IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 12, 2020
Lyle W. Cayce
Clerk

No. 19-30205
Summary Calendar

D.C. Docket No. 5:15-CV-2759

GLENN YOUNG,

Petitioner - Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent - Appellee

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

Before SMITH, COSTA, and HO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal.

It is ordered and adjudged that the judgment of the District Court is affirmed.

APPENDIX
A

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Petitioner–Appellant,

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DARREL VANNOY, Warden, Louisiana State Penitentiary,

Respondent–Appellee.

Appeal from the United States District Court
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No. 5:15-CV-2759

Before SMITH, COSTA, and HO, Circuit Judges.

PER CURIAM:*

Glenn Young, Louisiana prisoner #457113, moves for a certificate of

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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appealability ("COA") to appeal the denial of his 28 U.S.C. § 2254 petition challenging his convictions of possession of more than 28 but less than 200 grams of cocaine and illegal use of weapons. He contends that (1) the evidence was insufficient to support his convictions; (2) his trial counsel was ineffective because (a) he did not challenge the search warrant and failed to exclude evidence; (b) he did not file a motion to continue; (c) he did not object at trial to the references to marihuana; (d) he did not note the race and sex of the jurors; (e) he did not object that state law was violated because not all bench conferences were recorded; (f) he did not object to testimony concerning the special response team; and (g) he did not request a jury instruction on accomplice testimony; and (3) the state trial court lacked jurisdiction. Young also appeals the denial of his request for an evidentiary hearing.

In his COA motion, Young does not raise the following claims: The trial court failed to comply with various state laws; the trial court erred in allowing testimony concerning the special response team; the prosecutor's presentation of evidence concerning the special response team constituted misconduct; and his counsel failed to file a motion to quash the multiple-offender bill. Young has abandoned these claims by failing to brief them adequately. *See Hughes v. Dretke*, 412 F.3d 582, 597 (5th Cir. 2005).

To obtain a COA, Young must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where the district court denies the claims on the merits, the petitioner must establish that reasonable jurists would find the decision to deny relief debatable or wrong, *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that the issue deserves encouragement to proceed further, *see Miller-El*, 537 U.S. at 327.

Young's arguments do not meet this standard. We construe his motion

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for a COA with respect to the denial of an evidentiary hearing as a direct appeal of that issue, *see Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016), and affirm, *see Cullen v. Pinholster*, 563 U.S. 170, 181–82, 185–86 (2011).

The motion for a COA is DENIED. The denial of Young's motion for an evidentiary hearing is AFFIRMED.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

GLENN YOUNG #457113	CIVIL ACTION NO. 15-2759
VERSUS	JUDGE S. MAURICE HICKS, JR.
N. BURL CAIN	MAGISTRATE JUDGE HORNSBY

JUDGMENT

For the reasons assigned in the Report and Recommendation of the Magistrate Judge previously filed herein, and having thoroughly reviewed the record, including the written objections filed, and concurring with the findings of the Magistrate Judge under the applicable law;

IT IS ORDERED that Petitioner's Petition for Writ of Habeas Corpus be denied.

Rule 11 of the Rules Governing Section 2254 Proceedings for the U.S. District Courts requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. The court, after considering the record in this case and the standard set forth in 28 U.S.C. Section 2253, denies a certificate of appealability because the applicant has not made a substantial showing of the denial of a constitutional right.

THUS DONE AND SIGNED in Shreveport, Louisiana, this the 1st day of March, 2019.

S. MAURICE HICKS, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX
B

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

GLENN YOUNG #457113	CIVIL ACTION NO. 15-cv-2759
VERSUS	CHIEF JUDGE HICKS
N. BURL CAIN	MAGISTRATE JUDGE HORNSBY

REPORT AND RECOMMENDATION

Introduction

A Caddo Parish jury, by a vote of 10 to 2, convicted Glenn Young ("Petitioner") of (1) possession of more than 28 grams but less than 200 grams of cocaine and (2) illegal use of weapons. Petitioner was adjudicated a third felony habitual offender and given a lengthy sentence. His convictions, along with a conviction of a co-defendant, were affirmed on appeal. State v. Wallace and Young, 71 So.3d 1142 (La. App. 2d Cir. 2011), writ denied, 79 So.3d 1026 (La. 2012). Petitioner also pursued a post-conviction application in the state courts.

Petitioner now seeks federal habeas corpus relief on several grounds. For the reasons that follow, it is recommended that his petition be denied. Petitioner's co-defendant, Bobby Wallace, raised several of the same claims presented in this petition, and a Report and Recommendation regarding them is pending in Wallace v. Cain, 15-cv-2823.

APPENDIX C

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Timeliness

The state argues that the petition is untimely. The defense has potential merit, but there is some uncertainty. The facts and law applicable to the timeliness defense are outlined below, but it is recommended that the court address the claims on the merits. If a reviewing court were to find that a claim has habeas merit, the timeliness defense would need to be ruled upon.

The court has reviewed the timeliness defense under the rules explained in Dagenhart v. Goodwin, 2016 WL 4534909 (W.D. La. 2016). The one-year limitations period to file a federal petition was tolled, with 32 days remaining, when Petitioner filed his post-conviction application. The state trial court denied that application in May 2013, after which state law allowed Petitioner 30 days to seek a writ from the appellate court.

Petitioner did not take any action until more than one year later, in July 2014, when he filed a notice of intent to seek review before the state appellate court and asked the trial court to set an extended return date. Petitioner represented that his tardiness was because he did not receive a copy of the trial court's ruling until July 14, 2014. The trial court judge granted the extension. Tr. 1287-91. Co-defendant Wallace made similar claims of delayed notice in his case, although he claims he did not receive the trial court's ruling until August 18, 2014.

Petitioner thereafter proceeded on a timely basis in the state courts, and he filed his federal petition about 30 days after the Supreme Court of Louisiana denied a writ

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application on his post-conviction application.[1] His federal petition is untimely if his lack of timely action after the trial court's post-conviction ruling is deemed to have ceased the tolling effect during the several months of inactivity that followed. If the post-conviction application had a tolling effect the entire time it was pending, then the federal petition is timely by a few days.

The tolling effect of a post-conviction application ordinarily ceases 30 days after a trial court's denial unless the prisoner files a timely application for review with the appellate court. Melancon v. Kaylo, 259 F.3d 401 (5th Cir. 2001). Petitioner did not do that, and more than the one-year limitation period expired before he renewed the process. In this case, however, the prisoner made an uncontested claim of lack of timely notice of the trial court's decision, and the state court granted an extension of the period to seek appellate relief. Tr. 1287-91. The granting of such an extension may, under certain circumstances, effectively keep the post-conviction application pending and thus continue to toll the federal limitations period. Grillette v. Warden, 372 F.3d 765 (5th Cir. 2004). The undersigned does not necessarily find that the federal petition is timely, but the timeliness defense is less than certain. The better course of action under the circumstances is to address the merits of the petition.

[1] The certificate of mailing at the end of Petitioner's federal petition certifies that it was placed in the federal mailbox at Angola to be scanned and filed electronically on November 26, 2015 (Thanksgiving). It was electronically transmitted to the clerk of court the following Monday, November 30, 2015.

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Sufficiency of the Evidence

A. The Evidence

Marcus Thomas testified that he joined a Shreveport street gang, the Rolling 60s Crips, when he was about 15. Fellow members included Petitioner, co-defendant Bobby Wallace, and some of their cousins. Thomas has an extensive record of misdemeanor convictions for assault, battery, theft, and the like, as well as some felonies that resulted in prison time. Thomas testified at trial that he was then 35, had completed parole, and had left the gang lifestyle after getting out of prison. He was working at a local hospital. He nonetheless remained acquainted with many gang members.

Bad blood had developed between Thomas and certain gang members when he refused to "take a charge" for Stevie Young, who is a first cousin of Petitioner and co-defendant Bobby Wallace. Thomas said that Stevie Young received a 24-year federal sentence, and his cousins were not happy about it.

Thomas, his girlfriend, and her two-year old daughter went to a convenience store in Shreveport, where they encountered Greg Young. Thomas and Young had an argument. As Thomas and his guests later drove down David Raines Road, several gunshots hit his SUV. Bullets broke a window and flattened two tires, but no person was hit. Thomas told police the names of three shooters: Petitioner, Bobby Wallace, and Greg Young. Thomas also told police that the men lived on Hattie Street. Thomas testified at trial that he saw Petitioner with a handgun pointing at the SUV and firing. He said there was "[n]o doubt in my mind" that Petitioner was one of the men shooting at him, and he saw a handgun in

Petitioner's hand. Bobby Wallace and Greg Young were also firing handguns. At one time, he told police that Calvin Elie had also been a shooter.

The police soon executed a search warrant for the Hattie Street house. They found Petitioner and four others inside. Police recovered a plastic baggy of 31 grams of powder cocaine from under the cushions of the couch in the front room. There were no fingerprints on the baggy. A kitchen cabinet contained small sandwich bags, an open box of baking soda, and a Glock .40-caliber handgun. A firearms expert testified that the spent casings found at the scene of the shooting were fired from that handgun. An SKS rifle was found in a car parked at the house. The car was registered to someone from Texas.

Police found in the kitchen a digital scale of a type commonly used for weighing drugs for resale. Bobby Wallace's fingerprint was on the scale. Three agents testified that they overheard Petitioner and Wallace tell Kendra Young to take the charge by claiming that the drugs and gun belonged to her. Ms. Young initially told police that everything belonged to her, but when cautioned that other crimes may go along with ownership of the gun, she changed her story to say that the items belonged to Calvin Elie.

Police found Calvin Elie hiding in a closet. He pleaded guilty to possession of cocaine and received probation on the condition that he testify truthfully. He testified that he did not live at the residence but had been asleep in the back bedroom and jumped in a closet when he heard the police enter the house. He denied knowledge of the cocaine found on the sofa. Petitioner and his co-defendant Bobby Wallace testified that Elie was a drug addict who was staying at the house and slept on the sofa where the drugs were found.

Petitioner, who admitted convictions for possession of crack and indecent behavior with a juvenile, testified that he lived at the Hattie Street house with Kendra Young (his sister), her children, and Calvin Elie. He denied ever being in a gang. He said that he was home with his sister when he heard the shooting, and he was asleep in the back of the house when police later executed the search warrant. Elie was asleep on the couch when the police arrived, but he ran down the hall and hid in a closet. Petitioner and Bobby Wallace testified that Elie was a drug addict who stayed at the house because his family had run him off because of his drug problem. Petitioner denied knowing anything about the Glock, the drugs, or the scale found in his house. He was asked whether he asked his sister to take the charges for the drugs and gun. He said, "I can't recall." He said the car in the driveway belonged to a friend from Texas, and it had been there for six or eight weeks after breaking down.

Marquae Wallace, a younger cousin to the defendants, testified that he met Elie the day before the warrant was executed. Elie had a bag of powder cocaine, which was the same bag later seized from the house. Marquae said that he got the scales from a "fiend on the street," planned to sell them, and left them on the kitchen counter at the Hattie Street house.

B. Elements of the Crimes

Petitioner was convicted of possession of cocaine. The State was required to prove that he was in possession of the illegal drug and that he knowingly possessed it. The State did not have to prove actual physical possession. Constructive possession is sufficient to

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support a conviction under state law. State v. Foster, 3 So.3d 595, 600-01 (La. App. 2d Cir. 2009).

Constructive possession means having a relationship with an object such that it is subject to one's dominion and control, with knowledge of its presence. Louisiana courts look to several factors in determining whether a defendant exercised sufficient control and dominion to establish constructive possession. They include (1) his knowledge that drugs were in the area, (2) his relationship with the person, if any, found to be in actual possession, (3) his access to the area where the drugs were found, (4) evidence of recent drug consumption, and (5) his physical proximity to drugs. State v. Major, 888 So.2d 798, 802 (La. 2004). Giving a false name or other efforts to attempt to avoid blame indicate consciousness of guilt and is a circumstance from which a jury may infer guilt. State v. Toups, 833 So.2d 910, 914 (La. 2002).

Petitioner was also convicted of illegal use of a weapon. Louisiana law defines that crime as "the intentional or criminally negligent discharging of any firearm...where it is foreseeable that it may result in death or great bodily harm to a human being." La. R.S. 14:94.

C. Jackson and Section 2254(d)

Petitioner argues that the evidence was not sufficient to prove his guilt under applicable state law. In evaluating the sufficiency of evidence to support a conviction "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 99 S.Ct. 2781, 2789 (1979). The Jackson

inquiry "does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit." Herrera v. Collins, 113 S.Ct. 853, 861 (1993).

The state courts decided the Jackson claim on the merits on direct appeal. Habeas corpus relief is available with respect to a claim that was adjudicated on the merits in the state court only if the adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d). Thus, a state-court decision rejecting a sufficiency challenge is reviewed under a doubly deferential standard. It may not be overturned on federal habeas review unless the decision was an objectively unreasonable application of the deferential Jackson standard. Parker v. Matthews, 132 S.Ct. 2148, 2152 (2012); Harrell v. Cain, 595 Fed. Appx. 439 (5th Cir. 2015).

D. Analysis

The state appellate court reviewed the evidence in detail. It noted that the jury was faced with an array of often contradictory testimony about the relevant factors. The bag of drugs did not bear any fingerprints, but it was under a couch in the main room of Petitioner's residence, where it was easily accessible by anyone. There was testimony that Calvin Elie was sleeping on the couch when police arrived, but he denied being there. The court reasoned that the jury, who saw Mr. Elie testify, could have concluded that it was unlikely that the seldom employed and homeless Elie was the only person with a

connection to a rather significant (and therefore expensive) quantity of cocaine. There was also the evidence that Petitioner asked Kendra Young to "take the charges," which was suggestive of guilt on his part.

With respect to the weapon conviction, the appellate court observed that the jury saw photos of the shot-up SUV that had been hit with "a fusillade of bullets." The .40–caliber Glock handgun retrieved from Petitioner's house was proved to be the weapon that fired shell casings left behind at the scene of the shooting. The victim, Mr. Thomas, testified that he had no doubt that Petitioner was one of the shooters and was firing a handgun. Petitioner argues that Thomas was inconsistent because he told authorities that two, then three, then four men were shooting at him, but the casings found at the scene matched only a single weapon.

The state court applied the Jackson standard to these facts and determined that, when the evidence was viewed in the light most favorable to the prosecution, the evidence was sufficient to prove beyond a reasonable doubt that Petitioner was in constructive possession of the cocaine. The case was not a slam dunk for the prosecution, but there was evidence that Petitioner and other members of the household were involved in a shooting, and his cousin's fingerprint was on a scale located near drug paraphernalia. This and the other relevant facts were sufficient that the state court's application of Jackson to affirm the conviction was not an objectively unreasonable application of that standard. Reasonable minds could perhaps differ on whether the evidence was sufficient when Jackson was applied on direct appeal, but once that decision was made by the state court, it was adequate to withstand doubly deferential habeas review.

With respect to the weapons conviction, it was rational to conclude that there was no reasonable doubt as to Petitioner's guilt if the jury accepted the testimony of Mr. Thomas as credible. Thomas testified that he had no doubt that he saw Petitioner firing a handgun at him. Petitioner attacks that testimony based on alleged inconsistencies, but inconsistencies did not prohibit the jury from believing Thomas. Such credibility determinations are squarely within the province of the trier of fact. "[U]nder Jackson, the assessment of the credibility of the witnesses is generally beyond the scope of review." Schlup v. Delo, 115 S.Ct. 851, 868 (1995). "All credibility choices and conflicting inferences are to be resolved in favor of the verdict." Ramirez v. Dretke, 398 F.3d 691, 695 (5th Cir. 2005). When those standards are applied, there is no basis for setting aside the weapon conviction on habeas review for sufficiency of the evidence.

Lack of Written Reasons for Sentence

Petitioner argues that the trial court failed to comply with La. R.S. 15:529.1(D)(3), which requires that in a multiple offender hearing "[t]he court shall provide written reasons for its determination." Petitioner raised this claim on direct appeal. State courts often find such an omission harmless if the transcript of the hearing showed sufficient evidence and oral reasons were transcribed. State v. Papillion, 63 So. 3d 414, 425 (La. App. 3 Cir. 2011); State v. James, 938 So. 2d 1191, 1197 (La. App. 2 Cir. 2006). The appellate court found in this case that the error was harmless because the transcript showed clear oral reasons. State v. Wallace, 71 So.3d at 1153.

This claim is based solely on state law so lacks habeas merit. A claim that the trial court improperly applied state law does not constitute an independent basis for federal habeas relief. Estelle v. McGuire, 112 S.Ct. 475, 479-80 (1991). And the Fifth Circuit has rejected habeas challenges to a state court's failure to comply with similar state law sentencing procedural rules. Haynes v. Butler, 825 F.2d 921, 924 (5th Cir. 1987); Butler v. Cain, 327 Fed. Appx. 455 (5th Cir. 2009).

No Sentencing Delay

Petitioner argued that the trial court erred by sentencing him without observing a 24-hour delay required by La. C.Cr.P. art. 873. Petitioner raised this claim on direct appeal. The appellate court found that the error was harmless because there was no prejudice shown. State v. Wallace, 71 So.3d at 1153-54. This claim relies solely on state law, so it lacks habeas merit for the reasons explained in the preceding section.

Bill of Information

Petitioner was charged by a bill of information, which was later amended. He was also charged by another bill of information under a separate docket number. The details of the charging instruments and the amendments are set forth in the State's memorandum (Doc. 35, n. 11). Petitioner complained on post-conviction application that the amendment process resulted in the lack of a viable charge against him for the weapons count. The trial court stated that the "first claim of defective bill is without merit and therefore said claim is denied." Tr. 1286. The appellate court summarily denied a writ application "on the showing made." Tr. 1421. The Supreme Court of Louisiana denied a writ application and

stated: "On the showing made, relator fails to demonstrate prejudice resulting from any defect in the bill of information." Tr. 1578.

The sufficiency of a state indictment or bill of information is not a matter for federal habeas corpus relief unless it can be shown that the charging instrument "is so defective that the convicting court had no jurisdiction." Morlett v. Lynaugh, 851 F.2d 1521, 1523 (5th Cir. 1988). State law is the reference for determining sufficiency and if the issue "is presented to the highest state court of appeals, then consideration of the question is foreclosed in federal habeas corpus proceedings." Morlett, supra. See also Wood v. Quarterman, 503 F.3d 408, 412 (5th Cir. 2007); McKay v. Collins, 12 F.3d 66, 68-69 (5th Cir. 1994).

The charging instrument in this case was presented to the state's highest court, which found no error, so there is no basis for habeas relief with respect to this issue. Petitioner makes a vague assertion that the amendment process violated his federal due process rights, but he does not point to any clearly established federal law as decided by the Supreme Court that would undermine the state court's rejection of this claim. See 28 U.S.C. § 2254(d)(1).

Ineffective Assistance of Counsel

A. Introduction; Burden

Petitioner argues that his attorney rendered ineffective assistance in several ways. To prevail on such a claim, Petitioner must establish both that his counsel's performance fell below an objective standard of reasonableness and that, had counsel performed

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reasonably, there is a reasonable probability that the result in his case would have been different. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984).

Petitioner's ineffective assistance claims were adjudicated and denied on the merits by the state court, so 28 U.S.C. § 2254(d) directs that the question is not whether a federal court believes the state court's determinations under the Strickland standard were incorrect but whether the determinations were unreasonable, which is a substantially higher threshold. Schriro v. Landrigan, 127 S.Ct. 1933, 1939 (2007). The Strickland standard is a general standard, so a state court has even more latitude to reasonably determine that a defendant has not satisfied it. The federal court's review is thus "doubly deferential." Knowles v. Mirzayance, 129 S.Ct. 1411, 1420 (2009).

B. No Motion to Continue

Petitioner argued in his post-conviction application that counsel was ineffective for not requesting a continuance—after the prosecutor amended the bill of information to include the weapon charge—because counsel was unprepared to provide a proper defense to the weapon charge. The State explains that there was no surprise because a bill filed in a related case number had charged Petitioner with the weapons count months before the trial. Both the drug and weapons charges were read at the commencement of the trial, and experienced trial counsel voiced no surprise or objection. Tr. 475-76.

The trial court summarily denied the post-conviction claim on the grounds that Petitioner did not meet his burden under Strickland. Tr. 1286. The appellate court denied the application on the showing made, citing Strickland. Tr. 1421. The Supreme Court of Louisiana denied a writ and stated that Petitioner "has not established that he received

ineffective assistance of counsel under the standard set forth in Strickland[.]" Tr. 1578. Petitioner's argument that counsel was surprised by the weapons charge is not supported by the record, so there is no basis to find that the state court's application of Strickland to this claim was objectively unreasonable.

C. Failure to Challenge Search Warrant

Detective Lane Smith applied for a warrant to search the home at 2997 Hattie Street for a .40 caliber handgun and ammunition. His affidavit in support of the warrant application stated that officers met with Marcus Thomas, who reported being shot at by three known suspects. Thomas named two of the men, including Petitioner, and said that he knew the third suspect but could not recall his full name at the time. Officers went to the scene of the shooting, found .40 caliber spent shell casings on the sidewalk, and they saw that Thomas' vehicle had been struck by several shots. Detective Smith recounted that he conducted a detailed interview with Thomas a few days later, where Thomas named all three suspects. Thomas said that he had known the three men all of his life, and he identified photographs of them. Thomas told Smith that the suspects believed that Thomas had cooperated with the police in another case. Thomas said the suspects ran to 2997 Hattie after firing the shots, and he said Petitioner and another of the suspects then lived at or frequented the Hattie Street address. Thomas said that a source told him that the two men had .40 caliber handguns. The officers had Thomas physically point to the Hattie Street home, which they then verified had water service billed to a Kendra Young, who Thomas said was the sister of one of the suspects. Based on that affidavit, a state court judge signed a warrant to search the home for a .40 caliber handgun and ammunition. Tr. 51-53.

Petitioner argues that his defense counsel was ineffective because he did not file a motion to suppress the results of the search on the grounds that the affidavit contained false statements and did not give rise to probable cause. "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." Kimmelman v. Morrison, 106 S.Ct. 2574, 2583 (1986); Shed v. Thompson, 2007 WL 2711022, *5 (W.D. La. 2007). This is a habeas challenge under Section 2254(d)(1), so the Petitioner must establish not only that suppression of the evidence would be the correct result, but also that it would be contrary to or an unreasonable application of clearly established federal law for the state habeas court to rule otherwise. Evans v. Davis, 875 F.3d 210, 219 (5th Cir. 2017), cert. denied, 139 S. Ct. 78, 202 L. Ed. 2d 52 (2018).

The affidavit used to support the search warrant is presumed valid. Franks v. Delaware, 98 S.Ct. 2674 (1978). The veracity of the affidavit may only be attacked upon a showing of deliberate falsehood or reckless disregard for the truth by the affiant. Id. If an accused establishes by a preponderance of the evidence that false information was intentionally or recklessly included in an affidavit, the court must excise the offensive language and determine whether the remaining portion would have established the necessary probable cause. U.S. v. Danhach, 815 F.3d 228, 235 (5th Cir. 2016), citing Franks.

Petitioner presented this claim in his post-conviction application. Tr. 1203-07. He argued that the affidavit did not establish probable cause because it did not demonstrate that evidence of a crime or contraband would be found in the home. He complained that Marcus Thomas told the detective that an unnamed source said that Wallace and Petitioner carried .40 caliber handguns, but the police had no "physical evidence" that Petitioner and Wallace lived at the Hattie Street address. Petitioner also complained that the affidavit was not supported by any personal observation of weapons at the address. The state courts, in the rulings cited above, summarily denied the Strickland claims asserted in the post-conviction application.

Petitioner's claim is subject to the deferential standards of Section 2254(d). Under that standard, it is not enough for the state court to have been incorrect in its application of state law or determination of facts; it must also have been unreasonable. Coble v. Quarterman, 496 F.3d 430, 435 (5th Cir. 2007). And "Section 2254(d) applies even where there has been a summary denial." Cullen v. Pinholster, 131 S.Ct. 1388, 1402 (2011). A petitioner who challenges a state court's summary denial may meet his burden under the first prong of Section 2254(d) only by showing that there was "no reasonable basis" for the state court's decision. The federal habeas court must determine what arguments or theories could have supported the summary decision, and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the Supreme Court. Pinholster, 131 S.Ct. at 1402, citing Harrington v. Richter, 131 S.Ct. 770, 786 (2011).

Petitioner has not met his burden. The affidavit by Detective Smith was detailed and noted variations or uncertainties in the information obtained from the witness. There is no indication that Detective Smith set forth any deliberate falsehoods or acted with reckless disregard for the truth. Petitioner's various arguments about why Mr. Thomas was an unreliable or inadequate witness do not make Detective Smith's testimony false. Petitioner has not shown that he had a meritorious Fourth Amendment claim that would have resulted in the suppression of the evidence seized pursuant to the warrant. Moreover, he has not demonstrated that the state courts' rejection of this claim was an objectively unreasonable application of Strickland or Kimmelman.

D. Failure to Exclude Evidence

The search warrant issued for the Hattie Street house allowed police to search for certain property described as .40 caliber handgun and .40 caliber ammunition. Tr. 53. Petitioner argues that the testimony at trial showed that the officers quickly located a handgun and ammunition, but they then continued their search and recovered a scale and cocaine. Petitioner argues that counsel should have moved to exclude the later found evidence from use at trial.

The police were not required to immediately end the search once a single weapon and some ammunition were recovered. They had been told that there were multiple shooters and that two men in the home had such weapons. Police were entitled to continue the search until they recovered all such weapons and ammunition, together with any items that they encountered in plain view during the course of that search. Counsel would have lacked legal authority to obtain the exclusion of the evidence, and Petitioner has not cited

any decisions that would support his argument. Counsel was not ineffective in this regard because he was "not required to make futile motions or objections." Garcia v. Stephens, 793 F.3d 513, 525 (5th Cir. 2015), quoting Koch v. Puckett, 907 F.2d 524, 527 (5th Cir.1990). The state court's denial of this claim was not an objectively unreasonable application of Strickland.

E. No Objection to Marijuana Reference

Agent Denham was asked to identify a photograph. He said it "looks like a black scale and a small amount of suspected marijuana on it." Tr. 661. Defense counsel objected that his clients were not on trial for marijuana, so the references to that substance had no probative value. The prosecutor responded that all defendants were arrested for the misdemeanor possession of marijuana, but the misdemeanor could not be tried in the jury trial for the felony charges. He argued that the discovery of the marijuana was part of the res gestae and that having other drugs in the house was indicative of knowing or intentional possession of the cocaine. The trial judge sustained the objection. Tr. 662-67.

The next witness was Agent Troy Skeesick. He was asked about some keys he found in the house. He answered, "Yes. I actually found some keys on that shelf along with a small amount of marijuana." Counsel objected and asked that the prosecutor instruct all future witnesses not to mention the marijuana. The court observed that Skeesick had not been present when the earlier ruling was made, nor had the prosecutor had enough time to instruct the witnesses not to mention the marijuana. Furthermore, Skeesick's response was not directly responsive to the prosecutor's question. The court asked counsel if he

wished the court to admonish the jury on the issue. Counsel elected to move on rather than emphasize the marijuana further. Tr. 670-78.

Defense counsel later questioned Petitioner and his co-defendant about their knowledge of the "drugs" found in the house. Both denied knowledge of drugs in the home. Tr. 747, 779. When the prosecutor cross-examined Petitioner about his knowledge of drug activity in the house, he first asked him if he knew about cocaine underneath the sofa cushion. The prosecutor then asked whether he knew "about any marijuana in the house." Tr. 759-60. The prosecutor cross-examined co-defendant Wallace about the coincidence of his print being on a scale that was found by the keys to the vehicle in which an assault rifle was found, as well as beside the .40 caliber Glock used in the shooting. The prosecutor mentioned in that question that the keys and the pistol were "also where the marijuana and the scales were" in a cabinet. Tr. 804. Defense counsel did not object to those questions.

Petitioner seeks to have his conviction thrown out on habeas review because counsel did not raise those additional objections. "It is oft-recognized that the decision not to seek a mistrial is frequently a strategic one." Geiger v. Cain, 540 F.3d 303, 309 (5th Cir. 2008). Counsel must balance the harm caused by the prosecutor's improper question against the possibility that a new trial would present worse prospects for his client. Id., citing Ward v. Dretke, 420 F.3d 479, 491 (5th Cir. 2005). The same principles apply to decisions whether to object or seek admonishments or cautionary instructions. Counsel often make a strategic decision to let some matters go rather than draw additional attention to them.

The state court's decision to deny relief on this Strickland claim was within the realm of a reasonable application of Strickland to the facts. Counsel fought hard to keep out evidence of the marijuana, and he largely succeeded once his objections were made. He did not object to the later minor references, but that may have been a matter of strategy or an implied recognition that he had opened the door by having his clients deny knowledge of "drugs" in the house. There is also no reasonable likelihood that the verdict would have been different had counsel raised an objection to the marijuana questions. There were only a few such references, and they were largely insignificant among the extensive questions about cocaine, which questions were fair game. Habeas relief is not permitted on this claim.

F. No Motion to Quash Multiple Offender Bill

Louisiana law allows a sentence for a current conviction to be enhanced if the defendant is adjudicated a multiple offender. The State charged Petitioner with being a third felony offender, and that status was used to impose an enhanced sentence. One of the prior convictions used to obtain multiple offender status was a 2003 conviction for possession of schedule II CDS. Petitioner argues that his counsel was ineffective because he did not file a motion to quash the multiple offender bill on the grounds that (1) the bill of information that charged the 2003 drug offense did not specify the quantity of drugs at issue and (2) the court did not inform Petitioner when he entered the 2003 plea that the conviction could be used against him later to enhance a sentence.

Louisiana law provides that if a defendant denies the allegations in a multiple offender bill, the burden is on the State to prove the existence of the prior guilty pleas and

that the defendant was represented by counsel when the pleas were entered. If the State meets that burden, the defendant has the burden to produce affirmative evidence of an infringement of his rights or a procedural irregularity in the taking of his plea. If he does that, the burden of proving the constitutionality of the former plea shifts to the State. It can meet its burden with a transcript or other records to show that the defendant was informed of and waived his right to trial by jury, his privilege against self-incrimination, and his right to confront witnesses. The ultimate issue is whether the State has met its burden of proving that the prior guilty plea was informed and voluntary and was made with a waiver of the three Boykin rights. State v. Shelton, 621 So.2d 769 (La. 1993).

The State in this case submitted court records regarding the prior convictions, and an expert witness testified that Petitioner's fingerprints established that he was the same person previously convicted. Defense counsel did not offer any objection. Tr. 979-990.

The version of the statute under which the prior drug conviction was obtained, La. R.S. 40:967, allowed a conviction for possession of any amount of certain substances. It allowed increased penalties if the State proved possession of greater amounts. The bill (Tr. 145) that charged Petitioner did not charge that he possessed any particular amount. The minutes show that Petitioner appeared with counsel and entered a plea after being informed of his Boykin rights, and then he was sentenced to three years. That sentence was within the range of the lowest sentencing category (not more than five years) under the applicable version of the statute, so the lack of quantity in the charging instrument was irrelevant. Counsel could not be ineffective for failing to move to quash the multiple offender

indictment on this ground. It lacked merit at the time of the original conviction, and there was no basis under Shelton to discount the prior conviction.

Petitioner argues that counsel should have quashed the bill because he was not warned when he entered his 2003 plea that the conviction could be used to enhance future sentences. Petitioner has not cited any authority that (1) requires such a warning at the time a plea is entered or (2 prohibits the use of the conviction for future enhancements if such a warning is not given. Absent such authority, counsel had no basis to file a motion to quash. The state court's denial of this Strickland claim was reasonable, so habeas relief is not permitted under the doubly deferential standard of review.

Petitioner makes a related argument that appellate counsel was ineffective for not requesting an errors patent review that could have led to relief with respect to these issues. This claim lacks merit because the underlying issues are meritless and because "all appeals are routinely reviewed for errors patent on the face of the record." State v. Kelly, 195 So.3d 449, 453 (La. 2016).

G. Failure to Note Race and Gender of Jurors

The record includes a transcript of the voir dire that took place over two days. Tr. 239-471. Both sides used peremptory strikes, and the discussions regarding the strikes and challenges for cause were transcribed on the record. Petitioner argues that defense counsel was ineffective because he did not ensure that the record stated the race and gender of all prospective jurors and then lodge (unspecified) Batson objections.

The record often contains a recitation by the trial judge or a written document that sets forth the race and gender of the jury venire. The State does not point to any such

evidence in this record. However, Petitioner offers only a conclusory assertion that a valid Batson objection could have been raised. Defense counsel Larry English, who is African American, does not have a reputation as one who would have been shy about raising such an objection. Had that happened, it is certain that the race or gender of the relevant jurors would have been mentioned. But no objection was made, so the record was not completed in that regard. Petitioner's conclusory assertion that a Batson claim could be raised had counsel noted the race and gender of jurors is speculative and conclusory. This court cannot say that the state court was objectively unreasonable when it rejected this Strickland claim.

The State also raises a lack of exhaustion/procedural bar defense based on Petitioner's alleged failure to present this claim to the state appellate or supreme courts. The defense need not be addressed in light of the recommended denial for lack of merit.

H. Bench Conferences

The Supreme Court of Louisiana has held that, as a matter of state criminal procedural law, bench conferences are a material part of the proceedings. If there are potential grounds to appeal based on how challenges were ruled upon at the bench, the absence of a transcript or other contemporaneous records to account for the selection process requires reversal. State v. Pinion, 968 So.2d 131 (La. 2007). Petitioner argues that Pinion and related state rules and statutes were violated when there were at least 13 unrecorded bench conferences during the course of his trial. He argues that he has no way of reviewing what was said, so he was unable to assign as error any unfavorable rulings made during those bench conferences.

This court may not grant habeas relief based on violations of Pinion or other state law. Federal habeas corpus relief is available only for errors of federal constitutional law. Estelle v. McGuire, 112 S.Ct. 475 (1991). Furthermore, the Supreme Court has not required the State to provide a full transcript based on mere request. Draper v. State of Washington, 83 S.Ct. 774 (1963). Only those parts that are germane to consideration of an appeal must be provided. This means a defendant must allege a specific error that can be uncovered through production of portions of the voir dire transcript not included in the record. The State is not required to provide complete transcripts so that a defendant may conduct a fishing expedition to seek out possible errors for appeal. Johnson v. Cooper, 2013 WL 4548526, *7 (E.D. La. 2013), citing Kunkle v. Dretke, 352 F.3d 980, 985-86 (5th Cir. 2003).

Petitioner has not articulated any particular appellate issue that could have been fleshed out by obtaining a transcript of a bench conference. He has not pointed to any places in the record that suggest any actual rulings were made at such conferences. Habeas relief is not available on this claim. This court has previously rejected similar claims. See, e.g., Hedgespeth v. Warden, 2015 WL 1089325, *6 (W.D. La. 2015); Greer v. Warden, 2014 WL 4387295, *9 (W.D. La. 2014).

I. Special Response Team

Two of the officers involved in the search testified about the use of a Special Response Team ("SRT") to enter the home. Petitioner argues that counsel was ineffective for failing to object to this testimony, the trial court erred in admitting the evidence, and there was related prosecutorial misconduct. All of the claims lack merit.

Agent David Recchia with the Shreveport Police Department testified that he is involved in narcotics investigations and was assisting the narcotics unit serve a search warrant on the Hattie Street home. Recchia said that detectives "had information that there was narcotics within that residence," so they "made entry using an SRT team to make a forceful entry to the residence." Tr. 642-43. The prosecutor asked about the purpose of the SRT. Recchia explained that many times drug operations are associated with a "chance for, propensity for violence." He said, "There are usually guns involved with dope." The team is "vested up" and uses heavy gear to make entry and secure the residence. Once the SRT has cleared the house, they allow the investigators to enter and conduct the search and interviews. Recchia said this form of entry was both for the safety of officers as well as to prevent destruction of evidence. Tr. 643-44.

Agent Chad Denham testified that he also served on the SRT or SWAT team. Denham said he was assigned to the entry team for the search of the Hattie Street home. There were 16 members of the SRT, dressed in vests, helmets, masks, and armed with "very big guns" and a ballistic shield. Tr. 649-52.

Defense counsel Larry English did not object to Agent Recchia's testimony, but he did object at this point during Agent Denham's testimony that the description was not relevant to whether the drugs and guns found in the home were possessed by the two defendants. The prosecutor responded that he thought it was important knowledge for the jurors to have, and the court summarily overruled English's objection. The testimony regarding the ballistic shield, the caliber of the police weapons, the use of a distraction device, and other matters were described. Tr. 652-56.

Petitioner argues that counsel was ineffective for not objecting, but counsel did eventually object and was overruled. The court cannot find counsel ineffective merely because he did not succeed on his objection. Bustos v. Quarterman, 2007 WL 701028, *5 (W.D. Tex. 2007) ("The mere fact that counsel did not prevail on his motion to suppress does not render his performance deficient.").

Petitioner argues that the trial judge erred in allowing the testimony. A federal court may grant habeas relief based on an erroneous state court evidentiary ruling only if the ruling violates a specific federal constitutional right or is so egregious such that it renders the petitioner's trial fundamentally unfair. Brown v. Epps, 686 F.3d 281, 286 n. 20 (5th Cir. 2012); Wilkerson v. Cain, 233 F.3d 886, 890 (5th Cir. 2000). The evidence at issue was of questionable relevance, but its admission was not so unfair as to meet the heavy burden required for habeas relief.

Finally, Petitioner argues that the prosecutor engaged in misconduct by pursuing this line of evidence. Claims of prosecutorial misconduct do not provide a basis for habeas relief unless the prosecutor's actions or argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 106 S.Ct. 2464, 2471 (1986). The petitioner must also demonstrate prejudice by showing that the misconduct was so persistent and pronounced or that the evidence of guilt was so insubstantial that the conviction would not have occurred but for the improper remarks. Geiger v. Cain, 540 F.3d 303, 308 (5th Cir. 2008); Jones v. Butler, 864 F.2d 348, 356 (5th Cir. 1988). The questions at issue were not an important part of the state's prosecution, and there was no argument that the testimony about the SRT entry supported a finding of

guilt. There is little reason to believe that the verdict would have been different had this testimony not been presented. Accordingly, the state court's denial of this claim was not an objectively unreasonable application of clearly established federal law.

J. Jury Instruction on Accomplice Testimony

Calvin Elie, who was arrested in the house, entered a guilty plea, received probation, and agreed to testify truthfully at this trial. Mr. Elie testified that he did not live at 2997 Hattie Street; he lived with his grandmother at another house on the street. Elie denied that he used drugs and said that he had come over to the house only a couple of hours before the raid. He denied possessing the drugs that were found, but he admitted that he entered a plea of guilty after spending over ten months in jail. Elie denied any involvement in the shooting, and he said he did not know whether the persons in the Hattie Street house were involved in drugs. He did say that he heard Petitioner mention that he needed to get a Reggie. Elie explained that a Reggie was 31 grams of cocaine, a reference to the jersey number of former NBA player Reggie Miller. But Elie did not offer any testimony that directly implicated Petitioner as a possessor of the drugs that were found. Tr. 621-42.

In Louisiana, a conviction may be sustained on the uncorroborated testimony of an accomplice, although the jury should be instructed to treat such testimony with great caution. State v. Hollins, 15 So.3d 69, 71 (La. 2009). A cautionary accomplice instruction is not required if there is material corroboration of the accomplice's testimony. Id. at 71-72. Petitioner argues that his attorney was ineffective because he did not request such an instruction.

The state court acted reasonably in denying this claim. There was nothing in Elie's testimony that directly incriminated Petitioner as possessing the cocaine that was found in the house. Rather, he said that he did not know whether the people in the house were involved in drugs. Elie did testify that he heard Petitioner say that he needed to get a Reggie, but Elie said Petitioner added, "I'm just playing, man, you know, I ain't got no money." Accordingly, there was little reason for defense counsel to ask for an instruction that Elie's testimony be treated with caution. It just wasn't very damaging.

The mere absence of a request for a jury instruction does not overcome the strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment. Thomas v. Vannoy, 651 Fed. Appx. 298, 303 (5th Cir. 2016). There is no reason to believe that the verdict might have been different had counsel requested such an instruction. This claim lacks merit.

Accordingly,

It is recommended that Petitioner's Petition for Writ of Habeas Corpus be denied.

Objections

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed. R. Civ. P. 6(b). A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 14 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See Douglass v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

An appeal may not be taken to the court of appeals from a final order in a proceeding under 28 U.S.C. § 2254 unless a circuit justice, circuit judge, or district judge issues a certificate of appealability. 28 U.S.C. § 2253(c); F.R.A.P. 22(b). Rule 11 of the Rules Governing Section 2254 Proceedings for the U.S. District Courts requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate may issue only if the applicant has made a substantial showing of the denial of a constitutional right. Section 2253(c)(2). A party may, within fourteen (14) days from the date of this Report and Recommendation, file a memorandum that sets forth arguments on whether a certificate of appealability should issue.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 11th day of February, 2019.

Mark L. Hornsby
U.S. Magistrate Judge

The Supreme Court of the State of Louisiana

STATE EX REL. GLENN YOUNG

NO. 2014-KH-2603

VS.

STATE OF LOUISIANA

- - - - - -

IN RE: Glenn Young; - Plaintiff; Applying For Supervisory and/or Remedial Writs, Parish of Caddo, 1st Judicial District Court Div. 5, No. 259,554 & 264,432; to the Court of Appeal, Second Circuit, No. 49695-KH;

- - - - - -

October 30, 2015

Denied. See per curiam.

JTK

BJJ

JLW

GGG

MRC

SJC

HUGHES, J., would grant in part.

Supreme Court of Louisiana
October 30, 2015

Deputy Clerk of Court
For the Court

APPENDIX
D

SUPREME COURT OF LOUISIANA

No. 14-KH-2603

STATE EX REL. GLENN YOUNG

OCT 30 2015

v.

STATE OF LOUISIANA

On Supervisory and/or Remedial Writs from the
1st Judicial District Court, Parish of Caddo

99f

PER CURIAM:

Denied. On the showing made, relator fails to demonstrate prejudice resulting from any defect in the bill of information. State v. James, 305 So.2d 514, 517 (La. 1974). In addition, relator has not established that he received ineffective assistance of counsel under the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Relator has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, see 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the Legislature in 2013 La. Acts 251 amended La.C.Cr.P. art. 930.4 to make the procedural bars against successive filings mandatory. Relator's claims have now been fully litigated in state collateral proceedings in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless relator can show that one of the narrow

Hughes, J., would grant in part.

SUPREME COURT OF LOUISIANA

No. 14-KH-2603

STATE EX REL. GLENN YOUNG

OCT 30 2015

v.

STATE OF LOUISIANA

On Supervisory and/or Remedial Writs from the
1st Judicial District Court, Parish of Caddo

Hughes, J., would grant in part.

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ST[illegible] OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
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Judge, First Judicial District
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Glenn Young
LA State Prison
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NOTICE OF JUDGMENT AND CERTIFICATE OF MAILING

November 12, 2014

DOCKET Number: **KH 14-49695**

STATE OF LOUISIANA

VERSUS

GLENN YOUNG

NOTICE IS HEREBY GIVEN that the attached order was rendered this date and a copy was mailed to the trial judge, the trial court clerk, all counsel of record and all parties not represented by counsel as listed above.

FOR THE COURT

Clerk of Court

APPENDIX
E

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
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NO: 49695-KH

STATE OF LOUISIANA

VERSUS

GLENN YOUNG

FILED: 09/23/14
RECEIVED: PM 08/11/14

On application of Glenn Young for POST CONVICTION RELIEF in Nos. 259,554 and 264,432 on the docket of the First Judicial District, Parish of CADDO, Judge Craig Owen Marcotte.

Pro se	Counsel for: Glenn Young
Charles Rex Scott, II	Counsel for: State of Louisiana

Before: CARAWAY, MOORE and GARRETT, JJ.

WRIT DENIED.

The applicant, Glenn Young, seeks supervisory review of the trial court's denial of his application for post-conviction relief. On the showing made, this writ is hereby denied. La. C. Cr. P. 930.2; *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Shreveport, Louisiana, this 12th day of November, 2014.

FILED: November 12, 2014
Kaunfreer McGee
Dy. CLERK

SECOND CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA
Endorsed Filed Nov. 12, 20 14
Lillian Evans Richie
LILLIAN EVANS RICHIE, CLERK OF COURT
A TRUE COPY - Attest

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STATE OF LOUISIANA	:	NUMBER: 259,554
VERSUS	:	FIRST JUDICIAL DISTRICT COURT
GLENN YOUNG	:	CADDO PARISH, LOUISIANA SECTION 5

RULING

Petitioner, Glenn Young has filed an application for post conviction relief on or about April 25, 2013.

Petitioner Glenn Young has alleged ineffective assistance of counsel as well as a defective Bill of Information. Mr. Young proceeded to trial of on a charge of possession of CDS cocaine, over 28 grams but less than 200 grams as well as illegal use of a weapon.

Mr. Young was found guilty of both charges by a jury of his peers on April 4, 2008. Thereafter the state filed a multiple offender bill and defendant was adjudicated a third felony offender. He was sentenced to 50 years at hard labor on each charge to run concurrently.

The appellate court vacated his sentences and amended said sentences.

Petitioners first claim of defective bill is without merit and therefore said claim is denied. Regarding his second claim of ineffective assistance of counsel, petitioner claims that his attorney prepared a defense based upon the information contained in the Bill of Information. Further he claims that his counsel was ineffective as he did not challenge the application for a search warrant as well as not having an alibi witness testify for him.

Petitioner's claim does not meet his burden of proof set forth by Strickland v. Washington, 466 U.S. 668, 686 (1984).

Therefore petitioner's claim for ineffective assistance of counsel is hereby denied as well.

Thus done and signed at Shreveport, Caddo Parish, Louisiana on this the 23 day of May, 2013.

Judge Craig O. Marcotte

APPENDIX
F

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

NO. 2011-KO-1961

VS.

GLENN YOUNG

- - - - - -

IN RE: Young, Glenn; - Defendant; Applying For Writ of Certiorari and/or Review, Parish of Caddo, 1st Judicial District Court Div. 3, No. 259,554; to the Court of Appeal, Second Circuit, No. 46,422-KA;

- - - - - -

February 17, 2012

Denied.

JPV

BJJ

JTK

JLW

GGG

MRC

Supreme Court of Louisiana
February 17,2012

Deputy C
E

APPENDIX
G

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STATE OF L. JIANA
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Angola, LA 70712

NOTICE OF JUDGMENT AND CERTIFICATE OF MAILING

August 10, 2011

DOCKET Number: **KA 11-46422**

STATE OF LOUISIANA

VERSUS

BOBBY WALLACE, JR.
and GLENN YOUNG

NOTICE IS HEREBY GIVEN that the attached judgment and written opinion was rendered this date and a copy was mailed to the trial judge, the trial court clerk, all counsel of record and all parties not represented by counsel as listed above.

FOR THE COURT

Lillian Evans Richie
Clerk of Court

APPENDIX
H

Judgment rendered August 10, 2011.
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 46,422-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA — Appellee

versus

BOBBY WALLACE, JR.
AND GLENN YOUNG — Appellant

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 259,554

Honorable Michael A. Pitman, Judge

* * * * *

LOUISIANA APPELLATE PROJECT By: Peggy J. Sullivan	Counsel for Appellant Bobby Wallace, Jr.
BOBBY WALLACE, JR.	Pro Se
LOUISIANA APPELLATE PROJECT By: Carey J. Ellis, III	Counsel for Appellant Glenn Young
GLENN YOUNG	Pro Se
CHARLES REX SCOTT, II District Attorney	Counsel for Appellee
BRIAN HARRIST BARBER JASON TREVOR BROWN Assistant District Attorneys	

* * * * *

Before WILLIAMS, DREW and MOORE, JJ.

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DREW, J.:

Defendant Bobby Wallace, Jr., was convicted of possession of Schedule II CDS, over 28 grams but less than 200 grams of cocaine, a violation of La. R.S. 40:967(F)(1)(a). He was adjudicated a third felony habitual offender and sentenced to life imprisonment at hard labor without benefit of suspension of sentence, probation, or parole. Wallace was acquitted of illegal use of weapons, La. R.S.14:94(A) and (B).

Defendant Glenn Young was convicted of possession of Schedule II CDS, over 28 grams but less than 200 grams of cocaine, a violation of La. R.S. 40:967(F)(1)(a). He was adjudicated a third felony habitual offender and sentenced to serve 50 years at hard labor, all without benefit of suspension of sentence, probation, or parole.

Young was also convicted of illegal use of weapons, a violation of La. R.S.14:94(A) and (B), and sentenced to a concurrent 50 years at hard labor, all without benefits.

Both defendants appeal. We affirm all convictions, as well as the sentence imposed upon Wallace. We amend and affirm Young's sentence for his drug conviction, eliminating any parole restriction after the initial five years of his sentence. Young's sentence for illegal use of weapons far exceeds his statutory exposure, so we must vacate that sentence and remand.

FACTS

The charges against these men arose when a feud between present and former gang members led to gunfire on the streets of Shreveport.

One of the victims, Marcus "Donut" Thomas, testified that:

- as a youth in the early 1990s, he had been a member of the Shreveport "Rollin 60s" street gang associated with the Crip gang faction;

- he has a long criminal history;[1]
- he first went to prison in 1992 for illegal use of weapons;
- he left the gang lifestyle in the mid-1990s when released from prison;
- he remained acquainted, however, with many gang members;
- the defendants and many of Donut's family were gang members;
- bad blood developed between him and the gang when he refused to "take a charge" for Stevie Young, the first cousin of defendants;
- Stevie Young was convicted of the referenced drug offense and sentenced to serve 24 years in federal prison;
- he (Donut) feared retaliation from the Young/Thomas families;
- on April 30, 2007, he and his girlfriend, Linnear Jordan, and her daughter went to the Quick Pack grocery store in Shreveport;
- the three of them entered the store;
- inside was Greg Young, Rollin 60s member, a cousin of defendants;
- he and Greg began arguing, which almost led to physical violence;
- Greg refused to fight, driving from the store with another man;
- as he (Donut) drove down David Raines Road near Victor Street, shots came from a group of men who were standing beside the road;
- several bullets hit the SUV;
- he sped off as his girlfriend successfully protected her child;
- despite the hail of bullets,[2] no one in his SUV was hit;
- when questioned by Shreveport Police Department ("SPD") officers, he first identified only Greg Young and Bobby Wallace as the shooters, but later added Glenn Young[3] as a shooter;

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[1]His convictions include two felonies and several misdemeanors.

[2]Witnesses said they heard about six shots. SPD officers retrieved six spent .40-caliber shell casings from the area where the shooters had been standing.

[3]His story as to the number of assailants varied as the investigation progressed, according to SPD detectives. He never alleged that a fourth person, "Little Cal," actually

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- he attributed this discrepancy to the immediate trauma of the event;
- he could not recall what type of guns the other men had; and
- he told the SPD that Wallace and both Youngs lived on Hattie Street.

Police executed a search warrant for the house on May 7, 2007.

Five people were inside the Hattie Street house at the time of the search: Kendra Young (Glenn Young's sister), Anthony Wallace, Calvin Elie, defendant Bobby Wallace, Jr., and defendant Glenn Young. Police *Mirandized*[4] all subjects and took them outside during the search.

The SPD recovered a plastic Baggie from under the cushions of the couch in the front room. It contained just over 31 grams[5] of powder cocaine. No fingerprints could be found on the Baggie.

The officers looked into a kitchen cabinet and found a box of small sandwich bags, an open box of baking soda, a package of batteries, and a Glock .40-caliber handgun. Subsequent testing proved that this was the handgun from which the spent casings at the scene had been fired.[6]

Also found in the kitchen was a digital scale of a type commonly used for weighing drugs for resale.[7] Investigators found on the scale the fingerprint of defendant Bobby Wallace, Jr. The police also seized Cingular

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shot at him.

[4]*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[5]Thirty-one grams of cocaine, with a street value of about $700, is known in street parlance as a "Reggie," relating to the jersey number of former Indiana Pacer star Reggie Miller.

[6]Although police also found an SKS rifle in a vehicle outside the house, no evidence tied the rifle to the shooting.

[7]Police found a bag of marijuana next to the scale, but because the marijuana charge was not being pursued during this trial, the court excluded that evidence and, apart from inadvertent mentions by witnesses, the jury was not aware of its discovery.

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telephone invoices bearing Glenn Young's address at that location.

As the officers were about to transport the suspects to jail, Kendra Young, responding to urging from these two defendants, initially told them that "everything belonged to her." SPD investigator Lee Scott asked Ms. Young whether she claimed the crime that went along with the gun, and she quickly changed her story to assert that the items belonged to Calvin Elie.

All occupants were charged with possession of cocaine over 28 grams but less than 200 grams. Glenn Young and Wallace were also charged with illegal use of weapons. The two men were tried together on both charges.

Calvin Elie pled guilty to possession of cocaine in January 2008. In exchange for his testimony against the other defendants, he received a two-year probated sentence. At the defendants' trial, he testified that:

- he was sleeping in a back room with Wallace when the police arrived;
- despite his previous guilty plea, he denied that the drugs were his;
- he previously heard Glenn Young say that he needed a "Reggie";
- he was unaware of any drug dealing at the Hattie Street residence;
- the digital scales did not belong to him;
- he did not know of the shooting and did not live with the Youngs; and
- despite physical signs of drug abuse, he denied being a drug user.[8]

A variety of police witnesses and forensic experts testified and explained that the lack of additional shell casings at the scene of the

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[8]A review of Elie's testimony as a whole reflects that of an unsophisticated and mentally slow drug abuser. A later police witness described Elie as physically appearing to be a crack user (his teeth and skin were in poor condition) and "simple." The officer explained that a crack user like Elie would likely not have possession of such a large quantity of cocaine nor would he be likely to have powder cocaine because crack users typically do not use the powder form.

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shooting could be attributed to the use of revolvers—which do not automatically eject spent casings—or the use of "shell catchers." Thomas said at trial that three of the four men fired at him. Elie did not.

The defendants chose to testify on their own behalf.

Glenn Young told the jury that:

- he lived on Hattie Street with Kendra Young[9] and with Calvin Elie;[10]
- he had prior convictions in 2002 for possession of crack cocaine and for indecent behavior with a juvenile;
- he was not employed at the time of the shooting;
- he had never been a member of the Rollin 60s street gang;
- he was at home with his sister when he heard the shooting;
- when the SPD executed the warrant, he was asleep in the back room;
- Elie was asleep on the sofa in the front room when the police came;
- Wallace was there to drive Kendra Young's child to school;
- he had never before seen the Glock handgun seized from his kitchen, nor did he know how the weapon came to be there;
- he denied any knowledge of the drugs found in the sofa;
- he "couldn't recall" whether he had asked his sister to take the charges for the items found in the house; and
- he denied knowing that the scale was in the house.

Bobby Wallace testified that:

- he was in the Rollin 60s until his manslaughter conviction at age 16;
- he left the gang when he was released from custody in 1996;
- he knew nothing of the shooting or the drugs at the Youngs' home;

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[9]Kendra Young is Glenn Young's sister.

[10]Young testified that Elie, his first cousin, had lived with him for the seven months since his grandmother kicked him out of her house for drug usage.

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- at the time of the shooting, he was at his uncle's girlfriend's house;
- he was on probation for a felony drug conviction at the time;
- his probation was due to end the day after the warrant was executed;
- Donut had always been an habitual liar;
- he did not understand why Donut would lie about the shooting;
- he knew nothing of any words that day between Donut and Greg;
- Elie was a drug addict who lived at the Hattie Street address because his family had thrown him out due to his drug problem;
- at the time the warrant was served, he was only at the Hattie Street residence to pick up Kendra's child to take her to Head Start;
- Elie was asleep on the couch when he arrived, and he (Wallace) was in the back of the house when the police entered the home;
- he knew nothing about the gun or scale seized that day;
- his fingerprint on the scale was entirely innocent;
- he touched the scale at his grandmother's house the day before, at which time he had told his cousin Marquae to get rid of the scale;
- after he was arrested, SPD investigator Scott unsuccessfully attempted to drop the bag into Wallace's open hand;[11] and
- he denied asking Kendra Scott to "take the charges."

Marquae Wallace, cousin of Bobby Wallace, testified that Bobby had touched the digital scale at a location away from the Hattie Street address the day before the warrant was executed. He explained that after Bobby touched the scales, he (Marquae) left Bobby and then met Calvin Elie on the street. Marquae said that Elie had a bag of powder cocaine, which Elie identified as the same bag seized by police from the Young residence, so the

[11]This allegation is bitterly denied by the investigator.

two of them went to his cousin Kendra's house (the Hattie Street address) and used some of the powder cocaine. Marquae said that he left the scales on the kitchen counter and forgot about them.

A jury convicted both men of possession of over 28 grams but less than 200 grams of cocaine. The jury convicted Glenn Young of illegal use of a weapon but acquitted Bobby Wallace of that charge.

The state filed habitual offender bills against both men. In due course, they were each adjudicated as a third felony offender.

The defendants filed a motion for new trial, citing inconsistencies in the testimony of two of the state's witnesses. The trial court denied the motions in open court and immediately sentenced the defendants.

Wallace was sentenced to a mandatory life sentence at hard labor without benefits.[12]

Young, convicted on both charges, was sentenced to serve 50 years without benefits on each.[13] The sentencing range for his drug offense, after adjudication as an habitual offender, was 20 to 60 years at hard labor, with only the first five years to be served without benefits. The court took careful consideration of the factors under La. C. Cr. P. art. 894.1 before sentencing.

Young received the same 50-year concurrent sentence for his conviction for illegal use of weapons, which sentence exceeds his exposure of two years, with or without hard labor. We vacate the sentence for that

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[12]The two predicate felony convictions for Wallace's adjudication were manslaughter and possession of Schedule I CDS with the intent to distribute.

[13]Young's two predicate felony convictions for his adjudication were indecent behavior with a juvenile and simple possession of a Schedule II CDS.

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offense only, and remand for resentencing.

DISCUSSION

Sufficiency

Our law is well settled as to reviewing convictions for sufficiency of the evidence.[14]

Young argues that his conviction for illegal use of weapons must be reversed. He cites inconsistencies in Thomas's testimony, including his varying recollection of the number of people who were shooting at him,

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[14]The standard of appellate review for a sufficiency of the evidence claim 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 proven beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Tate*, 2001-1658 (La. 5/20/03), 851 So. 2d 921, *cert. denied*, 541 U.S. 905, 124 S. Ct. 1604, 158 L. Ed. 2d 248 (2004); *State v. Carter*, 42,894 (La. App. 2d Cir. 1/9/08), 974 So. 2d 181, *writ denied*, 2008-0499 (La. 11/14/08), 996 So. 2d 1086. This standard, now legislatively embodied in La. C. Cr. P. art. 821, does not provide the appellate court with a vehicle to substitute its own appreciation of the evidence for that of the fact finder. *State v. Pigford,* 2005-0477 (La. 2/22/06), 922 So. 2d 517; *State v. Dotie*, 43,819 (La. App. 2d Cir. 1/14/09), 1 So. 3d 833, *writ denied*, 2009-0310 (La. 11/6/09), 21 So. 3d 297. The appellate court does not assess the credibility of witnesses or reweigh evidence. *State v. Smith*, 1994-3116 (La. 10/16/95), 661 So. 2d 442. A reviewing court accords great deference to a jury's decision to accept or reject the testimony of a witness in whole or in part. *State v. Eason,* 43,788 (La. App. 2d Cir. 2/25/09), 3 So. 3d 685, *writ denied*, 2009-0725 (La. 12/11/09), 23 So. 3d 913; *State v. Hill*, 42,025 (La. App. 2d Cir. 5/9/07), 956 So. 2d 758, *writ denied*, 2007-1209 (La. 12/14/07), 970 So. 2d 529.

The *Jackson* standard is applicable in cases involving both direct and circumstantial evidence. An appellate court reviewing the sufficiency of evidence in such cases must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of every essential element of the crime. *State v. Sutton,* 436 So. 2d 471 (La. 1983); *State v. Speed,* 43,786 (La. App. 2d Cir. 1/14/09), 2 So. 3d 582, *writ denied*, 2009-0372 (La. 11/6/09), 21 So. 3d 299.

Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. *State v. Speed, supra*; *State v. Allen*, 36,180 (La. App. 2d Cir. 9/18/02), 828 So. 2d 622, *writs denied*, 2002-2595 (La. 3/28/03), 840 So. 2d 566, 2002-2997 (La. 6/27/03), 847 So. 2d 1255, *cert. denied*, 540 U.S. 1185, 124 S. Ct. 1404, 158 L. Ed. 2d 90 (2004).

In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. *State v. Gullette,* 43,032 (La. App. 2d Cir. 2/13/08), 975 So. 2d 753; *State v. Burd*, 40,480 (La. App. 2d Cir. 1/27/06), 921 So. 2d 219, *writ denied*, 2006-1083 (La. 11/9/06), 941 So. 2d 35.

despite the finding of only six spent shell casings fired by a single weapon. Further, Young notes that no fingerprints were found on the seized gun and that he never had possession of the gun at the time of seizure.

La. R.S. 14:94 provides, in pertinent part:

> A. Illegal use of weapons or dangerous instrumentalities is the intentional or criminally negligent discharging of any firearm, or the throwing, placing, or other use of any article, liquid, or substance, where it is foreseeable that it may result in death or great bodily harm to a human being.
>
> B. Except as provided in Subsection E, whoever commits the crime of illegal use of weapons or dangerous instrumentalities shall be fined not more than one thousand dollars, or imprisoned with or without hard labor for not more than two years, or both.

Unquestionably there are internal and external variations in Thomas's testimony and his reports to the police, and the physical evidence did not conclusively prove that more than one person fired at Thomas's vehicle. Nevertheless, the jury saw photos of that vehicle and the damage that was unquestionably caused by a fusillade of bullets. Further, the .40-caliber handgun retrieved from Young's house was proven to be the weapon that marked the shell casings left behind at the scene of the shooting. Thomas specifically identified Glenn Young as one of the three shooters and described the type of weapon being used by Young.

The jury chose to believe Thomas and to disbelieve Glenn Young as to Young's participation in the crime. As regards Young, Thomas' testimony had little internal contradiction and bore no irreconcilable conflict with the physical evidence seized from Young's house. The evidence is sufficient to convict Glenn Young of illegal use of a weapon.

Both Young and Wallace argue that the evidence is insufficient to prove that they were in possession of the drugs found in the Youngs' house. Essentially, they argue that they were merely present in the house, were not in close proximity to the drugs (or related paraphernalia) when police arrived to execute the warrant, and that some of the evidence showed that Calvin Elie, a known drug user, was sleeping in close proximity to the location where the drugs were found.

The legal analysis for appellate review of possession cases is well settled.[15]

The jury was faced with a wide array of often contradictory testimony about these factors relevant to the possession of the narcotics. The evidence proved that the drugs were found in the house shared by defendant Young, his sister, and perhaps Calvin Elie, who had pled to possession of the

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[15]To support a conviction for possession of a controlled dangerous substance, the state must prove the defendant was in possession of the illegal drug and that he knowingly possessed the drug. *State v. White*, 37,261 (La. App. 2d Cir. 6/25/03), 850 So. 2d 987. The state need not prove that the defendant was in physical possession of the drugs found; constructive possession is sufficient to support a conviction. *State v. Toups*, 2001-1875 (La. 10/15/02), 833 So. 2d 910. Constructive possession is defined as having an object subject to one's dominion and control, with knowledge of its presence, even though it is not in one's physical possession. *State v. Mingo*, 42,407 (La. App. 2d Cir. 9/19/07), 965 So. 2d 952; *State v. White*, *supra*. The mere presence of a person in the place where contraband is found or the mere association with another person possessing contraband is not sufficient to prove constructive possession. *State v. Harris*, 1994-0970 (La. 12/8/94), 647 So. 2d 337; *State v. Brown*, 42,188 (La. App. 2d Cir. 9/26/07), 966 So. 2d 727, *writ denied*, 2007-2199 (La. 4/18/08), 978 So. 2d 347.

Guilty knowledge is an essential element of a possession charge, and such knowledge may be inferred from the circumstances. *State v. Toups*, *supra*; *State v. Robbins*, 43,129 (La. App. 2d Cir. 3/19/08), 979 So. 2d 630. A determination of whether the defendant was in possession depends on the "peculiar facts" of each case; which may include the following: (1) the defendant's knowledge that the contraband is in an area; (2) his relationship with the person found to be in actual possession; (3) his access to the area where the drugs were found; (4) evidence of recent drug use; and (5) the defendant's physical proximity to the contraband. *Id.* Further, a defendant may have constructive possession if he willfully and knowingly shares the right to control the contraband with another. *Id.*

drugs.[16] The bag of drugs did not bear any fingerprints; it was found under a couch in the main room, easily accessible by anyone.

Although there was testimony that Elie was sleeping on this couch just prior to the entry of the police, he denied being there. The jury had the opportunity to observe him, a witness who exuded the appearance and demeanor of a crack addict, and the evidence supports the conclusion that the seldom employed and homeless Elie was not the only person with a connection to this significant quantity of cocaine.

Elie explained that he had heard Glenn Young say that he needed a "Reggie," which corresponds with the 31 grams of powder cocaine found in the couch. Moreover, only Wallace's fingerprint was found on the digital scale, which was located in the kitchen cupboard near the gun,[17] plastic bags, baking soda, and batteries. Wallace admitted that this type of scale was often used to weigh drugs. His thin explanation as to how his fingerprint came to be on the scale was dubious. Both defendants implored Kendra Young to, in effect, "take the charges." Viewed in the light most favorable to the state, the evidence was sufficient to prove beyond a reasonable doubt that defendants were in constructive possession of drugs.

Wallace Sentencing: Trial court erred in not departing downward from the life sentence, in failing to specify which conviction was used to enhance the sentence, and in noncompliance with La. C. Cr. P. art. 894.1

This third felony conviction[18] brought Wallace under the ambit of La.

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[16]Elie explained, in effect, that this was a "best interest" plea, to get out of jail.

[17]Scientific testimony proved that this gun fired the recovered bullet hulls.

[18]The nature of his prior offenses mandated a life sentence upon adjudication. The lesser nature of Young's prior offenses did not expose him to this fate.

R.S. 15:529.1(A)(1)(b)(ii), which requires such a drastic sentence. The record does not reflect that Wallace filed a motion to reconsider sentence or formally requested a downward departure from the mandatory life sentence.

Our law is well settled relative to the review of a sentence where no motion to reconsider is filed.[19]

Wallace argues that his is the rare case when a mandatory minimum sentence is excessive. He cites his testimony of leaving gang life and that people now call him "Preach," because he counsels others to stay straight.

This record is sufficient to conclude that the life sentence is not excessive so as to consider any departure from the legislative mandate. Wallace was on probation at the time the police executed the warrant, yet he freely associated with a known crack addict. He was engaged in illicit activity with Glenn Young at Young's residence. After Wallace's arrest, he implored Kendra Young to take the charges for the items found in the house and, at trial, he proffered a preposterous story about (among other things) a

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[19]When a defendant fails to timely file a motion to reconsider sentence under La. C. Cr. P. art. 881.1, the appellate court's review is limited to the bare claim of constitutional excessiveness. *State v. Mims*, 619 So. 2d 1059 (La. 1993); *State v. Jones*, 41,449 (La. App. 2d Cir. 9/20/06), 940 So. 2d 61. A sentence violates La. Const. Art. I, § 20, if it is grossly out of proportion to the seriousness of the offense or nothing more than a purposeless and needless imposition of pain and suffering. *State v. Smith*, 2001-2574 (La. 1/14/03), 839 So.2d 1; *State v. Dorthey*, 623 So. 2d 1276 (La. 1993). A sentence is deemed grossly disproportionate if, when the crime and punishment are viewed in light of the harm done to society, it shocks the sense of justice or makes no reasonable contribution to acceptable penal goals. *State v. Guzman*, 1999-1528, 1999-1753 (La. 5/16/00), 769 So. 2d 1158.

Although the Louisiana Supreme Court has held that courts have the power to declare a mandatory minimum sentence excessive under Art. I, § 20 of the Louisiana Constitution, this power should only be exercised in rare cases and only when the court is firmly convinced that the minimum sentence is excessive. *State v. Ponsell*, 33,543 (La. App. 2d Cir. 8/23/00), 766 So. 2d 678, *writ denied*, 2000-2726 (La. 10/12/01), 799 So. 2d 490.

The mandatory life sentences the habitual offender law requires are presumptively constitutional and should be accorded great deference by the judiciary. *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So. 2d 672; *State v. Wade*, 36,295 (La. App. 2d Cir. 10/23/02), 832 So. 2d 977, *writ denied*, 2002-2875 (La. 4/4/03), 840 So. 2d 1213.

police effort to put his fingerprints on the drug evidence. This sort of conduct does not suggest that a downward departure is warranted.

He argues, without merit, that this record does not show which conviction was enhanced through the habitual offender proceedings. This is a simple inquiry, as he was convicted here only on the one drug offense.

Wallace attacks the unarticulated reasons for sentencing, in violation of La. C. Cr. P. art. 894.1. Such articulation is unnecessary where a sentence is mandated by law. *State v. Burd,* 40,480 (La. App. 2d Cir. 1/27/06), 921 So. 2d 219, *writ denied*, 2006-1083 (La. 11/9/06), 941 So. 2d 35.

Young's Sentences: Claims of Excessiveness

Young argues that his 50-year hard labor sentence, all without benefits, is excessive. His attorney made a detailed and impassioned plea for the minimum sentence, and after the imposition of sentence, he filed a motion to reconsider sentence, expressing the same arguments. The trial court denied that motion, citing reasons surrounding the commission of the illegal use of a weapon offense.

La. R.S. 40:967(F)(1)(a) provides:

> (a) Any person who knowingly or intentionally possesses twenty-eight grams or more, but less than two hundred grams, of cocaine or of a mixture or substance containing a detectable amount of cocaine or of its analogues as provided in Schedule II(A)(4) of R.S. 40:964, shall be sentenced to serve a term of imprisonment at hard labor of not less than five years, nor more than thirty years, and to pay a fine of not less than fifty thousand dollars, nor more than one hundred fifty thousand dollars.

At the time of the offense, La. R.S. 15:529.1(A)(1)(b)(i) provided, in part:

> (b) If the third felony is such that upon a first conviction, the offender would be punishable by imprisonment for any term

less than his natural life then:

> (i) The person shall be sentenced to imprisonment for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than twice the longest possible sentence prescribed for a first conviction[.]

Neither of these sections restricts the offender's right to parole.

La. R.S. 40:967(G), however, provides:

> G. With respect to any person to whom the provisions of Subsection F are applicable, the adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for probation or parole prior to serving the minimum sentences provided by Subsection F.

The potential sentence for a basic violation of La. R.S. 40:967(F)(1)(a) is from 10 to 30 years at hard labor. By operation of the applicable habitual offender law, the enhanced sentence must be for a term of at least 20 years but not more than 60 years at hard labor, without benefits only for the first five years.

The district court was without authority to order that Young's entire sentence be served without benefit of parole. Accordingly, this court amends Young's sentence to maintain the 50 years at hard labor, but requiring only the first five years to be served without benefit of suspension of sentence, probation, or parole.

The trial court engaged in a thorough examination of the factors enumerated in La. C. Cr. P. art. 894.1, noting that Young was convicted of illegal use of a weapon at the same trial as for his drug offense. The court cited the extremely dangerous nature of his conduct, his gang membership, and the serious nature of his previous convictions, one of which involved

drugs. Worse, the instant drug offense was committed in the presence of a child and an unsecured, loaded weapon.

The trial court's sentence was appropriate for Young's drug offense, but any restriction on parole beyond the five years allowed is illegal.

Confusion over which conviction was enhanced for Young's sentence

There is none. The habitual offender bill clearly specifies that Young's third offense was the instant drug conviction. Young argues that the trial court improperly sentenced him to serve 50-year hard labor concurrent sentences on both of his convictions. We agree.

The weapons charge was not multi-billed, leaving maximum exposure for violation of La. R.S. 14:94 (A) and (B) to be two years at hard labor.

We remand this case for the imposition of a lawful sentence.

Lack of written reasons for adjudication per La. R.S. 15:529.1(D)(3)

Both defendants complain of the trial court's noncompliance with La. R.S. 15:529.1(D)(3), which requires, *inter alia*, that the court provide written reasons for its determination that an offender is an habitual offender. In this case, the trial court did not issue written reasons, but the error is harmless because the transcripts of the habitual offender proceedings show clear oral reasons and the sufficiency of the evidence presented. *State v. James*, 41,069 (La. App. 2d Cir. 8/23/06), 938 So. 2d 1191.

Immediate sentencing after denial of motions for new trial without a waiver of the required 24-hour delay between denial and sentencing

Both defendants argue that the trial court committed reversible error by sentencing without observing the 24 hour delay required by La. C. Cr. P.

art. 873.[20] Although it is true that the defendants did not waive the delays prior to the imposition of sentence, vacation of the sentences is not mandatory, as this is harmless error, with no prejudice shown. *State v. White*, 404 So. 2d 1202 (La. 1981); *State v. Bobo*, 46,225 (La. App. 2d Cir. 6/8/11), __ So. 3d __, 2011 WL 2209146.

DECREE

We affirm the convictions of each defendant.

We affirm the life sentence imposed upon Wallace for the enhanced drug conviction.

We amend Young's 50-year hard labor sentence on the enhanced drug conviction, so as to deny parole only for the first five years of the sentence. As amended, we affirm Young's sentence for possession of the drugs.

We vacate Young's sentence relative to his conviction for illegal use of a weapon, and we remand that matter for resentencing.[21]

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[20]La. C. Cr. P. Art. 873:

> If a defendant is convicted of a felony, at least three days shall elapse between conviction and sentence. If a motion for a new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is overruled. If the defendant expressly waives a delay provided for in the article or pleads guilty, sentence may be imposed immediately.

[21]The sentence cannot exceed two years, with or without hard labor.