IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

No. _____

TONY DECLOUES -- PETITIONER

VS.

STATE OF LOUISIANA, -- RESPONDENT

APPENDICES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-30501

TONY DECLOUES,

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

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

O R D E R:

Tony Decloues, Louisiana prisoner # 193085, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 application challenging his conviction for second degree murder. Decloues argues that the trial court erred in denying his motion to suppress his confession, wherein he argued that his waiver of rights was not knowing and intelligent under *Miranda v. Arizona*, 384 U.S. 436 (1966).

To obtain a COA, Decloues must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Because the district court denied Decloues's claims on the merits, he "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that "the issues presented were adequate to deserve encouragement to

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proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted). Decloues has not met this standard.

Accordingly, his motion for a COA is DENIED. Additionally, his motion for leave to proceed in forma pauperis on appeal is DENIED.

/s/ Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TONY DECLOUES	CIVIL ACTION
VERSUS	NO. 14-1158
BURL CAIN	SECTION "R"

ORDER

Before the Court is petitioner Tony DeCloues's petition for habeus corpus pursuant to 28 U.S.C. § 2254.[1] This petition is before the Court on remand from the Fifth Circuit, which vacated the Court's order adopting the Magistrate Judge's first Report and Recommendation and denying the petition.[2] The Fifth Circuit instructed this Court to obtain and review the petitioner's video confession to evaluate whether he was incapacitated during his confession and was therefore unable to knowingly and voluntarily waive his *Miranda* rights.[3]

The Court has obtained and viewed the video confession. It has also reviewed the petition, the rest of the state record, and the applicable law. It

June 2019

1 R. Doc. 1.
2 R. Doc. 35; R. Doc. 25.
3 R. Doc. 35 at 4.

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has reviewed the Magistrate Judge's second Report and Recommendation[4] and the petitioner's objections to this Report and Recommendation.[5]

The state court determined that petitioner was sober enough to comprehend the consequences his words during his confession. The Court does not find this determination to be based on an unreasonable determination of the facts in light of his demeanor in the video confession and the evidence presented at the petitioner's competency hearing. Nor was the state court's determination that petitioner's confession was voluntary contrary to clearly established federal law. As the Magistrate Judge points out in her report, petitioner was alert and responsive throughout his confession. His statements were indicative of a person with accurate recall and a lucid mind. There is no evidence of coercive police activity at any point before or during petitioner's confession. The Court therefore reaffirms its earlier opinion that the Magistrate Judge correctly determined that the petitioner knowingly and voluntarily waived his rights. Both of petitioner's claims are meritless. Accordingly, the Court adopts the Magistrate Judge's two Reports and Recommendations as its opinion therein.

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4 R. Doc. 39.

5 R. Doc. 42; R. Doc. 42-1.

Petitioner's objections to the second Report and Recommendation merely rehash arguments made before the Magistrate Judge and are without merit. Contrary to petitioner's assertion, he is not entitled to counsel in these proceedings. *See Clark v. Johnson*, 227 F.3d 273, 283 (5th Cir. 2000) ("[I]t [is] constitutional under due process to not provide counsel on discretionary appeal."). The Court therefore denies petitioner's objections as meritless.

Rule 11 of the Rules Governing Section 2254 Proceedings provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Rules Governing Section 2254 Proceedings, Rule 11(a). A court may issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Rules Governing Section 2254 Proceedings, Rule 11(a) (noting that § 2253(c)(2) supplies the controlling standard). The "controlling standard" for a certificate of appealability requires the petitioner to show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented [are] 'adequate to deserve encouragement to proceed

further."' *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. MacDaniel*, 529 U.S. 473, 475 (2000)).

For the reasons stated in the two Reports and Recommendations, petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, IT IS ORDERED that the petition is DISMISSED WITH PREJUDICE. The Court will not issue a certificate of appealability.

New Orleans, Louisiana, this 30th day of May, 2019.

Sarah Vance

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TONY DECLOUES	CIVIL ACTION
VERSUS	NO. 14-1158
BURL CAIN	SECTION "R"

JUDGMENT

Considering the Court's order on file herein,

IT IS ORDERED, ADJUDGED AND DECREED that the petition of Tony DeCloues is hereby DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 30th day of May, 2019.

Sarah Vance

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TONY DECLOUES	CIVIL ACTION
VERSUS	NO. 14-1158
N. BURL CAIN, WARDEN	SECTION: "R"(1)

REPORT AND RECOMMENDATION

This matter was referred to this United States Magistrate Judge for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings of fact and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Upon review of the record, the Court has determined that this matter can be disposed of without an evidentiary hearing. See 28 U.S.C. § 2254(e)(2). Therefore, for all of the following reasons, **IT IS RECOMMENDED** that the petition be **DISMISSED WITH PREJUDICE**.

Factual Background

Petitioner, Tony Decloues, is a state prisoner incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. On April 9, 2009, Decloues was charged by a bill of indictment with one count of second degree murder.[1] On April 20, 2010, after a trial, Decloues was found guilty as charged.[2] On April 26, 2010, the trial court sentenced petitioner to the mandatory sentence of life imprisonment without the benefit of parole, probation, or suspension of sentence.[3]

[1] State Rec., Vol. 1 of 3, Bill of Indictment, 4/9/09.
[2] State Rec., Vol. 1 of 3, minute entry dated April 20, 2010; State Rec., Vol. 2 of 3, trial transcript of April 20,2010.
[3] State Rec., Vol. 1 of 3, minute entry dated April 26, 2010; State Rec., Vol. 2 of 3, sentencing transcript of April 26, 2010.

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On March 23, 2011, the Louisiana Fourth Circuit Court of Appeal affirmed petitioner's conviction and sentence.[4] The Louisiana Supreme Court denied writs without stated reasons on February 3, 2012.[5] Petitioner did not seek a petition for writ of certiorari with the United States Supreme Court.

In 2012, petitioner filed an application for post-conviction relief with the state district court.[6] On May 3, 2013, the state district court denied petitioner's application.[7] On June 1, 2013, petitioner filed an application for supervisory writs with the Fourth Circuit Court of Appeal.[8] On June 12, 2013, the Fourth Circuit denied the writ application without reasons.[9] On February 7, 2014, the Louisiana Supreme Court denied petitioner's related writ application.[10]

On May 16, 2014, petitioner filed the instant federal application seeking habeas corpus relief in which he asserted two grounds for relief: (1) the trial court erred in denying his motions to suppress the confession and resulting evidence because his confession was involuntary due to drug induced intoxication and sleep deprivation; and (2) ineffective assistance of counsel for failing to investigate and call witnesses and raise the issue of intoxication as a defense.[11]

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[4] State v. Decloues, 62 So.3d 778 (La. App. 4th Cir. 2011); State Rec., Vol. 2 of 3, 4th Cir. Opinion, 2010-KA-1247, 3/23/11.

[5] State ex rel. Decloues v. State, 79 So.3d 1022 (La. 2012); State Rec. Vol. 2 of 3, La. S. Ct. Order, 2/3/12.

[6] State Rec., Vol. 3 of 36. Federal habeas courts must apply Louisiana's "mailbox rule" when determining the filing date of a Louisiana state court filing, and therefore such a document is considered "filed" as of the moment the prisoner "placed it in the prison mail system." Causey v. Cain, 450 F.3d 601, 607 (5th Cir. 2006). Petitioner's application is undated with the exception of "2012" and there is no state district court minute entry reflecting the date of the filing. Petitioner, however, argued that he filed his application on October 22, 2012. Rec.Doc. 17, p. 2.

[7] State Rec., Vol. 1 of 3, judgment dated May 3, 2013.

[8] State Rec., Vol. 3 of 3, Application for Writ, 2013-K-0782, signed June 1, 2013.

[9] State Rec., Vol. 3 of 3, 4th Cir. Order, 2013-K-0782, dated June 12, 2013.

[10] State Rec., Vol. 3 of 3, La. Supreme Court Order, 2013-KH01694, dated February 7, 2014; Application for Writ, 13 KH 1694, signed July 11, 2013.

[11] Rec. Doc. 1. "A prisoner's habeas application is considered 'filed' when delivered to the prison authorities for mailing to the district court." Roberts v. Cockrell, 319 F.3d 690, 691 n.2 (5th Cir. 2003). Petitioner certified that he placed his application in the prison mail system on May 16, 2014. Rec. Doc. 4, p. 15; Rec. Doc. 1, p. 7.

The state challenged the timeliness of the application, but alternatively argued that the claims were meritless.[12] Decloues filed a traverse.[13]

On August 18, 2015, this court issued a Report and Recommendation in which it was recommended that the federal habeas petition filed by Tony Decloues be found timely but dismissed as his claims were meritless.[14] Decloues filed an objection claiming the court should review the video of his confession, which was not part of the state court record originally filed in this case.[15] After considering Decloues's objections, the District Judge issued an Order and Judgment on April 22, 2016, dismissing Decloues's petition.[16] Decloues appealed to the United States Fifth Circuit Court of Appeals.[17]

The Fifth Circuit authorized an appeal on two questions: (1) whether Decloues was too incapacitated by drugs and sleep deprivation to waive knowingly and voluntarily his Miranda rights before confessing to the murder; and (2) whether this Court erred in rejecting the Miranda claim without viewing the video. On August 17, 2018, the Fifth Circuit did not address petitioner's substantive Miranda claim, but vacated and remanded the matter for this court to obtain and review the video of the confession.[18]

On September 12, 2018, the undersigned ordered the Orleans Parish District Attorney to file a certified copy of the video of petitioner's confession.[19] A certified copy of the DVD including petitioner's video confession was filed with the court.[20]

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[12] Rec. Doc. 16.
[13] Rec. Doc. 17.
[14] Rec. Doc. 21.
[15] Rec. Doc. 22.
[16] Rec. Docs. 25 and 26.
[17] Rec. Doc. 27.
[18] Rec. Doc. 35.
[19] Rec. Doc. 36.
[20] Rec. Docs. 37 and 38.

I. Standards of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") comprehensively overhauled federal habeas corpus legislation, including 28 U.S.C. § 2254. Amended subsections 2254(d)(1) and (2) contain revised standards of review for pure questions of fact, pure questions of law, and mixed questions of both. The amendments "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." Bell v. Cone, 535 U.S. 685, 693 (2002).

As to pure questions of fact, factual findings are presumed to be correct and a federal court will give deference to the state court's decision unless it "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); see also 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

As to pure questions of law and mixed questions of law and fact, a federal court must defer to the state court's decision on the merits of such a claim unless that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Courts have held that the " 'contrary to' and 'unreasonable application' clauses [of § 2254(d)(1)] have independent meaning." Bell, 535 U.S. at 694.

Regarding the "contrary to" clause, the United States Fifth Circuit Court of Appeals has explained:

> A state court decision is contrary to clearly established precedent if the state court applies a rule that contradicts the governing law set forth in the [United States] Supreme Court's cases. A state-court decision will also be contrary to clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of the [United States] Supreme Court and nevertheless arrives at a result different from [United States] Supreme Court precedent.

Wooten v. Thaler, 598 F.3d 215, 218 (5th Cir. 2010) (internal quotation marks, ellipses, brackets, and footnotes omitted).

Regarding the "unreasonable application" clause, the United States Supreme Court has held: "[A] state-court decision is an unreasonable application of our clearly established precedent if it correctly identifies the governing legal rule but applies that rule unreasonably to the facts of a particular prisoner's case." White v. Woodall, 134 S. Ct. 1697, 1705 (2014). However, the Supreme Court cautioned:

> Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies this Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error. Thus, if a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision. AEDPA's carefully constructed framework would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.

Id., at 1706 (citations and quotation marks omitted). Therefore, when the Supreme Court's "cases give no clear answer to the question presented, let alone one in [the petitioner's] favor, it cannot be said that the state court unreasonably applied clearly established Federal law." Wright v. Van Patten, 552 U.S. 120, 126 (2008) (quotation marks and brackets omitted). The Supreme Court has also expressly cautioned that "an unreasonable application is different from an incorrect one." Bell, 535 U.S. at 694. Accordingly, a state court's merely incorrect application of Supreme Court precedent simply does not warrant habeas relief. Puckett v. Epps, 641 F.3d 657, 663 (5th Cir. 2011) ("Importantly, 'unreasonable' is not the same as 'erroneous' or 'incorrect'; an incorrect application of the law by a state court will nonetheless be affirmed if it is not simultaneously unreasonable.").

While the AEDPA standards of review are strict and narrow, they are purposely so. As the United States Supreme Court has held:

> [E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable.
>
> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a guard against *extreme malfunctions* in the state criminal justice systems, *not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.*

Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (citations omitted; emphasis added); see also Renico v. Lett, 559 U.S. 766, 779 (2010) ("AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.").

The Supreme Court has expressly warned that although "some federal judges find [28 U.S.C. § 2254(d)] too confining," it is nevertheless clear that "all federal judges must obey" the law and apply the strictly deferential standards of review mandated therein. White, 134 S. Ct. at 1701.

II. Facts

On direct appeal, the Louisiana Fourth Circuit Court of Appeal summarized the facts of this case as follows:

> On January 10, 2009, June Jones discovered the body of Louise Decloues in the bedroom of Ms. Decloues' home at 1312 Cambronne Street. The seventy-four year old victim had been stabbed five times. Three of the stab wounds were to her upper chest, one was to her upper abdomen, and the last stab wound went through her wrist. In addition, a plastic bag was tied over her head, causing her to asphyxiate. Upon observing the victim lying on the floor with a bag over her head, Ms. Jones ran from the house and called 911. Detective Randi Gant arrived at the scene, finding the defendant (who resided with his mother at 1312 Cambronne Street) in the backyard. He appeared agitated and tried to leave; he told the detective that he did not know what

had happened to his mother and that he had been at the house of a friend, Pershing Matthews, since 2:00 p.m. on the previous day.

The defendant was transported to the homicide office, where he was met by Detective Anthony Pardo who read him his rights. The defendant signed a rights of arrestee form and indicated to the detective that he understood his rights. He initially told Detective Pardo that he was at Mr. Matthews' house. However, after being confronted with the information that Mr. Matthews disputed this assertion, the defendant eventually confessed to stabbing and suffocating his mother. After taping his confession, the defendant showed the detective the dumpster on Dante Street where he had disposed of the murder weapon and the clothing he had worn during the murder. After obtaining a search warrant for the dumpster, the police retrieved a black gym bag, blue lock box, gloves, sweat shirt, sweat pants, a knife, and a small white bag containing newspaper. Everything recovered from the dumpster except the lock box had blood on it that was identified as human blood. No latent prints were found on the recovered knife, and no DNA testing was conducted on any of the evidence. In addition, two pairs of shoes found under the defendant's bed on Cambronne Street also contained human blood.[2]

[2]The shoes were found when a search warrant was executed at the house on January 11, 2009. Inexplicably, no DNA testing of the blood was done to discover if the blood on the defendant's shoes was that of his mother.

Meanwhile, shortly after the defendant was transported to the homicide office, Detective Ryan Aucoin arrived at Cambronne Street to conduct the on-scene investigation. He observed the body in the bedroom and blood on the bed. It appeared that the closet and dresser drawers had been rummaged through, a torn shoe box and black purse were on the floor, and crumpled newspaper containing blood was on a chair. Detective Aucoin spoke briefly with the defendant at University Hospital later that evening and found the defendant's speech to be somewhat slurred.[3]

[3]The defendant was at the hospital because a warrant to obtain blood and saliva samples was being executed.

On April 9, 2009, the State charged the defendant with second degree murder. He pleaded not guilty on April 15, 2009. The court conducted a competency hearing on June 16, 2009. He was found competent to proceed to trial. After a hearing, the trial court denied the defendant's motion to suppress the evidence and statement on July 21, 2009. The defendant was again found competent to proceed to trial and after trial on April 20, 2010, the defendant was found guilty as charged.

At the defendant's trial, the State presented the testimony of Ms. Jones (who discovered the victim's body), Doctor Paul McGarry (a forensic pathologist at the Coroner's Office of Orleans Parish) and the police officers who investigated the crime, Detectives Gant, Pardo, and Aucoin. The defendant's videotaped confession was played for the jury. Doctor McGarry testified that, had she received timely medical attention, the victim probably would not have died from the stab wounds and that her demise was hastened by the plastic bag tied tightly over her head while she was still alive, causing her to asphyxiate. The doctor surmised that Ms. Decloues died from a

combination of asphyxia and the stab wounds. Detective Pardo testified that he did not force, coerce or promise the defendant anything for his confession and, although the defendant stated he had smoked crack cocaine the day before, he did not appear intoxicated during the interview.

The defendant testified in his own defense as follows. At the time of the murder, he was fifty-five and had lived with his mother on Cambronne Street for ten years. They were not close due to his use of crack cocaine since his early twenties. He had five misdemeanor convictions for possession of drug paraphernalia. In January of 2009, he worked sporadically as an auto mechanic and did other odd jobs. On January 7, 2009, he performed some work for a man renovating a house and was paid in cash. With that money, he bought crack cocaine and smoked it. At approximately 9:00 p.m., he returned home to his mother's house. After showering and eating dinner, he went to his bedroom to watch television. As he was watching television, he started to have some pain in his leg.[4] After taking some Tylenol, he fell asleep until he was awoken suddenly by a nightmare at approximately 2:00 a.m. The gist of the nightmare was that he caught his "woman" in bed with another man. He remembered hitting her on the bed before pulling her to the floor. The defendant also remembered not wanting to look at her bloody face. He then went to the utility room and put the clothes that he was wearing into a black bag. Next thing he knew, he was at a dumpster. At that point he awoke from his dream, after which, he could not go back to sleep. He left the house and went to buy crack cocaine, which he smoked. He returned to the house around 6:30 a.m. on January 8, 2009 to get ready to go to work for Mr. Brown, the auto mechanic.

[4]The defendant had broken his ankle in an earlier accident, and had also had knee replacement surgery that caused him to walk with a limp.

After he got off of work, he bought more crack cocaine. He and his friend Matthew smoked together until they ran out of crack cocaine and money. The defendant then pawned a saw that he took from the shed behind his mother's house. With that money, he smoked more crack cocaine with Matthew. The defendant testified that he worked for Mr. Brown on January 9 and 10, 2009, and with the money he earned again bought and smoked crack cocaine.

He got off from work on January 10th at approximately 2:00 p.m. When he went to a convenience store to purchase cigarettes later that afternoon, he noticed an ambulance and fire truck further down the road near his mother's house. Because his leg was bothering him, he called Mr. Brown for a ride. Approximately two hours later, Mr. Brown picked the defendant up and dropped him off at this mother's house. The defendant ran into the house and towards his mother's bedroom. He briefly caught a glimpse of her body lying on the floor.

The defendant stated that he had not had slept or eaten since January 7, 2009. He could remember his dream, but he had no recollection of doing anything to his mother or of anything about his statement to the police. He remembered going to the

dumpster. He did not remember going to the hospital, but he did remember having his fingernails scraped. The defendant denied ever stealing anything from his mother.[21]

III. Petitioner's Claim

Decloues claims that the state district court erroneously denied his motion to suppress his confession because it was an involuntary statement in violation of the Fifth Amendment and the motion to suppress the resulting evidence because it was fruit of the poisonous tree. On direct appeal, the Louisiana Fourth Circuit denied that claim. This was the last reasoned state court opinion on the issue. See Ylst v. Nunnemaker, 501 U.S. 797, 802 (1991) (when the last state court judgment does not indicate whether it is based on procedural default or the merits of a federal claim, the federal court will presume that the state court has relied upon the same grounds as the last reasoned state court opinion).

The admissibility of a confession is a mixed question of law and fact. Miller v. Fenton, 474 U.S. 104, 112, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985); ShisInday v. Quarterman, 511 F.3d 514, 522 (5th Cir. 2007) (citing Miller, 474 U.S. at 112, 106 S.Ct. 445). A federal court on habeas review must respect the state court's determination of voluntariness as long as it was not "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1); Barnes v. Johnson, 160 F.3d 218, 222 (5th Cir. 1998). In doing so, a federal habeas court must afford a presumption of correctness to state courts' findings of fact if they are fairly supported by the record. Miller, 474 U.S. at 117, 106 S.Ct. 445.

There are two inquiries to determine whether an accused has voluntarily and knowingly waived his Fifth Amendment privilege against self-incrimination. Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986); Soffar v. Cockrell, 300 F.3d 588, 592 (5th Cir. 2002). First, waiver

[21] State v. Decloues, 62 So.3d 778, 778-780 (La. App. 4th Cir. 2011); State Rec., Vol. 2 of 3, 4th Cir. Opinion, 2010-KA-1247, pp., 2-6, 3/23/11.

of the right must be voluntary and not the product of intimidation, coercion or deception. Moran, 475 U.S. at 421, 106 S.Ct. 1135. Second, the waiver or relinquishment must be made with full awareness of the nature of the right being waived. Id. A written waiver "is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." North Carolina v. Butler, 441 U.S. 369, 373 (1979).

In making these inquiries, the court must consider the "totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." Schneckloth v. Bustamonte, 412 U.S. 218, 224, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). "[T]he mere fact that a defendant had taken drugs prior to giving a statement does not render it inadmissible." United States v. Taylor, 508 F.2d 761, 763 (5th Cir. 1975). "A confession may be involuntary if the defendant is so intoxicated by alcohol or other drugs that the confession is not rationally and freely given." United States v. Blake, 481 F. App'x 961, 962 (5th Cir. 2012) (per curiam) (citing United States v. Kreczmer, 636 F.2d 108, 110 (5th Cir.1981)). Nevertheless, "while mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry." Colorado v. Connelly, 479 U.S. 157, 165, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Coercive police conduct is a necessary prerequisite to a conclusion that a confession was involuntary, and the defendant must establish a causal link between the coercive conduct and the confession. Carter v. Johnson, 131 F.3d 452, 462 (citing Connelly, 479 U.S. at 163–67, 107 S.Ct. 515). A defendant's statement is not involuntary in the absence of evidence of official overreaching by way of coercion or psychological persuasion. Blake, 481 F. App'x at 962 (citing United States v. Raymer, 876 F.2d 383, 386 (5th Cir.1989)); United States v. Rojas–Martinez, 968 F.2d 415, 418 (5th Cir.1992).

In assessing voluntariness, "trickery or deceit is only prohibited to the extent it deprives the suspect 'of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' " Soffar, 300 F.3d at 596 (quoting Moran, 475 U.S. at 424, 106 S.Ct. 1135). Determining whether officers engaged in coercive tactics to elicit a confession is a question of fact, and the state court's factual findings are entitled to deference when supported by the record. Pemberton v. Collins, 991 F.2d 1218, 1225 (5th Cir. 1993); Self v. Collins, 973 F.2d 1198, 1204 (5th Cir. 1992); see also Miller, 474 U.S. at 112, 106 S.Ct. 445 (noting that subsidiary questions such as whether the police engaged in coercive tactics are afforded the presumption of correctness).

The habeas corpus statute obliges federal judges to respect credibility determinations made by the state court trier of fact. Pemberton, 991 F.2d at 1225 (citing Sumner v. Mata, 455 U.S. 591, 597, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982)). However, if the underlying facts as determined by the state court indicate the presence of some coercive tactic, the impact that factor had on the voluntariness of the confession is a matter for independent federal determination and is ultimately a legal determination. Miller, 474 U.S. at 117, 106 S.Ct. 445; ShisInday, 511 F.3d at 522.

Even if the confession is deemed involuntary under these standards, the Supreme Court has held that the admission of an involuntary confession is a trial error subject to harmless error analysis. Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Under these standards, to grant federal habeas relief, the trial error must have a substantial and injurious effect or influence in determining the verdict. Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Therefore, even if this court were to find that petitioner's Fifth Amendment rights were violated, the court must also consider whether use of the confession and the resulting evidence at trial was harmless in determining the verdict. Hopkins v. Cockrell, 325 F.3d 579, 583 (5th Cir. 2003).

In Decloues's case, as required by Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the state trial court conducted an evidentiary hearing on the admissibility of Decloues's confession and the resulting evidence, taking testimony from Detective Aucoin and Detective Pardo and viewing taped footage from Channel Four News taken at the time Decloues was being walked into Central Lockup as well as the video statement of Decloues.[22] Detective Pardo testified that he read Decloues his Miranda rights and Decloues signed a New Orleans Police Department Right of Arrestee Suspect Form and checked a box acknowledging his rights and his desire to give a statement.[23] At the conclusion of the hearing, the state trial court expressed that, "It is very marginal to me, very marginal. I mean what I saw in that tape is somebody that is not really with us" and took the matter under advisement.[24]

On July 21, 2009, the state trial court heard testimony from Dr. Vosburg, an expert in forensic psychology, who testified that he met with Decloues that day and reviewed the video statement.[25] Dr. Vosburg opined that Decloues understood the nature of the proceedings against him, could assist counsel, and was competent to proceed.[26] Dr. Vosburg testified that it was his opinion, as well as that of Dr. Kelly, who also met with petitioner and viewed Decloues's video confession, that the disorganization of thought, poor concentration, hyperactivity and fidgetiness Decloues exhibited on the video was related to drug abuse.[27] He noted that, while the video showed that there were times that Decloues tended to get upset, he was easily calmed by the officer sitting next to him.[28] Dr. Vosburg could not say whether he was upset because he killed his mother, but testified that "what we really saw was someone who was very heavily drugged up, you know, just still coming off the stuff

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[22] State Rec., Vol. 2 of 3, hearing transcript of July 17, 2009.
[23] Id., at pp. 15, 17, 20.
[24] Id., at p. 23.
[25] State Rec., Vol. 2 of 3, hearing transcript of July 21, 2009.
[26] Id., at p. 5.
[27] Id., at p. 6.
[28] Id.

that he was using and very recently."[29] He opined that while Decloues exhibited deficient concentration at times, the video demonstrated that he could be brought back to task easily and he was able to describe the events with great clarity.[30] Dr. Vosburg noted that he saw no coercion by the officers and, that while it was obvious Decloues was under the influence of something at the time of his confession, it was his opinion that Decloues understood what he was doing and knowingly, intelligently and voluntarily waived his right to remain silent before making his statement.[31] The parties stipulated that Dr. Kelly would concur in the opinion of Dr. Vosburg if called to testify.[32] After considering the additional testimony, the state trial court denied the motions to suppress the statement as well as the evidence.[33]

While counsel did not file a writ application in connection with the state trial court's adverse decision, he did raise the issue on direct appeal. The Louisiana Fourth Circuit entered its own findings, which constitute the last reasoned decision on this issue. The Fourth Circuit considered and reviewed the evidence and testimony that was received at the suppression hearing as well as the trial testimony. The Fourth Circuit denied the claim holding:

> By his sole assignment of error, the defendant argues that the trial court erred in denying his motion to suppress because he was impaired from days of drug use and sleep deprivation at the time he gave his statement.
>
> Intoxication will render a confession inadmissible when the intoxication is of such a degree as to negate the defendant's comprehension and render him unconscious of the consequences of what he is saying. State v. Simmons, 443 So.2d 512 (La. 1983); State v. Robinson, 384 So.2d 332 (La.1980). Whether intoxication exists and is of a degree sufficient to vitiate the voluntariness of the confession are questions of fact and we will not overturn the trial judge's conclusions on the credibility and weight of the testimony relating to the voluntariness of a confession unless they are not supported by the evidence. State v. Rankin, 357 So.2d 803 (La. 1978); State v. Hutto, 349 So.2d 318 (La. 1977).

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[29] Id., at pp. 6-7.
[30] Id., at pp. 7-8.
[31] Id., at pp. 8-10.
[32] Id., at p. 10.
[33] Id., at p. 11.

The defendant argues that his demeanor during the taped confession and his testimony at trial clearly show that he was impaired at the time he gave his confession. The trial judge reviewed the taped confession during the motion hearing held on July 17, 2009, and, finding it marginal whether the confession was voluntary, continued the matter until July 21, 2009. When the court reconvened on that day, the State presented the testimony of Dr. Charles Vosburg, an expert in forensic psychology. Doctor Vosburg testified that he reviewed the tape of the defendant's confession and, in his opinion, the poor concentration and disorganized thought exhibited by the defendant, along with the defendant's hyperactivity, were due to drug abuse. He commented that the tape indicated someone who was coming down from drugs that were recently ingested. However, the defendant was easily calmed when he became upset, his concentration was easily restored, and there was no observable evidence of coercion. Moreover, the defendant spoke with clarity and with specificity during his confession. Accordingly, based upon these observations, Doctor Vosburg opined that the defendant knowingly waived his rights and that the statement was voluntary.

Our review of the taped confession indicates that at the beginning of the interview the detective read the defendant his rights. The defendant appears attentive while those rights were being read, acknowledging each one individually. When asked whether he understood his rights, the defendant gave a definitive yes. The defendant is noticeably fidgety and sometimes had to be asked to speak up, but as Doctor Vosburg observed, he was easily calmed. His answers were responsive to the questions asked by the detective. Significantly, the confession is detailed in the description of how the murder occurred. The defendant explained that he had stayed out all night the night before and when he returned home, he and his mother argued. After retreating to his room to watch television and smoke more crack cocaine, he left the house again. When he returned, he thought he could slip into his mother's room while she slept and take her credit card from her purse and a phone book that contained the pin number to the credit card. When he entered the room, she was awake and the defendant asked her for some Tylenol. He then went to the kitchen, retrieved a knife, returned to his mother's room, and approached her. When his mother became vocal, he attacked her. The defendant admitted stabbing her, trying to break her neck, and suffocating her. He stated that the drugs made him deranged. He then explained how he removed all of his clothes and placed them in a black bag along with a glove and the knife that he wrapped in newspaper. The defendant placed the shoes that he was wearing under his bed. Afterwards, when he was looking for her purse, the defendant came across the lock box. He broke into the lock box and found thirty dollars. During the interview, the defendant expressed remorse for his actions.[5][34]

[5]The defendant was clearly aware of the implications of what he had done at the time of the murder as evidenced by his explanation that, before he left the house, he opened the drawers in the chests in their bedrooms to make it look like a burglary. He also noted that he threw the black bag in the dumpster because he realized the evidence inside the bag was incriminating.

[34] Decloues, 62 So.3d at 781-82; Vol. 2 of 3, 4th Cir. Opinion, 2010-KA-1247, pp., 6-9, 3/23/11.

The Louisiana Supreme Court then denied petitioner's related writ applications without assigning additional reasons.[35]

On federal habeas review, this court must presume that the factual determinations of the state courts supporting its legal conclusion were correct, including that Decloues failed to demonstrate that he was not aware of the consequences of his statements to police officials as a result of his sleepy and drugged condition. To overcome the presumption of correctness as to the state court's factual findings, Decloues must rebut them by clear and convincing evidence, which he has not done. In his federal petition he has repeated the same allegations that were already addressed by the state courts, that his behavior during the video statement and his trial testimony show that he did not understand what he was saying or the resulting consequences. He has not shown that his alleged sleep deprivation and intoxication were to a level that prevented him from knowingly waiving his Miranda rights and making his statement freely and voluntarily.

This court's thorough review of the state court record, including the expert's testimony and the video of Decloues's confession to law enforcement, leads this court to find that the state court's determination that Decloues knowingly and voluntarily waived his Miranda rights is well supported by the record. The video showed that, when Detective Wischan told Decloues that he was going to read him his rights, Decloues responded, "I'm listening." While appearing despondent, Decloues was calm, attentive, and appeared to be smoking a cigarette when he was given his full Miranda warnings. He acknowledged each of his rights as they were read to him and very clearly responded "Yes, Sir" when asked if he understood his rights as they have been read to him.

The video certainly demonstrates that at times during his statement Decloues was agitated in manner and in speech. However, there is ample evidence that he was mentally present, had accurate

[35] State ex rel. Decloues v. State, 79 So.3d 1022, (La. 2012); State Rec. Vol. 2 of 3,La. S. Ct. Order, 2/3/12.

recall, knew what he was saying, and the context in which he was saying it--giving a recorded statement to two officers in an interrogation room at the Headquarters of the New Orleans Police Department, Homicide Division. While he mumbled at times or dropped his voice, he immediately responded to requests to speak up. It is evident that when asked questions, he comprehended them and responded to each one giving detailed answers. Similarly, when he needed clarification on a question, he asked for it. His expansive narrative included details about the dimensions of a door he was trying to sell in order to get money to buy drugs, the color of his mother's telephone book, the color of the gym bag in which he placed his clothes and the knife, newspaper and a lockbox, and the exact location and color of the dumpster where he disposed of the bag.

In addition to providing significant detail, Decloues explained the events in the order of their occurrence. He did not deviate from the timeline. In fact, he resisted doing so. When Detective Pardo asked him what he did with the garbage bag that he used to dispose of his clothes, Decloues responded, "I'm getting to that." Later, when Detective Pardo asked another question about the sequence of events, Decloues responded, "I'm telling you." He was extremely detailed and meticulously chronological in his narrative of every minute of the evening leading up to and through the murder and also afterwards as he collected things of value to take and disposed of incriminating evidence. He articulated logical thoughts about how and why he staged the scene to look like a burglary had occurred, a plan he formed to get a friend to go "find" the body together, and an understanding that the bag of clothes could incriminate him and needed to be dumped. He gave his statement with a clear recollection and understanding of what he was saying.

At times, he appeared to be distressed that he just killed his mother and even expressed his disbelief that he was explaining how he killed his mother. He demonstrated appropriate remorse while relating instances of her encouraging him to get help, items he had stolen from her in the past, and

efforts she had made to make sure he did not steal her things. When given an opportunity to make any further statement, he ended with a lecture on the evils of drugs: "Drugs is a killer." For all of these reasons, the video does not demonstrate that Decloues was too incapacitated by drugs and sleep deprivation to knowingly and voluntarily waive his *Miranda* rights before confessing to the murder. As such, Decloues has failed to show his waiver was not a product of his own free will.

Furthermore, there is no evidence that he was under the influence of fear, intimidation, menaces, threats, inducements, or promises. The video demonstrates that the detectives were polite and solicitous toward Decloues. Detective Pardo is shown patting Decloues's back or arm on multiple occasions. In the 25 minute videotaped confession, Decloues did the majority of the talking; he was rarely prompted by the officers present, and was never asked leading or misleading questions. When Detective Pardo asked if he had been threatened, forced or promised anything to give the statement, Decloues responded "No" three times. He emphatically stated that, "Yes, this is what happened. I'm sick, but that's exactly what happened." For these reasons, Decloues has failed to show that his waiver was involuntary. Addison v. Rader, Civ. Action No. 12-0977, 2013 WL 4039425, at *9 (E.D. La. Aug. 7, 2013) (petitioner's intoxication as a result of drugs and or alcohol consumed over a number of days that day did not render his statement involuntary where there was no evidence of any coercion or overreaching on the part of the arresting officers) (citing Martinez v. Quarterman, 270 F. App'x 277, 289-90 (5th Cir. 2008) (finding that petitioner was not entitled to relief as to claim of ineffective assistance of counsel because, even assuming he was intoxicated when he gave written confession, he failed to show any overreaching or coercive treatment by police)), appeal dismissed, 13-10943 (5th Cir. Jan. 8, 2014); see Merridith v. Cain, Civ. Action No. 04-1227, 2007 WL 1466829, at *7-8 (W.D. La. Nov. 14, 2007) (rejecting claim of ineffective assistance of counsel in failing to file a motion to suppress confession where "Merredith's intoxication by itself could not support a finding of

involuntariness and is relevant only to the extent it made him more susceptible to mentally coercive police tactics," and there was no evidence of coercive tactics by police).

The state court's factual determinations that the statement was voluntary, not coerced, and that Decloues knew the ramifications of his actions and waiver are supported by the record. Therefore, this court on habeas corpus review must accept as conclusive the state court's factual determination that Decloues knew the consequences of his statements. The state court's legal conclusion that Decloues offered the statements voluntarily is reasonably based upon these facts. Since the statements were voluntary as a matter of fact and law, harmless error analysis is unnecessary. The denial of relief on this issue was not contrary to or an unreasonable application of Supreme Court precedent. Decloues is not entitled to relief on this claim.

RECOMMENDATION

It is therefore **RECOMMENDED** that the federal application for habeas corpus relief filed by Tony Decloues be **DISMISSED WITH PREJUDICE**.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within fourteen (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, provided that the party has been served with notice that such consequences will result from a failure to object. 28 U.S.C. § 636(b)(1); see Douglass v. United Services Auto. Ass'n, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

New Orleans, Louisiana, this 8th day of March, 2019.

Janis Van Meerveld

JANIS VAN MEERVELD
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TONY DECLOUES	CIVIL ACTION
VERSUS	NO: 14-1158
BURL CAIN, WARDEN	SECTION: R

ORDER

Before the Court is Tony DeCloues's petition for federal *habeas corpus* relief under 28 U.S.C. § 2254. The Court, having reviewed *de novo* the petition,[1] the record, the applicable law, the Magistrate Judge's Report and Recommendation ("R & R"),[2] and the petitioner's objections thereto,[3] hereby approves the R & R and adopts it as its opinion.

Petitioner objects to the R & R on the grounds that the Magistrate Judge did not adequately address petitioner's claim that his Fifth Amendment rights were violated by the introduction of his confession, as well as evidence that law enforcement seized on the basis of the confession. This objection is meritless because the Magistrate Judge addressed this claim at length. The Magistrate Judge correctly deferred to the state court's fact-finding concerning subsidiary

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[1] R. Doc. 1.

[2] R. Doc. 21.

[3] R. Doc. 22.

APPENDIX
D

factual questions, and she correctly determined that the state court reasonably applied federal law in concluding that petitioner's confession was voluntary. Petitioner's argument that defense counsel was ineffective because he (1) failed to investigate and call certain witnesses and (2) failed to raise the defense of intoxication also lacks merit. The Magistrate Judge thoroughly addressed this argument in the R & R, and the Court need not reiterate her analysis here.

Rule 11(a) of the Rules Governing Section 2254 Proceedings provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A court may only issue a certificate of appealability if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The "controlling standard" for a certificate of appealability requires the petitioner to show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented [are] adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The Court finds that DeCloues's petition, in conjunction with his objections to the Magistrate Judge's R & R, does not satisfy this standard. Thus, the Court will not issue a certificate of appealability.

For the foregoing reasons, the Court DENIES DeCloues's petition for *habeas corpus* and DENIES a certificate of appealability.

New Orleans, Louisiana, this 22nd day of April, 2016.

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TONY DECLOUES	CIVIL ACTION
VERSUS	NO. 14-1158
N. BURL CAIN, WARDEN	SECTION "R"(1)

JUDGMENT

The Court having approved the Report and Recommendation of the United States Magistrate Judge and having adopted it as its opinion herein;

Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment against petitioner, Tony Decloues, dismissing with prejudice his petition for issuance of a writ of habeas corpus under 28 U.S.C. § 2254.

New Orleans, Louisiana, this 22nd day of April, 2016.

Sarah Vance

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-30579
USDC No. 2:14-CV-1158

TONY DECLOUES,

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

O R D E R:

Tony Decloues, Louisiana prisoner # 193085, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 habeas corpus petition, which challenged his second degree murder conviction. To obtain a COA, Decloues must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Because the district court denied Decloues's claims on the merits, he "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that "the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted).

APPENDIX
E

Decloues challenges the denial of § 2254 relief regarding the validity of his confession and the evidence that he asserts was the fruit of that confession. Decloues argues that the state courts' denial of his claim that he was too impaired by drug use and sleep deprivation to waive his rights under *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966), was "contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States," § 2254(d)(1), or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). *See Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010); *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Relatedly, Decloues complains that the videotape of his confession was not made a part of the federal habeas record, and he argues that the district court improperly denied relief without reviewing the videotape. Because reasonable jurists would find the denial of these constitutional claims debatable or wrong or that these issues were adequate to deserve encouragement to proceed further, Decloues's motion for a COA is GRANTED IN PART as to these issues only. *See Slack*, 529 U.S. at 484. Decloues's motion for leave to proceed in forma pauperis (IFP) on appeal is also GRANTED, and the clerk is DIRECTED to issue a briefing schedule.

Decloues also argues that his trial attorney was ineffective in failing to interview or call several witnesses or to obtain medical records and in failing to present an intoxication defense. He complains that the district court denied an evidentiary hearing for these claims. Decloues has failed to make the required showing for a COA as to these issues. *See Slack*, 529 U.S. at 484. Accordingly, his COA motion is DENIED IN PART as to all other issues.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-30579

TONY DECLOUES,

Petitioner - Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:14-CV-1158

Before GRAVES and COSTA, Circuit Judges, and BENNETT, District Judge.*
PER CURIAM:**

A Louisiana jury convicted Tony Decloues for the murder of his mother and sentenced him to life in prison. After the district court denied Decloues's habeas petition, we authorized an appeal on two questions: (1) whether he was too incapacitated by drugs and sleep deprivation to knowingly and voluntarily waive his *Miranda* rights before confessing to the murder, and (2) whether the district court erred in rejecting the challenge to the *Miranda* waiver without reviewing the video of the confession. Based only on the procedural challenge

* District Judge for the Southern District of Texas, sitting by designation.
** Pursuant to 5TH CIR. R. 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 CIR. R. 47.5.4.

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APPENDIX
F

Decloues brings to the incomplete record, we vacate the district court's denial of the petition and remand for the court to obtain and view the video.

Before making a recommendation on Decloues's habeas petition, the magistrate judge ordered the Orleans Parish District Attorney to file a copy of the "entire state court record." But there is no indication in the record before us, and the DA's office does not contend, that its submission included the video of the confession. After the magistrate judge issued a report recommending that the petition be denied, Decloues objected on the ground that the court should have watched the video before making that determination. *Contrast Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986) (holding the district court committed no error because Dillard "neither objected nor requested that additional [state court] transcripts be furnished"). The district court overruled that and other objections and denied the petition.

Because federal district courts reviewing habeas petitions are not acting as courts of appeal for state convictions, they are not required to review the state record "in its entirety." *Id.* Choosing whether to do so is left to the judge's discretion. *Id.* A court may make its habeas decision after reviewing only the relevant portions of the state record. *Id.*

So we have affirmed the denial of habeas petitions when the federal court did not have the complete record from the state court. *See Valdez v. Cockrell*, 274 F.3d 941, 956 (5th Cir. 2001). In *Valdez*, for example, the district court did not have a number of exhibits from the state trial. *Id.* at 956–57. But those it did have "form[ed] the basis for Valdez's central contention" and placed before the court materials essential to review the state court's decision. *Id.* at 956. Likewise, *Dillard* found no error when the district court reviewed only abbreviated transcripts and certain portions of the state court record because, in part, Dillard had not shown "prejudice." 780 F.2d at 513; *see also Tabler v. Stephens*, 588 F. App'x 297, 308 (5th Cir. 2014) (holding that the district court

had adequately considered the claims presented because Tabler was unable to show prejudice from an incomplete trial transcript).

But a federal habeas court cannot rely solely on the state court's opinion when deciding if that opinion clearly erred in its factfinding. In *Magouirk v. Phillips*, we were "at a loss to understand" how a meaningful sufficiency review could take place given that the district court did not possess a trial transcript. 144 F.3d 348, 362–63 (5th Cir. 1998). We explained that the deference federal courts must give to state court factfinding does not extend so far that "we may simply rely upon the state court decision [the defendant] identifies as denying his constitutional rights to support our conclusion that they were not violated." *Id.* at 363; *see also Nasby v. McDaniel*, 853 F.3d 1049, 1052–53 (9th Cir. 2017) (finding "no alternative" to remand because the district court relied on the facts as described by the Nevada Supreme Court instead of independently examining trial and evidentiary hearing transcripts or conducting a hearing of its own). Indeed, under AEDPA "state court fact findings may not be entitled to the same deference when the federal habeas record does not contain that portion of the state court record that it is required to establish the sufficiency of the evidence to support the state court's fact finding." *Magouirk*, 144 F.3d at 362 (citing 28 U.S.C. § 2254(e)).

The district court reviewing Decloues's petition had more material to review than just the Louisiana Court of Appeal's description of his confession. The state court record it received also includes testimony from a detective and doctor discussing whether Decloues appeared intoxicated when he confessed. Those records also contain a transcript of the suppression hearing showing that after viewing the video the state trial judge said, "It is very marginal to me, very marginal. I mean, what I see[] in that tape is somebody that is not really with us."

But the district court did not have access to the video. That recording is likely the most probative evidence for evaluating whether Decloues's *Miranda* waiver was knowing and voluntary. Although the court had before it multiple second-hand accounts, there is no complete substitute for video evidence. *Cf. Scott v. Harris*, 550 U.S. 372, 378–81 (2007) (assigning greater weight to facts evident in videos). That the video led the state trial judge to view the waiver question as a close one confirms its importance. The centrality of the video to Decloues's claim that he was incapacitated when he confessed makes this more like the cases finding the absence of certain records problematic.

* * *

Without addressing Decloues's substantive *Miranda* claim, we VACATE the denial of the habeas petition and REMAND this matter so the district court can obtain and review the video of the confession.

WESTLAW

State ex rel. DeCloues v. State
Supreme Court of Louisiana. February 7, 2014 131 So.3d 857 (Mem) 2013-1694 (La. 2/7/14) *(Approx. 1 page)*

131 So.3d 857 (Mem)
Supreme Court of Louisiana.

STATE ex rel. Tony DeCLOUES (DeClues)

v.

STATE of Louisiana.

No. 2013–KH–1694.
Feb. 7, 2014.

Opinion

In re Tony DeCloues (DeClues);—Plaintiff; Applying For Supervisory and/or Remedial ***858** Writs, Parish of Orleans, Criminal District Court Div. D, No. 485–036; to the Court of Appeal, Fourth Circuit, No. 2013–K–0782.

Denied.

All Citations

131 So.3d 857 (Mem), 2013-1694 (La. 2/7/14)

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APPENDIX
G

WESTLAW

State v. Decloues
Court of Appeal of Louisiana, Fourth Circuit. March 23, 2011 62 So.3d 778 2010-1247 (La.App. 4 Cir. 3/23/11) *(Approx. 6 pages)*

62 So.3d 778
Court of Appeal of Louisiana,
Fourth Circuit.

STATE of Louisiana
v.
Tony **DECLOUES** (Declues).

No. 2010–KA–1247.
March 23, 2011.

Synopsis

Background: Defendant was convicted by a jury in the District Court, Orleans Parish, No. 485–036, Section D, Frank A. Marullo, J., of second degree murder. Defendant appealed.

Holding: The Court of Appeal, Edwin A. Lombard, J., held that the trial court's denial of defendant's motion to suppress his confession on the basis that the confession was involuntary due to intoxication was not an abuse of discretion.

Affirmed.

West Headnotes (3)

Change View

1 **Criminal Law** Particular cases
The trial court's denial of defendant's motion to suppress his confession on the basis that the confession was involuntary due to intoxication was not an abuse of discretion; defendant's confession coincided with the physical evidence, and the videotape of the confession showed that defendant was advised of and understood his rights.

2 Cases that cite this headnote

2 **Criminal Law** Intoxication
Intoxication will render a confession inadmissible when the intoxication is of such a degree as to negate the defendant's comprehension and render him unconscious of the consequences of what he is saying.

1 Case that cites this headnote

3 **Criminal Law** Confessions, admissions, and declarations
Criminal Law Admission, statements, and confessions
Whether intoxication exists and is of a degree sufficient to vitiate the voluntariness of the confession are questions of fact and the Court of Appeals will not overturn the trial judge's conclusions on the credibility and weight of the testimony relating to the voluntariness of a confession unless they are not supported by the evidence.

1 Case that cites this headnote

Attorneys and Law Firms

**778* Leon A. Cannizzaro, Jr., District Attorney, Matthew Caplan, Assistant District Attorney, New Orleans, LA, for State of Louisiana.

Mary Constance Hanes, Louisiana Appellate Project, New Orleans, LA, for Defendant/Appellant.

(Court composed of Judge MICHAEL E. KIRBY, Judge EDWIN A. LOMBARD, Judge

APPENDIX H

DANIEL L. DYSART).

Opinion

EDWIN A. LOMBARD, Judge.

2 Tony **Decloues appeals [1] his conviction and sentence for second degree murder. After review of the record in light of the applicable law and arguments of the parties, we affirm the defendant's conviction and sentence.

Relevant Facts and Procedural History

On January 10, 2009, June Jones discovered the body of Louise **Decloues** in the bedroom of Ms. **Decloues**' home at 1312 Cambronne Street. The seventy-four year old victim had been stabbed five times. Three of the stab wounds were to her upper chest, one was to her upper abdomen, and the last stab wound went *779 through her wrist. In addition, a plastic bag was tied over her head, causing her to asphyxiate. Upon observing the victim lying on the floor with a bag over her head, Ms. Jones ran from the house and called 911. Detective Randi Gant arrived at the scene, finding the defendant (who resided with his mother at 1312 Cambronne Street) in the backyard. He appeared agitated and tried to leave; he told the detective that he did not know what had happened to his mother and that he had been at the house of a friend, Pershing Matthews, since 2:00 p.m. on the previous day.

**3 The defendant was transported to the homicide office, where he was met by Detective Anthony Pardo who read him his rights. The defendant signed a rights of arrestee form and indicated to the detective that he understood his rights. He initially told Detective Pardo that he was at Mr. Matthews' house. However, after being confronted with the information that Mr. Matthews disputed this assertion, the defendant eventually confessed to stabbing and suffocating his mother. After taping his confession, the defendant showed the detective the dumpster on Dante Street where he had disposed of the murder weapon and the clothing he had worn during the murder. After obtaining a search warrant for the dumpster, the police retrieved a black gym bag, blue lock box, gloves, sweat shirt, sweat pants, a knife, and a small white bag containing newspaper. Everything recovered from the dumpster except the lock box had blood on it that was identified as human blood. No latent prints were found on the recovered knife, and no DNA testing was conducted on any of the evidence. In addition, two pairs of shoes found under the defendant's bed on Cambronne Street also contained human blood. [2]

Meanwhile, shortly after the defendant was transported to the homicide office, Detective Ryan Aucoin arrived at Cambronne Street to conduct the on-scene investigation. He observed the body in the bedroom and blood on the bed. It appeared that the closet and dresser drawers had been rummaged through, a torn shoe box and black purse were on the floor, and crumpled newspaper containing blood was on a chair. Detective Aucoin spoke briefly with the defendant at University Hospital later that evening and found the defendant's speech to be somewhat slurred. [3]

**4 On April 9, 2009, the State charged the defendant with second degree murder. He pleaded not guilty on April 15, 2009. The court conducted a competency hearing on June 16, 2009. He was found competent to proceed to trial. After a hearing, the trial court denied the defendant's motion to suppress the evidence and statement on July 21, 2009. The defendant was again found competent to proceed to trial and after trial on April 20, 2010, the defendant was found guilty as charged.

At the defendant's trial, the State presented the testimony of Ms. Jones (who discovered the victim's body), Doctor Paul McGarry (a forensic pathologist at the Coroner's Office of Orleans Parish) and the police officers who investigated the crime, Detectives Gant, Pardo, and Aucoin. The defendant's videotaped confession was played for the jury. Doctor McGarry testified that, had she received timely medical attention, the victim probably would not have died from the stab wounds and that *780 her demise was hastened by the plastic bag tied tightly over her head while she was still alive, causing her to asphyxiate. The doctor surmised that Ms. **Decloues** died from a combination of asphyxia and the stab wounds. Detective Pardo testified that he did not force, coerce or promise the defendant anything for his confession and, although the defendant stated he had smoked crack cocaine the day before, he did not appear intoxicated during the interview.

The defendant testified in his own defense as follows. At the time of the murder, he was fifty-

were due to drug abuse. He commented that the tape indicated someone who was coming down from drugs that were recently ingested. However, the defendant was easily calmed when he became upset, his concentration was easily restored, and there was no observable evidence of coercion. Moreover, the defendant spoke with clarity and with specificity during his confession. Accordingly, based upon these observations, Doctor Vosburg opined that the defendant knowingly waived his rights and that the statement was voluntary.

Our review of the taped confession indicates that at the beginning of the interview the detective read the defendant his rights. The defendant appears attentive while those rights were being read, acknowledging each one individually. When asked whether he understood his rights, the defendant gave a definitive yes. The defendant is noticeably fidgety and sometimes had to be asked to speak up, but as Doctor Vosburg observed, he was easily calmed. His answers were responsive to the questions asked by the detective. Significantly, the confession is detailed in ***8*** the description of how the murder occurred. The defendant explained that he had stayed out all night the night before and when he returned home, he and his mother argued. After retreating to his room to watch television and smoke more crack cocaine, he left the house again. When he returned, he thought he could slip into his mother's room while she slept and take her credit card from her purse and a phone book that contained the pin number to the credit card. When he entered the room, she was awake and the defendant asked her for some Tylenol. He then went to the kitchen, retrieved a knife, returned to his mother's room, and approached her. When his mother became vocal, he attacked ***782*** her. The defendant admitted stabbing her, trying to break her neck, and suffocating her. He stated that the drugs made him deranged. He then explained how he removed all of his clothes and placed them in a black bag along with a glove and the knife that he wrapped in newspaper. The defendant placed the shoes that he was wearing under his bed. Afterwards, when he was looking for her purse, the defendant came across the lock box. He broke into the lock box and found thirty dollars. During the interview, the defendant expressed remorse for his actions. [5]

Moreover, the defendant's confession coincides with the physical evidence presented at trial. The tape and testimony show that appellant was advised of and understood his rights. Doctor Vosburg's observations of the defendant's taped confession appear accurate. The district court viewed the taped confession and heard the testimony of Detective Pardo and Dr. Vosburg before finding the confession to be voluntary. Because the confession is supported by the evidence, ***9*** we do not find the trial court abused its discretion by denying the motions to suppress the statement and evidence.

Errors Patent

The transcript of the sentencing hearing shows that the defendant's life sentence was imposed without benefit of probation, parole or suspension of sentence, and the minute entry of sentencing fails to reflect that the district court restricted parole eligibility as required by La.Rev.Stat. 14:30.1. The minute entry reflecting the illegally lenient sentence was sent to the Department of Corrections as evidence of the sentence imposed. However, pursuant to La.Rev.Stat. 15:301.1 A and *State v. Williams*, 2000–1725 (La.11/28/01), 800 So.2d 790, the sentence is deemed to have been imposed with the restriction of benefits, even in the absence of the minute entry showing the restrictions.

Conclusion

The defendant's conviction and sentence are affirmed.

AFFIRMED.

All Citations

62 So.3d 778, 2010-1247 (La.App. 4 Cir. 3/23/11)

Footnotes

1 On February 1, 2011, the defendant filed a motion for leave and extension of time to file a *pro se* brief. The motion was granted on February 3, 2011, and the defendant was ordered to submit his brief within thirty days. That time period has expired and the court has not received the brief or a motion for extension of time.

2 The shoes were found when a search warrant was executed at the house on

January 11, 2009. Inexplicably, no DNA testing of the blood was done to discover if the blood on the defendant's shoes was that of his mother.

3 The defendant was at the hospital because a warrant to obtain blood and saliva samples was being executed.

4 The defendant had broken his ankle in an earlier accident, and had also had knee replacement surgery that caused him to walk with a limp.

5 The defendant was clearly aware of the implications of what he had done at the time of the murder as evidenced by his explanation that, before he left the house, he opened the drawers in the chests in their bedrooms to make it look like a burglary. He also noted that he threw the black bag in the dumpster because he realized the evidence inside the bag was incriminating.

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