me." *Id.* at 173.

Finally, Dozart testified that her cell phone had been stolen along with her purse and that she had given the number to police. *Id.* at 133, 142. Detective Rupf testified that he obtained Dozart's phone records. *Id.* at 145–46. Those records showed a call made from Dozart's phone to Coleman's residence in Vinton, Louisiana, at 9:06 pm on the night of the robbery. *Id.* at 158; *see id.* at 150–51 (providing Coleman's address). The defense, meanwhile, put on no witnesses of its own. It attempted to paint Dozart's identification of Coleman from the news report as unreasonably suggestive and to show Hillary and Budwine's unreliability. *See id.* at 139–41 (cross-examination of Jill Dozart); *id.* at 162–65, 169–72 (cross-examination of Detective Rupf); *id.* at 174–75 (cross-examination of Jeff Dozart, husband of the victim).

On this evidence, Coleman cannot show a reasonable probability that the outcome of his trial would have been different had counsel objected to and obtained the exclusion of Rupf's

testimony about statements that Hillary and Budwine made to him. It seems that the chief utility of these statements was to show the steps of Rupf's investigation and how the police came to uncover Coleman's identity. It was the victim's account and the phone records that ultimately proved his connection to the robbery rather than Hillary's self-serving account of the event. Meanwhile, Coleman fails to show how the brief statements cited from Budwine might have contributed to the jury's verdict.

Coleman cannot show sufficient prejudice under *Strickland* based on defense counsel's failure to urge exclusion of these statements or his failure to preserve the claim for appeal. He therefore fails to demonstrate that the Louisiana Supreme Court's decision was contrary to or involved an unreasonable application of federal law, and he is not entitled to federal habeas relief on this claim.

2. Sufficiency of evidence

Coleman next claims that there was insufficient evidence to sustain his conviction of armed robbery with a firearm. The Louisiana Third Circuit's decision on appeal is the one under § 2254(d) review for this claim. A sufficiency of evidence claim presents a mixed question of law and fact. *Taylor v. Cain*, 649 F.Supp.2d 460, 470 (E.D. La. 2009). Accordingly, we do not reassess any factual determinations made by the state courts and we instead review the Third Circuit's decision to determine whether it was contrary to or involved an unreasonable application of clearly established federal law.

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

[4] On federal habeas review, a court refers to the substantive elements of the offense as defined by state law. *Weeks v. Scott*, 55 F.3d 1059, 1062 (5th Cir. 1995).

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; emphasis added). Thus, though state law may require the exclusion of all reasonable hypotheses of innocence, a court on habeas review "may find the evidence sufficient to support a conviction even though the facts also support one or more reasonable hypotheses consistent with the defendant's claim of innocence." *Gibson v. Collins*, 947 F.2d 780, 783 (5th Cir. 1991).

Under *Jackson*, both direct and circumstantial evidence can contribute to the sufficiency of evidence and circumstantial evidence alone may be enough to support the conviction. *Schrader v. Whitley*, 904 F.2d 282, 287 (5th Cir. 1990). The habeas court must defer to the trial court's findings on issues of conflicting testimony and the weight of the evidence, resolving all conflicting inferences and credibility choices in favor of the verdict, and may not substitute its judgment for that of the factfinder's. *Ramirez v. Dretke*, 398 F.3d 691, 695 (5th Cir. 2005); *Alexander v. McCotter*, 775 F.2d 595, 598 (5th Cir. 1985). Thus, under the standards of *Jackson* and § 2254, this court's review on sufficiency of evidence claims is "twice-deferential." *Parker v. Matthews*, 132 S.Ct. 2148, 2152 (2012).

The Louisiana Third Circuit conducted a review of the evidence presented at trial and determined that Dozart's positive identification of Coleman as the perpetrator was sufficient to support his conviction. *Coleman*, 2010 WL 3903831 at *1–*4. "In light of [her] testimony and that of Detective Rupf regarding the corroborating evidence obtained during the investigation," it went on, "[Coleman's] identity as the perpetrator was sufficiently proven by the State." *Id.* at *4.

Louisiana law defines armed robbery as "the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon." La. Rev. Stat. § 14:64(A). It imposes an additional penalty if the dangerous weapon is a firearm. *Id.* at § 14:64.3. Coleman did not dispute that the state produced sufficient evidence of the commission of an armed robbery against Dozart, and it appears that the state met its burden on these claims based on her testimony as described under the previous claim. Instead, he challenged the sufficiency of evidence relating to his identification as the perpetrator. *Coleman,* 2010 WL 3903831 at *2.

Under Louisiana law, as the Third Circuit noted, when identity is in dispute "the state is required to negate any **reasonable** probability of misidentification." *State v. George*, 19 So.3d 614, 618 (La. Ct. App. 3d Cir. 2009) (citing *State v. Hughes*, 943 So.2d 1047 (La. 2006)) (emphasis added). However, "[o]ne witness's positive identification is sufficient to support a conviction." *Id.* Under our doubly deferential standards on habeas review, there is no basis for second-guessing Dozart's testimony confirming the identity of the perpetrator, corroborated by a call made from her stolen cell phone shortly after the robbery in Lake Charles, Louisiana, to the Coleman's residence in Vinton. Therefore the petitioner shows no error to the Third Circuit's conclusion that this testimony, either alone or corroborated by the other evidence presented at trial, was sufficient to sustain the conviction.

IV.
CONCLUSION

Based on the foregoing, **IT IS RECOMMENDED** that the instant petition 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 AND SIGNED in Chambers this 7th day of September, 2018.

KATHLEEN KAY
UNITED STATES MAGISTRATE JUDGE

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