APPENDIX "A"

DENIAL OF COA BY THE FIFTH CIRCUIT COURT OF APPEALS

United States Court of Appeals for the Fifth Circuit

No. 19-30716

JON TERRANCE WINZER,

Petitioner—Appellant,

versus

DARREL VANNOY, *Warden, Louisiana State Penitentiary*,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
No. 3:19-CV-658

ORDER:

Jon Winzer, Louisiana prisoner # 493559, was convicted of second-degree murder and armed robbery. The district court dismissed his 28 U.S.C. § 2254 petition as time-barred.

Winzer moves for a COA, for which he must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). Where, as here, the district court denies habeas corpus relief on procedural grounds, the movant must demonstrate that reasonable jurists would find it debatable whether the § 2254 petition states a valid claim of the denial of a constitutional right and

whether the district court was correct in its procedural ruling, or that the issue deserves encouragement to proceed further. *Id.*

Winzer has not challenged the district court's determination that his petition is time-barred; he has merely repeated the substantive arguments he made in his § 2254 petition. Although *pro se* briefs are afforded liberal construction, even *pro se* litigants must brief arguments to preserve them. *Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1993). So Winzer has abandoned the issue. *See McGowen v. Thaler*, 675 F.3d 482, 497 (5th Cir. 2012). To the extent that Winzer's argument can be liberally construed as asserting that his actual innocence provides a gateway to present his time-barred claims, he had not established that he is entitled to a COA on that basis. *See Slack*, 529 U.S. at 484.

The motion for a COA is DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

A True Copy
Certified order issued Nov 30, 2020

Tyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX "B"

DENIAL OF THE FEDERAL DISTRICT COURT WESTERN DISTRICT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

JONTERRANCE WINZER	**CIVIL ACTION NO. 19-0658**
	SECTION P
VS.	**JUDGE TERRY A. DOUGHTY**
DARREL VANNOY	**MAG. JUDGE KAREN L. HAYES**

REPORT AND RECOMMENDATION

Petitioner JonTerrance Winzer, a prisoner in the custody of Louisiana's Department of Corrections proceeding pro se and in forma pauperis, filed the instant Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on approximately May 22, 2019. Petitioner attacks his second-degree murder and armed robbery convictions, as well as the respective life and ninety-nine-year concurrent sentences imposed by the Third Judicial District Court, Union Parish.[1] For the following reasons, the Court should deny the Petition as untimely.

Background

On July 25, 2013, a jury found Petitioner guilty of second-degree murder and armed robbery. [doc. # 1, p. 1]. Thereafter, the Third Judicial District Court, Union Parish, imposed a life sentence for second degree murder and a concurrent ninety-nine-year sentence for armed robbery. *Id.*

Petitioner appealed, claiming that the evidence introduced at trial was insufficient to sustain his convictions, that the trial court failed to review his motion to quash and motion for a continuance, that there was no probable cause to arrest him, that the prosecution withheld

[1] This matter has been referred to the undersigned for review, report, and recommendation under 28 U.S.C. § 636 and the standing orders of the Court.

evidence, and that his trial counsel rendered ineffective assistance. See *State v. Winzer*, 49,316 (La. App. 2 Cir. 10/8/14), 151 So. 3d 135, 148, writ denied, 2014-2373 (La. 4/22/16), 191 So. 3d 1044. On October 8, 2014, the Louisiana Second Circuit Court of Appeal affirmed Petitioner's convictions and sentences. *Id.*

On April 22, 2016, the Supreme Court of Louisiana denied Petitioner's Application for Writ of Certiorari and/or Review. *State v. Winzer*, 2014-2373 (La. 4/22/16), 191 So. 3d 1044. Petitioner did not apply for certiorari before the United States Supreme Court. [doc. # 1, p. 4].

Petitioner filed an application for post-conviction relief on July 12, 2017.[2] [doc. #s 1-2, p. 2; 9-3, pp. 4-11]. On July 31, 2017, the trial court denied Petitioner's application. [doc. # 9-3, p. 36].

On August 30, 2017, Petitioner filed a writ application before the Louisiana Second Circuit Court of Appeal. *Id.* On November 15, 2017, the appellate court denied the application. *Id.* The Supreme Court of Louisiana denied Petitioner's writ application on January 28, 2019. *State v. Winzer*, 2018-0203 (La. 1/28/19), 262 So. 3d 891.

Petitioner filed the instant proceeding on approximately May 22, 2019, claiming that: (1) his appellate counsel rendered ineffective assistance; (2) his trial counsel rendered ineffective assistance; (3) there was no probable cause to arrest him; (4) the trial court failed to review, or conduct a hearing on, his motion for a speedy trial, motion to quash, motion for change of venue, and motion for a continuance; (5) he is actually innocent; (6) the State engaged in prosecutorial misconduct; and (7) the evidence introduced at trial was insufficient to sustain his convictions. [doc. # 1-2].

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[2] Petitioner also maintains that he filed a "Motion to vacate illegal sentence" and a "Mandamus motion to object to ruling of denial for mandamus." *Id.* at 3.

Law and Analysis

Title 28 U.S.C. § 2244(d)(1) provides a one-year statute of limitations for filing habeas corpus applications by persons in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Here, with respect to subsection "C" above, Petitioner's claims do not rely on a constitutional right newly recognized by the United States Supreme Court and made retroactively applicable to cases on collateral review. With respect to subsection "D," Petitioner does not contend that "the factual predicate of the claim or claims presented" were "discovered through the exercise of due diligence" after the date on which his judgment became final.

Petitioner does not mention subsection "B" or otherwise argue that he was impeded from filing this Petition.[3] Out of caution, though, the undersigned will examine subsection "B."

Petitioner alleges that he filed a "shell petition" before this Court on January 30, 2019,

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[3] See *Hebrard v. Day*, 232 F.3d 208 (5th Cir. 2000) ("Hebrard does not argue that a state impediment prevented him from timely filing a § 2254 petition."); *Hatcher v. Quarterman*, 305 F. App'x 195, 196 (5th Cir. 2008) (finding that, because the petitioner "did not allege that the state habeas court created an 'unconstitutional' impediment that prevented him from timely filing his federal habeas application[,] . . . the statutory exception in § 2244(d)(1)(B) [did] not apply.").

requesting an extension of time in which to file his complete petition. [doc. # 1-2, pp. 2-3]. The requirements for the "statutory time-bar reset provision of § 2244(d)(1)(B) . . . are understandably steep." *Wickware v. Thaler*, 404 F. App'x 856, 862 (5th Cir. 2010). To invoke the "reset," a petitioner "must show that: (1) he was prevented from filing a petition (2) by State action (3) in violation of the Constitution or federal law." *Id.*

Here, in the "shell petition,"[4] Petitioner noted that "[h]e has access to the [sic] both the law library and his legal material that has been missing," thus suggesting that he once encountered impediments to filing the instant Petition. [doc. # 13, p. 5]. Petitioner does not specify the legal materials he lacked, who was responsible for the impediment, when the impediments began and ended, or the extent he was impeded. In fact, Petitioner suggests that, as of January 30, 2019, he encountered no impediments. [doc. # 13, p. 5].

Petitioner, ultimately, does not allege or maintain that the impediments he mentions were "created by State action" or, even if they were, that the State action violated "the Constitution or laws of the United States . . . ." 28 U.S.C. §2244(d)(1)(B). Moreover, Petitioner does not definitively contend that the presumed impediments prevented him from filing this Petition.[5]

Consequently, the one-year period of limitation "runs" from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . ." 28 U.S.C. § 2244(d)(1)(A).

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[4] Below, the undersigned discusses whether Petitioner filed the "shell petition."

[5] See *Cardona v. Davis*, 770 F. App'x 179, 184 (5th Cir. 2019) (examining 2244(d)(1)(B) and concluding, "We find no error in the district court's finding that Cardona's thin account of what was deficient . . . do[es] not establish official impediments to his access to the courts for these 23 months."); *Parker v. Johnson*, 220 F.3d 584 (5th Cir. 2000) (finding, where the petitioner argued "that his alleged lack of access to legal materials . . . extend[ed] the tolling period under 28 U.S.C. § 2244(d)(1)(B)[,]" that the petitioner did not show that "the State imposed an unconstitutional impediment to the filing of his federal habeas petition . . . .").

On April 22, 2016, the Supreme Court of Louisiana denied Petitioner's Application for Writ of Certiorari and/or Review. *State v. Winzer*, 2014-2373 (La. 4/22/16), 191 So. 3d 1044. Under United States Supreme Court Rule 13, "a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." Here, Petitioner did not apply for certiorari before the United States Supreme Court. [doc. # 1, p. 4]. Thus, the trial court's judgment became final on July 21, 2016, ninety days after the Supreme Court of Louisiana denied Petitioner's application.

Because Petitioner's conviction became final on July 21, 2016, Petitioner had one year, or until July 21, 2017, to file a federal habeas corpus petition. Petitioner did not file the instant Petition until, at the earliest, May 21, 2019.[6] Thus, the one-year limitation period bars Petitioner's claims unless Petitioner extended the July 21, 2017 deadline through statutory or equitable tolling.

I. Statutory Tolling

The statutory tolling provision in 28 U.S.C. § 2244(d)(2) provides, "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation . . . ." However, any lapse of time before the proper filing of an application for post-conviction relief in state court is counted against the one-year limitations period, *Flanagan v. Johnson*, 154 F.3d 196, 199 n.1 (5th Cir. 1998), and the limitations period is tolled only for as long as the state application remains pending. *Johnson v. Quarterman*, 483 F.3d 278, 285 (5th Cir. 2007).

[6] Petitioner signed his memorandum in support of his Petition on May 21, 2019. [doc. # 1-2, p. 35].

Here, Petitioner filed an application for post-conviction relief on July 12, 2017. [doc. #s 1-2, p. 2; 9-3, pp. 4-11]. Thus, 356 days elapsed, from the time Petitioner's conviction became final to the time Petitioner filed his application for post-conviction relief before the state trial court. On July 31, 2017, the trial court denied Petitioner's application. *Id.* On November 15, 2017, the appellate court denied the application. *Id.* The Supreme Court of Louisiana denied Petitioner's writ application on January 28, 2019. *State v. Winzer*, 2018-0203 (La. 1/28/19), 262 So. 3d 891.

Petitioner had 9 days following the Supreme Court of Louisiana's denial on January 28, 2019, to file the instant Petition before the 1-year period of limitation expired. Petitioner, however, allowed 113 days to elapse, following the Supreme Court of Louisiana's denial, before he filed the instant Petition, at the earliest, on May 21, 2019.

Accordingly, the instant Petition is untimely and should be dismissed absent rare and exceptional circumstances.

II. Equitable Tolling

The one-year statute of limitations can, in rare and exceptional circumstances, be equitably tolled. See *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). Equitable tolling "applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *U.S. v. Wheaten*, 826 F.3d 843, 851 (5th Cir. 2016). "A petitioner's failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner's own making do not qualify." *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006). "To be entitled to equitable tolling, [the petitioner] must show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Lawrence v.*

Fla., 549 U.S. 327, 336 (2007) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Here, Petitioner does not ask the Court to equitably toll the one-year period of limitation. However, as noted, Petitioner alleges that he filed a "shell petition" before this Court on January 30, 2019, requesting an extension of time in which to file his complete petition. [doc. # 1-2, pp. 2-3]. In the undated "shell petition," he wrote:

> Petitioner request that he be provided 120 days extension to perfect his habeas Corpus relief. Petitioner request that he is presently housed at Louisiana State Prison Camp C. He has access to the both the law library and his legal material that has been missing. Petitioner request within the next 120 days will allow him to perfect his habeas Corpus. [sic].

Id. To reiterate, Petitioner did not specify the legal materials he lacked, who was responsible for the impediment, when the impediments began and ended, or the extent he was impeded.

For several reasons, Petitioner's "shell petition" does not equitably toll the period of limitation.

i. <u>Evidence of Filing</u>

First, Petitioner provides no evidence, other than his sworn statement, demonstrating that he filed the "shell petition." Petitioner claims that he filed it on January 30, 2019. However, the undersigned thoroughly searched filings in all federal district courts and did not locate Petitioner's "shell petition."

On April 25, 2019, Petitioner filed a letter, in which he requested "a status check on motion for extension that was submitted to your Court on January 30, 2019." *In Re Jon Terrance Winzer*, 3:19-mc-0028 (W.D. La. 2019). The Clerk of Court docketed the letter in a new, miscellaneous proceeding and then returned the letter to Petitioner, writing:

> On April 25, 2019, the Monroe Division of the Clerk's Office for the Western District of Louisiana received the attached document. After review, it is being returned to you since your submission does not indicate in which case it is to be filed or it includes an incorrect case number. We are unable to determine the

> case number from our records. If the document was intended to be filed in a particular case in this court, please resubmit the documents bearing the appropriate case number.

Id. at doc. 2. Petitioner responded: "Case History: 3rd Judicial District # 48, 447, 2nd Cir. Court # KH-17-51971, Supreme Court # 2018-KH-0203." *Id.* at doc. 3. Petitioner was presumably referencing his state court proceedings. The Clerk of Court returned Petitioner's response, issuing the same reply set forth above. *Id.* at 4.

It appears that Petitioner either: (1) mistakenly thought he filed a motion for an extension before this Court on January 30, 2019; (2) mailed his motion, but the motion was misplaced before it reached this Court; or (3) considering his state court citations, filed his motion before a state court.

On July 26, 2019, following the undersigned's order to provide a copy of the "shell petition" or other evidence demonstrating that he mailed, delivered to prison officials for mailing, or otherwise filed the "shell petition," Petitioner submitted an "Offender Withdrawal Request," which reveals that, on January 25, 2019, he withdrew $1.00 to mail an item. [doc. # 13, p. 10]. The filing does not demonstrate that Petitioner then mailed a document to this Court or, if he did, that he mailed the "shell petition." *Id.*

ii. Case or Controversy

Petitioner submits a sworn statement that he filed the "shell petition" on January 30, 2019, requesting an extension of time. [doc. # 13, pp. 4-8]. Even assuming Petitioner filed the "shell petition," he did not toll the period of limitation because the "shell petition" is not a petition. Rather, it is a motion for extension of time in which to file a petition.

The Court may not *extend* the Congressionally-created statute of limitation at a litigant's

request. Rather, as explained above, the Court may only *toll*[7]—statutorily or equitably—the statute of limitation.

More important, and again assuming Petitioner filed the "shell petition" on January 30, 2019, he did not present a "case or controversy" under Article III of the United States Constitution.

"It is, however, elementary that, as a predicate to any action before a federal court, parties must establish that they have proper standing to raise a claim. In the absence of a party with sufficient interest, the constitutional limitation of federal court jurisdiction to 'cases or controversies' would prevent a federal court from considering the matter. Standing, therefore, is literally a threshold question for entry into a federal court, limiting the exercise of its jurisdiction, and the court must consider the standing of any party even if the issue has not been raised by the parties to the action." *United States v. One 18th Century Colombian Monstrance*, 797 F.2d 1370, 1374 (5th Cir. 1986) (internal footnotes removed).

Here, Petitioner attempted to initiate a proceeding by filing a motion for an extension of time. He did not present claims or assignments of error, he did not identify a respondent, he did not identify the state court that convicted him, and he did not seek any relief. See RULE 2 OF THE RULES GOVERNING SECTION 2254 CASES (mandating that a petitioner must name a respondent, specify grounds for relief, state the facts supporting each ground, and, inter alia, state the relief requested); 28 U.S.C. § 2242 ("Application for a writ of habeas corpus shall . . . allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.").

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[7] See BLACK'S LAW DICTIONARY (11th ed. 2019) (defining toll: "to stop the running of; to abate.").

In his motion, Petitioner essentially asked the Court for an advisory opinion concerning whether the statutory period of limitation would bar a petition that he may (or may not) file or whether the Court would equitably toll the period of limitation on a petition yet to be filed. See *United States v. Cook*, 795 F.2d 987, 994 (Fed. Cir. 1986) (concluding that a district court's order tolling the statute of limitations was premature because it affected persons who had not filed claims); *Wawak v. Johnson*, 2001 WL 194974, at *1 (N.D. Tex. Feb. 22, 2001), report and recommendation adopted, 2001 WL 290526 (N.D. Tex. Mar. 21, 2001).

"[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' Its judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). "Federal courts may not give opinions upon moot questions or abstract propositions." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365 (5th Cir. 2003) (internal quotation marks and quoted source omitted).

Here, because Petitioner's alleged "shell petition" was not a petition at all and thus did not present a case or controversy, it did not equitably toll the one-year period of limitation. See *Miller v. Quarterman*, 2007 WL 2890270, at *2 (N.D. Tex. Sept. 27, 2007) (" Insofar as Petitioner requests an extension of the one-year statute of limitations . . . his motion fails to present a case or controversy. . . . There is no statutory or case authority that allows a federal district court to issue a premature order staying the one-year limitations period before a § 2254 petition is filed"); *United States v. Leon*, 203 F.3d 162, 164 (2d Cir. 2000) ("[W]e hold—as

every other court to consider the question thus far has held—that a federal court lacks jurisdiction to consider the timeliness of a § 2255 petition until a petition is actually filed."); *Bryan v. Dretke*, 2006 WL 1004268, at *1 (N.D. Tex. Apr. 14, 2006).

iii. Extraordinary Circumstances

Finally, even assuming that Petitioner filed the "shell petition," that the "shell petition" was an actual petition, and that Petitioner presented a case or controversy, Petitioner does not present rare and exceptional circumstances. Rare and exceptional circumstances can exist when a petitioner is "actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (quotation marks and quoted source omitted).

In his "shell petition," Petitioner mentioned, almost as an afterthought, that as of January 30, 2019, he had access to both a law library and his once-missing legal material. [doc. # 13]. These cursory remarks do not reflect rare and exceptional circumstances. Petitioner did not indicate, for instance, why he lacked legal materials, which legal materials he lacked, how long he lacked legal materials, why he required access to the law library, when he gained access to the law library, or whether the alleged deprivations prevented him from asserting his rights. Moreover, Petitioner did not indicate that respondents actively misled him or prevented him in some extraordinary way from asserting his rights.[8]

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[8] See *Walck v. Johnson*, 213 F.3d 638 (5th Cir. 2000) (finding that the petitioner did not present rare and exceptional circumstances because the petitioner was "inconsistent with the dates he was denied access to his legal material[,] he [did] not state why he needed his materials to file his federal habeas petition[,] and he [did] not indicate that he was restrained or prevented from filing within the limitations period."); *Caldwell v. Dretke*, 182 F. App'x 346, 347 (5th Cir. 2006) (finding that the district court did not abuse its discretion in denying equitable tolling where the petitioner did not provide "specific evidence of the impact of his medical conditions on his ability to file a timely application [or of] the lack of evidence regarding why certain documents were necessary to the preparation of his application . . . ."); *Tate v. Parker*, 439 F. App'x 375,

Even assuming Petitioner presented extraordinary circumstances, Petitioner did not diligently pursue his rights: he waited 356 days, after his conviction became final, to file his application for post-conviction relief before the trial court.[9] See *Webb v. Dretke*, 165 F. App'x 375, 376 (5th Cir. 2006) (holding that the petitioner did not diligently pursue his rights because he "did not seek post-conviction relief until 11 months after his conviction had become final" and offered "no explanation for his delay other than his conclusional allegation that he is a pro se litigant with limited resources.").

Accordingly, this Petition is time-barred under 28 U.S.C. § 2244(d)(1)(A), unless Petitioner demonstrates a fundamental miscarriage of justice.

III. Fundamental Miscarriage of Justice

In one of his assignments of error, Petitioner argues that two affidavits from his brother, Lonnele Shelton, which are dated approximately three years after his conviction, demonstrate that he is actually innocent. [doc. # 1-2, p. 26].

The Louisiana Second Circuit Court of Appeal summarized the events surrounding Petitioner's crimes thusly:

> On the afternoon of April 26, 2011, police were dispatched to the home of Johnny Ray Simmons in the Sensley's Townhouses in Farmerville, Louisiana.

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376 (5th Cir. 2011) (finding that "ignorance of the law, lack of knowledge of filing deadlines, a claim of actual innocence, temporary denial of access to research materials or the law library, and inadequacies in the prison law library, are not sufficient to warrant equitable tolling."); *Krause v. Thaler*, 637 F.3d 558, 561 (5th Cir. 2011) ("Krause only alleges that the library at the transfer facility was inadequate. He does not at any point allege facts as to why the transfer facility's lack of legal materials prevented him from filing a timely habeas application."); *Hatcher v. Quarterman*, 305 F. App'x 195, 196 (5th Cir. 2008) ("Hatcher has not shown that not having possession of his trial counsel's file prevented him from filing his application, as opposed to proving his claims.").

[9] "Even when a petitioner demonstrates 'rare and exceptional circumstances' for missing the federal habeas deadline, he also must have pursued his claims diligently to justify equitable tolling of the statute of limitations." *Hill v. Johnson*, 265 F.3d 1059 (5th Cir. 2001).

> Upon their entrance into Apartment 26, police discovered the body of Romon Johnson, who had been shot multiple times. Police investigation revealed the Johnson had been shot as he sold one-half pound of marijuana to Simmons and Nicholas Higgins. It was also learned that 24–year–old Jonterrance Winzer, his 16–year–old brother, Lonnele Shelton, and Meagan Ward had spent the previous night at Simmons' apartment and were present during, but not privy to, the sale. Simmons' girlfriend, Ladrina Gray, her niece, Gerreal Gray, and Simmons' nine-month old daughter were also in the apartment at the time of the shooting.
>
> Police ascertained that Winzer and Simmons were childhood friends. On April 25, after a chance meeting with Simmons, Winzer came by his friend's apartment with his girlfriend and little brother and played dominoes late into the evening. The three ultimately spent the night at Simmons' home.
>
> Police questioned all individuals present in the apartment at the time of the shooting. Those interviews resulted in Winzer and his brother being implicated as the shooters. Arrest warrants were issued for the two brothers who were ultimately apprehended and arrested in Oklahoma City, Oklahoma.

Winzer, 151 So. 3d at 138.

In his direct appeal, Petitioner argued that the evidence presented at trial did not sufficiently establish that he shot the victim. *Id.* The Second Circuit summarized the evidence as follows:

> Dr. Peretti testified that Johnson suffered from three gunshot wounds: one to his right eyelid, one in the back of his neck, and one to his right cheek. In Dr. Peretti's opinion, the right eyelid wound was the fatal shot. He recovered a "small-caliber, non-jacketed bullets, .22's."
>
> Both Simmons and Higgins testified. Simmons testified that he and Winzer grew up together. The two had seen each other the day before the incident and Winzer, Ward and Shelton spent the night at his apartment. On the morning of the incident, Higgins called Simmons to set up a purchase of marijuana with an individual named Johnson, whom Simmons did not know. Simmons recalled that in the late morning, Gerreal Gray arrived at the apartment after getting out of school. She was the niece of Simmons' girlfriend, Ladrina Gray, who also lived in the apartment with the couple's nine-month old baby. Higgins also arrived.
>
> Near lunchtime, Simmons, Winzer, Shelton and Higgins left the residence to obtain food for everyone. Upon their return, Simmons testified that he and Higgins discussed the marijuana purchase and pooled $310. Simmons stated that although the two were originally going to Johnson's residence, ultimately

Johnson came to Simmons' home. After entering the apartment, Johnson went to the kitchen to join Simmons and Higgins. According to Simmons, it was Higgins who gave Johnson the money for the one-half pound of marijuana contained in a plastic bag. As Johnson counted the money, Simmons smelled the "weed" to "see what grade I got." Simmons claimed that immediately after the sale, he went to the bathroom and closed the door. As he came out of the bathroom, Simmons saw Shelton standing in front of the dishwasher in the kitchen. Simmons observed "[Shelton's] hand up and I saw him with the pistol and he shot. That's when he shot [Johnson]."

Simmons stated that Shelton shot Johnson from behind. He saw the victim fall to the ground. Simmons testified that he went back into the bathroom "soon as he shot [Johnson]." Simmons testified that after he went back into the bathroom, he heard "scuffling and stuff going on." He peeked out of the door and saw "Winzer, Shelton and Higgins by the front door." Simmons testified that he guessed "they were jumping on him at the time." He heard another shot and then everything "calmed down." Simmons testified that he "looked back out" and saw Shelton and Higgins "moving toward the table part." As Simmons left the bathroom and ran upstairs, he saw Winzer "picking up the money." Although he only "caught a glimpse" of Winzer, he was "arm distance" from him and "went right by him" as he ran up the stairs. Simmons recalled that he heard what sounded "like two more gun shots" while upstairs. Simmons also recalled hearing a knock at the front door and "running up my steps." He feared for the safety of his girlfriend and daughter and came out of the bedroom. He saw Higgins, Shelton and Winzer "running out the door at the time." Simmons stated that he then came downstairs and opened the screen door for police. He saw Johnson "laying down there," and the bag of money and marijuana were gone.

On cross-examination, Simmons admitted that he pled guilty to accessory after the fact to second degree murder and armed robbery. He also acknowledged that he initially told the police he was upstairs the entire time and did not see who shot Johnson but later gave a second statement in which he admitted being downstairs. He also stated that Winzer and Shelton had no part of the marijuana sale.

Higgins testified that after he got out of classes about 11:15 a.m. on April 26, 2011, he walked to Simmons' apartment. When he got there, he and Simmons "started negotiating about some marijuana" they were going to buy from Higgins' friend Johnson. Higgins corroborated that he, Simmons, Winzer and Shelton got food for everyone in the apartment. They traveled in Winzer's black truck. He testified that he had never seen Winzer or Shelton before that day. He also stated that as they ate lunch, he and Simmons discussed the drug deal in the kitchen. As they did so, Johnson called Higgins and told him he was on his way to Simmons' apartment. When Johnson knocked on the door, Higgins let him in and the two walked into the kitchen area. According to Higgins, Johnson pulled out the seven ounces of marijuana packaged in a plastic bag. Johnson placed the

marijuana on the counter and Higgins gave him the money. Higgins testified that as Johnson counted the money, Shelton came behind him and shot him once. Johnson fell down and Higgins "went up to Lonnele Shelton," and "tried to take the gun from him."

Higgins testified that as the two were "wrestling over the gun," he "slipped down" and Winzer "came over there with a mop stick," and "started beating me with it." Higgins recalled that the three were in the kitchen entrance during these events. Higgins testified that Winzer pulled him toward the kitchen area and Shelton "came through and hit me with the gun." Shelton told Higgins to be quiet and not move. Eventually Shelton made him "get up and move" near a table. Higgins testified that Shelton held him at gunpoint. During these events, Higgins heard Winzer state, "he's still moving." Higgins stated that he saw Winzer get "the gun from his brother," and "went and shot [Romon Johnson] two more times." Shelton remained in Higgins' "eyesight" and stated he knew Shelton did not shoot Johnson. He did not see where Winzer shot Johnson. Higgins testified that after Winzer shot Johnson, "he gave the gun back to his little brother, Lonnele Shelton." Shelton held Higgins at gunpoint, "talking about what he going to do with me." Higgins recalled seeing Shelton picking up the money, but he did not see anyone pick up the marijuana. Higgins remembered that the two brothers discussed what they were going to do with Johnson's body.

Higgins testified that someone came to the front door and Winzer and Shelton ran upstairs. It was then that Higgins ran outside and informed Johnson's family that he had been shot. He went back to Simmons' apartment with Johnson's brother and mother. When he got back to the apartment, Winzer, Shelton and Warden were gone. The money and marijuana were also gone. Higgins suffered a nose injury and swelling from being hit with the gun and broom handle.

On cross-examination, Higgins admitted that he initially told police that after the first shot, he blacked out. He explained that he meant he was "scared a lot," by seeing "somebody die right in front of your eyes." He did not believe that those feelings affected what he saw. Higgins admitted that in 2012, he pled guilty to attempted possession of marijuana.

Gearrel Gray testified that she was in the apartment at the time of the incident. She recalled that as she entered the apartment, Winzer, Shelton and Warden were seated at a table. Higgins also arrived at the apartment about five minutes after she got there. Gray testified that she ate her lunch on a small couch. She stated that Higgins was in the kitchen "counting money" and she heard him "call somebody up on the phone telling him how to get to the apartment." Johnson came to the apartment and went into the kitchen with Higgins. She heard and saw nothing of what transpired between the two men until she heard two gunshots "back towards the kitchen." She got behind the couch and observed what she saw by looking around the couch. Gray did not see who fired the shots, but turned around to see "the younger one" fighting Higgins. She thought that

Higgins was "trying to fight the gun out his hand while he's beating him up." Gray testified that she heard Shelton tell Higgins that he talked too much. Higgins was "hollering and kicking both of them." After that she heard two or three more gunshots and Shelton instruct Winzer to "get the money." Gray also heard Shelton and Winzer discuss where they were going to take the body. Gray testified that she never saw a gun. She stated that when somebody knocked on the door, Shelton and Winzer ran upstairs and Higgins ran out of the house. Thereafter, Gray stated that Shelton and Winzer also ran out of the house with Warden.[10]

On cross-examination, Gray confirmed that she did not see who fired the two gunshots and did not see any marijuana or money.

Warden corroborated the events leading up to the shooting. She witnessed Johnson enter the apartment and go into the kitchen. She saw only Higgins in the kitchen with Johnson and did not hear anything they said. She "knew what they were doing" but did not see marijuana or money. Warden testified that Higgins and Johnson were standing very close to one another. As she sat at the dining room table eating, Warden heard gunshots; she did not see who fired them. According to Warden, at the time of the gunshots, Winzer and Shelton were standing "around the kitchen door area." Johnson was "around the counter part." After she heard the shot, Warden got down on the floor in front of the large couch. She then heard "tussling, the moving around." Warden testified that it was "Jonterrance and Lonnele and Nick" involved in the tussling around the front door area. Warden stated that the three "wound up at the table that I was originally sitting at." Higgins was on one side and Winzer and Shelton were on the other. She heard somebody yelling at Higgins to "shut up and sit down." Warden recalled Winzer saying that "he's still moving," and then she heard more gunshots. She did not see who fired the shots. She saw Shelton holding a very small handgun toward Higgins. She had seen Winzer holding the gun prior to that day. Warden testified that she heard Winzer and Shelton "trying to figure out what to do with the body." Warden recalled that Winzer and Shelton went "upstairs for a while," when there was a knock at the door. At that time, Higgins "ran out the door." Winzer and Shelton then came downstairs and yelled at her to follow them. The three got into the truck and Winzer drove. Warden sat in the passenger seat and Shelton was in the back. The three traveled toward Bernice, Louisiana, and made a detour on a dirt road. Warden heard Shelton and Winzer discuss what happened. Winzer said that Johnson "must've had an angel watching over him because it took more than one shot." Warden saw that Winzer had money "popping out his pocket." She had given him $20 or $30 the night

[10] JaMarkus Hamilton testified that as he rang Simmons' doorbell on April 26, 2011, Higgins ran out telling them to go; Higgins' lip was bloody. Hamilton and another man hid behind the building and saw two males and a female exit the apartment. He was not able to identify Winzer as one of those males. Hamilton further testified that the three individuals got into a black truck and headed west after backing into the building and damaging the bumper.

before; she did not know how much he had left. Winzer and Shelton discussed the fact that Shelton had "missed Nick." The brothers dropped Warden off at her apartment; this was the last time she saw either of them.

On cross-examination, Warden testified that she did not "really" change her statements to police, although she "added some that I didn't say the very first time." She admitted pleading guilty to accessory after the fact to second degree murder, armed robbery and resisting an officer, and was awaiting sentencing. Warden admitted that the only person she saw with a gun in his hand was Shelton.

Police testimony showed that the Farmerville Police Department was dispatched to Simmons' apartment around 2:00 p.m. The scene was photographed and evidence collected, but no money, handguns or marijuana were found, except a small bag of marijuana recovered from a drawer in the kitchen. The black truck was later found and searched but it did not contain the gun, the marijuana or the money. Police received an anonymous tip that Winzer and Shelton were possibly in Oklahoma City, where they were subsequently arrested and extradited to Louisiana.

Winzer invoked his Fifth Amendment right to not testify. The defense did not present any witnesses.

Id. (footnotes in original).

Here, Lonnele Shelton first avers:

JonTerrance Winzer didn't know what was going to happen. Johnny Simmons told me to shoot Raymond Johnson "we we." That was Johnny Simmons gun. I gave Johnny Simmons the money, weed & the gun & when Gearral "Ge Ge" Gray left the scene of the crime with her mother Courtney Gray they left to hide the drugs money & gun. JonTerrance Winzer didn't know this was going to happen & I don't believe that JonTerrance Winzer knew what happen to the evidence from the crime scene. [sic].

[doc. # 8, p. 115]. In another affidavit, Shelton avers:

On April 26, 2011, I Lonnele Jamal Shelton B/M, DOB 12/18/94, did shoot and kill Ra'mon Johnson, inflicting three (3) shots from a .22 caliber belonging to Johnny Simmons to Johnson's neck, right cheek, and right eye. I Lonnel Jamal Shelton clarify that my brother, JonTerrance did not know that Johnny Simmons told me to kill Ra'mon Johnson and to give him the marijuana and gun so he could make his extra money from the marijuana sales profits. I Lonnel Jamal Shelton, also admits that I robbed Johnson for the $210. It was not $310 like the witnesses testified as. [sic].

Accordingly, Petitioner has not established a "credible gateway claim" sufficient to overcome the one-year period of limitation.

Conclusion

For the reasons above, **IT IS RECOMMENDED** that Petitioner JonTerrance Winzer's Petition for Writ of Habeas Corpus, [doc. # 1], be **DENIED and DISMISSED WITH PREJUDICE** as time-barred under 28 U.S.C. § 2244(d).

By this Report and Recommendation, the Court notifies Petitioner that his claims are subject to dismissal as untimely under the one-year period of limitation and that the undersigned is recommending dismissal without ordering Respondents to answer. Petitioner may raise any arguments, or present any evidence, against dismissal during the fourteen-day objection period described below.[14]

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Rule 72(b), parties aggrieved by this Report and Recommendation have **fourteen (14) days** from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within **fourteen (14) days** after being served with a copy of any objections or response to the District Judge at the time of filing. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the District Judge before the Judge makes a final ruling.

A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED

[14] See *Lewis v. Cockrell*, 33 F. App'x 704 (5th Cir. 2002) ("When a federal district court applies the limitations period *sua sponte*, it should consider whether the habeas petitioner has been given notice of the issue, whether the petitioner has had a reasonable opportunity to argue against dismissal, and whether the state has intentionally waived the defense.").

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN FOURTEEN (14) DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

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

In Chambers, Monroe, Louisiana, this 6th day of August, 2019.

KAREN L. HAYES
UNITED STATES MAGISTRATE JUDGE

APPENDIX "C'

STATE V WINZER 2014-2373 (LA. 4/22/16)

APPENDIX "C'

STATE V WINZER 2014-2373 (LA. 4/22/16)

PETITIONER DOES NOT HAVE APPENDIX "C" AND LAW LIBRARY AT LOUISIANA STATE PENITENTIARY CAMP C WEST LAW IS OFF LINE. BECAUSE OF COVID-19 OFFENDER COUNSEL CANNOT OBTAIN A COPY. I HAVE PROVIDED THE DOCKET NUMBER.

Jon Terrance Winzer 493559

Mr. Jon Terrance Winzer #493559 pro-se
Camp C Bear 3
Louisiana State Penitentiary
Angola, La 70712

APPENDIX "D"

STATE V WINZER, 151 SO 3D 135

State v. Winzer
Court of Appeal of Louisiana, Second Circuit. | October 8, 2014 | 151 So.3d 135 | 49,316 (La.App. 2 Cir. 10/8/14) *(Approx. 20 pages)*

151 So.3d 135
Court of Appeal of Louisiana,
Second Circuit.

STATE of Louisiana, Appellee
v.
Jonterrance **WINZER**, Appellant.

No. 49,316–KA.
Oct. 8, 2014.

Synopsis

Background: Following denial of his motions to quash and obtain continuances, defendant was convicted in the District Court, Parish of Union, R. Wayne Smith, J., of second degree murder and armed robbery. He appealed.

Holdings: The Court of Appeal, Caraway, J., held that:
1 evidence was sufficient to support defendant's convictions;
2 defendant's motion to quash indictment was waived;
3 denial of defendant's request for continuance was not abuse of discretion;
4 defendant was precluded from raising assignment of error that there was insufficient probable cause to issue arrest warrant;
5 **State** did not violate *Brady*; and
6 defendant was not denied effective assistance of counsel.

Affirmed.

West Headnotes (27)

Change View

1 **Criminal Law** Weight and conclusiveness in general
"Direct evidence" provides proof of the existence of a fact, for example, a witness's testimony that he saw or heard something.

2 **Criminal Law** Circumstantial Evidence
"Circumstantial evidence" provides proof of collateral facts and circumstances, from which the existence of the main fact may be inferred according to reason and common experience.

3 **Homicide** Intent or mens rea
Specific intent to kill can be inferred from the intentional use of a deadly weapon such as a knife or a gun. LSA–R.S. 14:30.1(A)(1).

4 **Criminal Law** Effect of impeachment
When a witness is impeached, the jury, as the trier of fact, is presented with evidence it may consider and weigh in determining the credibility, or believability of the witness.

5 **Criminal Law** Effect of impeachment
Simply because the witness may have been impeached by prior inconsistent statements does not mean that the jury is prohibited from believing anything said by the witness; the inconsistencies in the witness's statements are one of any

number of factors the jury weighs in determining whether or not to believe a witness's trial testimony.

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6 **Criminal Law** Credibility of witnesses in general
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.

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7 **Homicide** Second degree murder
Evidence was sufficient to support defendant's conviction for second-degree murder, even though witnesses' testimony contained minor inconsistencies; jury was made aware of inconsistencies, and witness testified that defendant grabbed gun from his brother and shot in direction of victim's body after commenting that victim was still moving. LSA–R.S. 14:30.1(A)(1).

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8 **Robbery** First degree; armed robbery
Evidence was sufficient to support defendant's conviction for armed robbery at scene of drug transaction, even though witnesses' testimony contained minor inconsistencies; jury was made aware of inconsistencies, and witness testified that defendant picked up money involved in drug transaction, which was corroborated by second witness's testimony that defendant left the scene with money hanging out of his pockets. LSA–R.S. 14:64.

1 Case that cites this headnote

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9 **Criminal Law** Principals, Aiders, Abettors, and Accomplices in General
Those persons who knowingly participate in the planning or execution of a crime are "principals."

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10 **Indictments and Charging Instruments** Motion to quash or set aside in general
Defendant's pro se, pre-trial motion to quash murder indictment was waived where defendant proceeded to trial with counsel without raising issue that the motion had not been ruled upon.

2 Cases that cite this headnote

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11 **Criminal Law** Motions
Motions pending at the commencement of trial are waived when the defendant proceeds to trial without raising the issue that the motions were not ruled upon.

1 Case that cites this headnote

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12 **Criminal Law** Defendant filing pro se motions while represented by counsel
A trial court is not required to entertain motions filed by a defendant who is represented by counsel; while an indigent defendant has a right to counsel as well as the opposite right to represent himself, he has no constitutional right to be both represented and representative. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

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13 **Criminal Law** Want of time for preparation by counsel
Trial court did not abuse its discretion when it denied murder defendant's request for continuance; the court reviewed the discovery responses and concluded that they were not so voluminous or substantial that counsel would be unable to adequately prepare for trial. LSA–C.Cr.P. art. 712.

Criminal Law Time for trial or hearing; continuance

14 Even when an abuse of discretion is shown, a conviction will not be reversed based upon the denial of a continuance absent a showing of specific prejudice. LSA–C.Cr.P. art. 712.

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15 **Criminal Law** Sufficiency and Scope of Motion
Criminal Law Necessity of ruling on objection or motion
Defendant was precluded from raising assignment of error that there was insufficient probable cause to issue arrest warrant based upon inconsistent testimony; issue was waived when defendant proceeded to trial without calling attention to lack of ruling on his motion to quash, and in his motion to quash, he argued that the arrest was illegal due to racism and prejudice. U.S.C.A. Const.Amend. 4; LSA–C.Cr.P. art. 841.

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16 **Criminal Law** Necessity of Objections in General
A new ground for objection cannot be presented for the first time on appeal. LSA–C.Cr.P. art. 841.

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17 **Criminal Law** Disclosure of Information
When the defendant requests it, the **state** must produce evidence that is favorable to the accused, if that evidence is material to guilt or innocence.

1 Case that cites this headnote

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18 **Criminal Law** Impeaching evidence
Rule that the **state** must produce evidence that is favorable to the accused, if requested, applies to evidence which impeaches the testimony of a witness when the credibility of that witness may be determinative of guilt or innocence.

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19 **Criminal Law** Impeaching evidence
State's presentation of witness's testimony, which identified defendant as the second shooter, which **State** allegedly withheld from defense, did not violate *Brady*; *Brady* addressed issues of pretrial discovery, and witness's trial testimony did not include exculpatory evidence.

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20 **Criminal Law** Preferability of raising effectiveness issue on post-conviction motion
As a general rule, a claim of ineffective assistance is more properly raised in an application for post conviction relief (PCR) in the trial court than by appeal; this is because PCR creates the opportunity for a full evidentiary hearing. U.S.C.A. Const.Amend. 6; LSA–C.Cr.P. art. 930.

2 Cases that cite this headnote

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21 **Criminal Law** Conduct of Trial in General
Criminal Law Effective assistance
When the record is sufficient, a claim of ineffective assistance may be resolved on direct appeal in the interest of judicial economy.

2 Cases that cite this headnote

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22 **Criminal Law** Deficient representation and prejudice in general
Ineffective assistance claims must both identify specific acts or omissions by counsel and **state** how these actions resulted in actual prejudice so severe that the defendant was denied a fair trial; general statements and conclusory charges will not suffice. U.S.C.A. Const.Amend. 6.

Criminal Law Insufficiency of Evidence

23 **Criminal Law** Judgment notwithstanding the verdict

To challenge a conviction based upon a claim of insufficiency of the evidence, a defendant should proceed by way of urging a motion for acquittal or a motion for post verdict judgment of acquittal. LSA–C.Cr.P. arts. 778, 821.

24 **Criminal Law** Of Acquittal

Defense counsel was not authorized to file a motion for acquittal because the defendant opted for a jury trial instead of a bench trial. LSA–C.Cr.P. art. 778.

25 **Criminal Law** Impeachment or contradiction of witnesses

Defendant's conclusory allegations that witnesses made statements to detectives denying knowing factual elements, and later made additional statements, were insufficient to establish claim of ineffective assistance of counsel based trial counsel's failure to impeach witnesses' during cross-examination in murder trial; defendant failed to specify the content of witnesses' statements or how failing to impeach the witnesses based upon these inconsistent statements would have prejudiced his case. U.S.C.A. Const.Amend. 6.

26 **Criminal Law** Examination of witnesses

Cross examination is a strategy decision and the Court of Appeal affords great deference to a trial counsel's tactical decisions and trial strategy.

27 **Criminal Law** Impeachment or contradiction of witnesses

Defendant was not prejudiced by trial counsel's failure to impeach **State's** witness during murder trial with witness's previous statements that defendant and his brother each shot the victim two times, as required to support claim of ineffective assistance of counsel; despite any inconsistencies in witness's recollection of how many shots were fired, he consistently identified defendant as having shot the victim. U.S.C.A. Const.Amend. 6.

Attorneys and Law Firms

***137** Carey J. Ellis, III, Louisiana Appellate Project, for Appellant.

Jonterrance R. **Winzer**, Pro se.

Robert W. Levy, District Attorney, John L. Sheehan, Penya Marzula Moses–Fields, Assistant District Attorneys, for Appellee.

Before STEWART, CARAWAY and PITMAN, JJ.

Opinion

CARAWAY, J.

****1** Jonterrance **Winzer** was charged by grand jury indictment and convicted as charged by a jury with the crimes of second degree murder and armed robbery. ***138 Winzer** received concurrent sentences of life imprisonment for the murder conviction and 99 years for the armed robbery. He appeals his convictions and sentences. We affirm.

Facts

On the afternoon of April 26, 2011, police were dispatched to the home of Johnny Ray Simmons in the Sensley's Townhouses in Farmerville, Louisiana. Upon their entrance into Apartment 26, police discovered the body of Romon Johnson, who had been shot multiple times. Police investigation revealed the Johnson had been shot as he sold one-half pound of marijuana to Simmons and Nicholas Higgins. It was also learned that 24–year–old Jonterrance **Winzer**, his 16–year–old brother, Lonnele Shelton, and Meagan Ward had spent the previous night at Simmons' apartment and were present during, but not privy to,

the sale. Simmons' girlfriend, Ladrina Gray, her niece, Gerreal Gray, and Simmons' nine-month old daughter were also in the apartment at the time of the shooting.

Police ascertained that **Winzer** and Simmons were childhood friends. On April 25, after a chance meeting with Simmons, **Winzer** came by his friend's apartment with his girlfriend and little brother and played dominoes late into the evening. The three ultimately spent the night at Simmons' home.

***2** Police questioned all individuals present in the apartment at the time of the shooting. Those interviews resulted in **Winzer** and his brother being implicated as the shooters. Arrest warrants were issued for the two brothers who were ultimately apprehended and arrested in Oklahoma City, Oklahoma.

On May 23, 2011, the Union Parish Grand Jury returned an indictment, charging **Winzer** with the second degree murder and armed robbery of Johnson. The matter proceeded to trial, and on July 25, 2013, a 12–person jury found **Winzer** guilty as charged on both counts. **Winzer** was sentenced to concurrent sentences of life imprisonment for second degree murder and 99 years for armed robbery, without benefit of probation, parole, or suspension of sentence. **Winzer** did not file a motion to reconsider sentence, but lodged a timely appeal. His appellate counsel raises one assignment of error and in a pro se and supplemental brief, **Winzer** makes seven additional assignments or error.

Discussion

Sufficiency of the Evidence

In two pro se assignments of error [1] and in **Winzer's** assignment of error by counsel, the sufficiency of the evidence is challenged. **Winzer** argues that none of the eyewitnesses could positively testify that **Winzer** ***3** shot or robbed Johnson. **Winzer** points to inconsistencies in the witnesses' statements and argues that Simmons' and Warden's testimonies were made with expectations of leniency in their own prosecutions. He contends that the witnesses' testimonies which were fraught with internal contradictions and irreconcilable conflict ***139** with physical evidence were not sufficient to support his convictions.

At trial, the **state** presented the testimony of eleven witnesses, including the Coroner, Dr. Frank Peretti, an expert in forensic pathology. Dr. Peretti testified that Johnson suffered from three gunshot wounds: one to his right eyelid, one in the back of his neck, and one to his right cheek. In Dr. Peretti's opinion, the right eyelid wound was the fatal shot. He recovered a "small-caliber, non-jacketed bullets, .22's."

Both Simmons and Higgins testified. Simmons testified that he and **Winzer** grew up together. The two had seen each other the day before the incident and **Winzer**, Ward and Shelton spent the night at his apartment. On the morning of the incident, Higgins called Simmons to set up a purchase of marijuana with an individual named Johnson, whom Simmons did not know. Simmons recalled that in the late morning, Gerreal Gray arrived at the apartment after getting out of school. She was the niece of Simmons' girlfriend, Ladrina Gray, who also lived in the apartment with the couple's nine-month old baby. Higgins also arrived.

Near lunchtime, Simmons, **Winzer**, Shelton and Higgins left the residence to obtain food for everyone. Upon their return, Simmons testified that he and Higgins discussed the marijuana purchase and pooled $310. ***4** Simmons **stated** that although the two were originally going to Johnson's residence, ultimately Johnson came to Simmons' home. After entering the apartment, Johnson went to the kitchen to join Simmons and Higgins. According to Simmons, it was Higgins who gave Johnson the money for the one-half pound of marijuana contained in a plastic bag. As Johnson counted the money, Simmons smelled the "weed" to "see what grade I got." Simmons claimed that immediately after the sale, he went to the bathroom and closed the door. As he came out of the bathroom, Simmons saw Shelton standing in front of the dishwasher in the kitchen. Simmons observed "[Shelton's] hand up and I saw him with the pistol and he shot. That's when he shot [Johnson]."

Simmons **stated** that Shelton shot Johnson from behind. He saw the victim fall to the ground. Simmons testified that he went back into the bathroom "soon as he shot [Johnson]." Simmons testified that after he went back into the bathroom, he heard "scuffling and stuff

going on." He peeked out of the door and saw "**Winzer**, Shelton and Higgins by the front door." Simmons testified that he guessed "they were jumping on him at the time." He heard another shot and then everything "calmed down." Simmons testified that he "looked back out" and saw Shelton and Higgins "moving toward the table part." As Simmons left the bathroom and ran upstairs, he saw **Winzer** "picking up the money." Although he only "caught a glimpse" of **Winzer**, he was "arm distance" from him and "went right by him" as he ran up the stairs. Simmons recalled that he heard what sounded "like two more gun shots" while upstairs. Simmons also recalled hearing a knock at ***5** the front door and "running up my steps." He feared for the safety of his girlfriend and daughter and came out of the bedroom. He saw Higgins, Shelton and **Winzer** "running out the door at the time." Simmons **stated** that he then came downstairs and opened the screen door for police. He saw Johnson "laying down there," and the bag of money and marijuana were gone.

On cross-examination, Simmons admitted that he pled guilty to accessory after the fact to second degree murder and armed robbery. He also acknowledged that he initially told the police he was upstairs the entire time and did not see ***140** who shot Johnson but later gave a second statement in which he admitted being downstairs. He also **stated** that **Winzer** and Shelton had no part of the marijuana sale.

Higgins testified that after he got out of classes about 11:15 a.m. on April 26, 2011, he walked to Simmons' apartment. When he got there, he and Simmons "started negotiating about some marijuana" they were going to buy from Higgins' friend Johnson. Higgins corroborated that he, Simmons, **Winzer** and Shelton got food for everyone in the apartment. They traveled in **Winzer's** black truck. He testified that he had never seen **Winzer** or Shelton before that day. He also **stated** that as they ate lunch, he and Simmons discussed the drug deal in the kitchen. As they did so, Johnson called Higgins and told him he was on his way to Simmons' apartment. When Johnson knocked on the door, Higgins let him in and the two walked into the kitchen area. According to Higgins, Johnson pulled out the seven ounces of marijuana packaged in a plastic bag. Johnson placed the ***6** marijuana on the counter and Higgins gave him the money. Higgins testified that as Johnson counted the money, Shelton came behind him and shot him once. Johnson fell down and Higgins "went up to Lonnele Shelton," and "tried to take the gun from him."

Higgins testified that as the two were "wrestling over the gun," he "slipped down" and **Winzer** "came over there with a mop stick," and "started beating me with it." Higgins recalled that the three were in the kitchen entrance during these events. Higgins testified that **Winzer** pulled him toward the kitchen area and Shelton "came through and hit me with the gun." Shelton told Higgins to be quiet and not move. Eventually Shelton made him "get up and move" near a table. Higgins testified that Shelton held him at gunpoint. During these events, Higgins heard **Winzer state**, "he's still moving." Higgins **stated** that he saw **Winzer** get "the gun from his brother," and "went and shot [Romon Johnson] two more times." Shelton remained in Higgins' "eyesight" and **stated** he knew Shelton did not shoot Johnson. He did not see where **Winzer** shot Johnson. Higgins testified that after **Winzer** shot Johnson, "he gave the gun back to his little brother, Lonnele Shelton." Shelton held Higgins at gunpoint, "talking about what he going to do with me." Higgins recalled seeing Shelton picking up the money, but he did not see anyone pick up the marijuana. Higgins remembered that the two brothers discussed what they were going to do with Johnson's body.

Higgins testified that someone came to the front door and **Winzer** and Shelton ran upstairs. It was then that Higgins ran outside and informed ***7** Johnson's family that he had been shot. He went back to Simmons' apartment with Johnson's brother and mother. When he got back to the apartment, **Winzer**, Shelton and Warden were gone. The money and marijuana were also gone. Higgins suffered a nose injury and swelling from being hit with the gun and broom handle.

On cross-examination, Higgins admitted that he initially told police that after the first shot, he blacked out. He explained that he meant he was "scared a lot," by seeing "somebody die right in front of your eyes." He did not believe that those feelings affected what he saw. Higgins admitted that in 2012, he pled guilty to attempted possession of marijuana.

Gearrel Gray testified that she was in the apartment at the time of the incident. She recalled that as she entered the apartment, **Winzer**, Shelton and Warden were seated at a table. Higgins also arrived at the apartment about five minutes after she ***141** got there. Gray

testified that she ate her lunch on a small couch. She **stated** that Higgins was in the kitchen "counting money" and she heard him "call somebody up on the phone telling him how to get to the apartment." Johnson came to the apartment and went into the kitchen with Higgins. She heard and saw nothing of what transpired between the two men until she heard two gunshots "back towards the kitchen." She got behind the couch and observed what she saw by looking around the couch. Gray did not see who fired the shots, but turned around to see "the younger one" fighting Higgins. She thought that Higgins was "trying to fight the gun out his hand while he's beating him up." Gray testified that she heard Shelton tell Higgins that he talked too much. ***8** Higgins was "hollering and kicking both of them." After that she heard two or three more gunshots and Shelton instruct **Winzer** to "get the money." Gray also heard Shelton and **Winzer** discuss where they were going to take the body. Gray testified that she never saw a gun. She **stated** that when somebody knocked on the door, Shelton and **Winzer** ran upstairs and Higgins ran out of the house. Thereafter, Gray **stated** that Shelton and **Winzer** also ran out of the house with Warden. [2]

On cross-examination, Gray confirmed that she did not see who fired the two gunshots and did not see any marijuana or money.

Warden corroborated the events leading up to the shooting. She witnessed Johnson enter the apartment and go into the kitchen. She saw only Higgins in the kitchen with Johnson and did not hear anything they said. She "knew what they were doing" but did not see marijuana or money. Warden testified that Higgins and Johnson were standing very close to one another. As she sat at the dining room table eating, Warden heard gunshots; she did not see who fired them. According to Warden, at the time of the gunshots, **Winzer** and Shelton were standing "around the kitchen door area." Johnson was "around the counter part." After she heard the shot, Warden got down on the floor in front of the large couch. She then heard "tussling, the moving around." Warden testified that it was "Jonterrance and Lonnele and Nick" involved in the tussling around the front door area. Warden **stated** that the three "wound up at the table that I was originally sitting at." ***9** Higgins was on one side and **Winzer** and Shelton were on the other. She heard somebody yelling at Higgins to "shut up and sit down." Warden recalled **Winzer** saying that "he's still moving," and then she heard more gunshots. She did not see who fired the shots. She saw Shelton holding a very small handgun toward Higgins. She had seen **Winzer** holding the gun prior to that day. Warden testified that she heard **Winzer** and Shelton "trying to figure out what to do with the body." Warden recalled that **Winzer** and Shelton went "upstairs for a while," when there was a knock at the door. At that time, Higgins "ran out the door." **Winzer** and Shelton then came downstairs and yelled at her to follow them. The three got into the truck and **Winzer** drove. Warden sat in the passenger seat and Shelton was in the back. The three traveled toward Bernice, Louisiana, and made a detour on ***142** a dirt road. Warden heard Shelton and **Winzer** discuss what happened. **Winzer** said that Johnson "must've had an angel watching over him because it took more than one shot." Warden saw that **Winzer** had money "popping out his pocket." She had given him $20 or $30 the night before; she did not know how much he had left. **Winzer** and Shelton discussed the fact that Shelton had "missed Nick." The brothers dropped Warden off at her apartment; this was the last time she saw either of them.

On cross-examination, Warden testified that she did not "really" change her statements to police, although she "added some that I didn't say the very first time." She admitted pleading guilty to accessory after the fact to second degree murder, armed robbery and resisting an officer, and was ***10** awaiting sentencing. Warden admitted that the only person she saw with a gun in his hand was Shelton.

Police testimony showed that the Farmerville Police Department was dispatched to Simmons' apartment around 2:00 p.m. The scene was photographed and evidence collected, but no money, handguns or marijuana were found, except a small bag of marijuana recovered from a drawer in the kitchen. The black truck was later found and searched but it did not contain the gun, the marijuana or the money. Police received an anonymous tip that **Winzer** and Shelton were possibly in Oklahoma City, where they were subsequently arrested and extradited to Louisiana.

Winzer invoked his Fifth Amendment right to not testify. The defense did not present any witnesses.

When issues are raised on appeal, both as to the sufficiency of evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. ***State*** *v. Lewis,* 48,373 (La.App.2d Cir.9/25/13), 125 So.3d 482. 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, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); ***State*** *v. Tate,* 01–1658 (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. Murray,* 36,137 (La.App.2d Cir.8/29/02), 827 So.2d 488, *writ denied,* 02–2634 (La.9/05/03), 852 So.2d 1020.

1 2 *****11*** Evidence may be direct or circumstantial. Direct evidence provides proof of the existence of a fact, for example, a witness's testimony that he saw or heard something. ***State*** *v. Lilly,* 468 So.2d 1154 (La.1985). Circumstantial evidence provides proof of collateral facts and circumstances, from which the existence of the main fact may be inferred according to reason and common experience. *Id.* When the direct evidence is thus viewed, the facts established by the direct evidence and inferred from the circumstances established by the evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the 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,* 09–0372 (La.11/6/09), 21 So.3d 299.

Winzer was charged with second degree murder, which is defined by La. R.S. 14:30.1(A)(1) as the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. He was also charged with armed robbery, defined as the taking of anything of value belonging to another from the person of another or that is in the immediate ****143*** control of another, by use of force or intimidation, while armed with a dangerous weapon. La. R.S. 14:64.

3 Specific intent is the **state** of mind that exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or his failure to act. La. R.S. 14:10(1). Specific intent to kill can be inferred from the intentional use of a deadly *****12*** weapon such as a knife or a gun. ***State*** *v. Fields,* 42,761 (La.App.2d Cir.1/9/08), 973 So.2d 973, *writ denied,* 08–0469 (La.9/26/08), 992 So.2d 983.

The appellate court does not assess the credibility of witnesses or reweigh evidence. ***State*** *v. Smith,* 94–3116 (La.10/16/95), 661 So.2d 442. It is the function of the trier of fact to assess credibility and resolve conflicting testimony. ***State*** *v. Thomas,* 609 So.2d 1078 (La.App. 2d Cir.1992), *writ denied,* 617 So.2d 905 (La.1993); ***State*** *v. Bonnett,* 524 So.2d 932 (La.App. 2d Cir.1988), *writ denied,* 532 So.2d 148 (La.1988). The trier of fact senses first hand the testimony, and unless the fact finder's assessment of believability is without any rational basis, it should not be disturbed by a reviewing court. ***State*** *v. Mussall,* 523 So.2d 1305 (La.1988); ***State*** *v. Combs,* 600 So.2d 751 (La.App. 2d Cir.1992), *writ denied,* 604 So.2d 973 (La.1992). 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,* 09–0725 (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,* 07–1209 (La.12/14/07), 970 So.2d 529. 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. Allen,* 36,180 (La.App.2d Cir.9/18/02), 828 So.2d 622, *writs denied,* 02–2595 (La.3/28/03), 840 So.2d 566, 02–2997 (La.6/27/03), 847 So.2d 1255, *cert. denied,* 540 U.S. 1185, 124 S.Ct. 1404, 158 L.Ed.2d 90 (2004).

4 5 *****13*** When a witness is impeached, the jury, as the trier of fact, is presented with evidence it may consider and weigh in determining the credibility, or believability of the witness. Simply because the witness may have been impeached by prior inconsistent statements does not mean that the jury is prohibited from believing anything said by the witness. The inconsistencies in the witness's statements are one of any number of factors the jury weighs in determining whether or not to believe a witness's trial testimony. ***State*** *v. Williams,* 35,911 (La.App.2d Cir.9/18/02), 828 So.2d 180; ***State*** *v. Dunn,* 30,346 (La.App.2d Cir.2/25/98), 708 So.2d 512.

Moreover, 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. Wiltcher,* 41,981 (La.App.2d Cir.5/9/07), 956 So.2d 769; ***State*** *v. Burd,* 40,480 (La.App.2d Cir.1/27/06), 921 So.2d 219, *writ denied,* 06–1083 (La.11/9/06), 941 So.2d 35.

7 8 The basis of **Winzer's** argument is the reliability of Simmons', Warden's and Higgins' testimony considering the inconsistent statements made by each to police and/or expected leniency in sentencing for their own convictions. **Winzer** also argues that no eyewitness was able to identify him as Johnson's shooter or robber. Nevertheless, the record shows that upon defense cross-examination, Simmons, Warden and Higgins admitted making inconsistent statements to police. Additionally, ***144** on cross-examination, both Simmons and Warden admitted pleading guilty to accessory after the fact to second degree murder and armed robbery as well as their impending ****14** sentencing for each offense. Thus, the jury was made aware of these facts and accepted the witnesses' testimony as credible. Such weight and credibility determinations remain within the jury's discretion and will not be disturbed on appeal. Gray, Warden and Hamilton gave independent accounts of the event. Considering that the testimony substantially corroborated the accounts of Higgins and Simmons, any minor differences in each individual witness's testimony was not so internally contradictory so as to undermine the totality of their testimony. Higgins' return to the scene after the events further validates his testimony. Nor did the testimony create irreconcilable conflict with physical evidence as it related to the proof of elements of the crime.

If believed, this testimony along with the other evidence establishes that two sets of shots were fired at Johnson. Simmons and Higgins witnessed Shelton inflict the first shot or shots, which caused Johnson to fall to the ground. Corroborating that evidence was Gray's testimony that she saw Shelton and Higgins tussle for control of the gun. Warden and Higgins also substantiated the circumstances of the fight. During the ensuing scuffle, Warden and Higgins identified **Winzer** as **stating**, "he's still moving." Thereafter, Higgins saw **Winzer** grab Shelton's gun and shoot in the direction of Johnson's body. It was after this incident that Higgins, Warden and Gray heard **Winzer** and Shelton discuss what to do with Johnson's body. **Winzer** bragged afterwards that it took more than one shot to kill Johnson. Although Higgins recalled that it was Shelton who took the money, Simmons **stated** that he saw **Winzer** picking up the money involved ****15** in the drug transaction and Gray heard Shelton tell **Winzer** to pick up the money. No drugs or money relating to the sale were found by police in the apartment and Warden witnessed **Winzer** with money bulging out of his pockets as the three fled the crime scene.

9 This direct and circumstantial evidence is sufficient to convict **Winzer** of the charged offenses. From Higgins' eyewitness account of **Winzer** grabbing the gun from his brother after commenting that Johnson was still moving, the jury could have reasonably inferred that it was **Winzer** who inflicted the fatal shot to Johnson. Likewise, even with the conflicting accounts from the scene of the shooting regarding who took the money from Johnson, the jury reasonably accepted Simmons' account of **Winzer** taking the drug money after killing Johnson, considering Warden's corroborating testimony that **Winzer** left the scene with money hanging out of his pockets. [3] After viewing this evidence in the light most favorable to the **state**, any rational trier of fact could have found **Winzer** guilty of the essential elements of armed robbery beyond a reasonable ***145** doubt. These assignments of error have no merit.

Motions

10 11 In his second and third pro se and supplemental assignments of error, **Winzer** argues that the trial court erred in failing to rule on or grant a ****16** contradictory hearing on his motion to quash and continuance. **Winzer** refers only to jurisprudence regarding the motion to quash and does not provide any particularized arguments. The record reflects that a pro se motion to quash was filed on June 6, 2012. In it **Winzer** made a cursory argument that he had been illegally arrested and that "prejudicial legalism and racism played a large and controlling role in the warrant and arrest"; the majority of the motion questioned the legality of the indictment. The record does not reflect a ruling on the motion to quash and **Winzer** proceeded to trial without calling attention to the lack of ruling. Nor did he raise any issue relating to the arrest warrant at trial. It is well established that motions pending at the

commencement of trial are waived when the defendant proceeds to trial without raising the issue that the motions were not ruled upon. ***State*** *v. Holmes,* 06–2988 (La.12/2/08), 5 So.3d 42, *cert. denied,* 558 U.S. 932, 130 S.Ct. 70, 175 L.Ed.2d 233 (2009). This includes a motion to quash. ***State*** *v. Logan,* 45,136 (La.App.2d Cir.4/14/10), 34 So.3d 528, *writ denied,* 10–1099 (La.11/5/10), 50 So.3d 812; ***State*** *v. Carter,* 42,894 (La.App.2d Cir.1/9/08), 974 So.2d 181, *writ denied,* 08–0499 (La.11/14/08), 996 So.2d 1086.

12 Moreover, a trial court is not required to entertain motions filed by a defendant who is represented by counsel. While an indigent defendant has a right to counsel as well as the opposite right to represent himself, he has no constitutional right to be both represented and representative. *Holmes, supra.* For these reasons, these assignments of error have no merit.

13 *****17*** In his supplemental brief, **Winzer** argues that the trial court erred in denying a continuance of the trial. The record shows that on June 25, 2013, the court heard a defense motion for continuance on the grounds that the **state** had provided "voluminous" discovery responses two weeks prior to the hearing for which the defense needed additional time to review. After reviewing the discovery response, the trial court denied the motion for continuance finding that he information was not "that voluminous" and did not contain "significantly new information." The court concluded that the filing of the discovery was "actually more than 30 days" prior to trial and that a previous continuance had been granted the defense. Voir dire began on July 23, 2013.

The decision to grant or deny a motion for continuance rests within the sound discretion of the trial court, and a reviewing court will not disturb a trial court's determination absent a clear abuse of discretion. La.C.Cr.P. art. 712; ***State*** *v. Harris,* 01–2730 (La.1/19/05), 892 So.2d 1238, *cert. denied,* 546 U.S. 848, 126 S.Ct. 102, 163 L.Ed.2d 116 (2005); ***State*** *v. Maffett,* 47,430 (La.App.2d Cir.9/26/12), 105 So.3d 138, *writ denied,* 12–2464 (La.4/12/13), 111 So.3d 1017.

14 Even when an abuse of discretion is shown, a conviction will not be reversed based upon the denial of a continuance absent a showing of specific prejudice. *Harris, supra; Maffett, supra;* ***State*** *v. Hill,* 46,050 (La.App.2d Cir.4/20/11), 64 So.3d 801, *writ denied,* 11–1078 (La.11/14/11), 75 So.3d 940.

*****18*** We find no abuse of discretion in the trial court's denial of **Winzer's** request for continuance. The court reviewed the discovery ****146*** responses and concluded that they were not so voluminous or substantial that counsel would be unable to adequately prepare for trial. Nor has **Winzer** alleged specific prejudice to his case by the denial of the motion. For these reasons, this assignment of error has no merit.

Arrest Probable Cause

15 16 In his fourth pro se supplemental assignment of error, **Winzer** raises the issue of sufficient of probable cause relating to his arrest. He argues that the magistrate issued the arrest warrant based upon inconsistent testimony. As noted above, **Winzer** waived his right to contest the legality of the arrest warrant. Moreover, in his motion to quash, he argued that the arrest was illegal due to racism and prejudice. A new ground for objection cannot be presented for the first time on appeal. La.C.Cr.P. 841; ***State*** *v. Cressy,* 440 So.2d 141 (La.1983); ***State*** *v. Harris,* 414 So.2d 325 (La.1982); ***State*** *v. Davis,* 357 So.2d 1125 (La.1978). In fact, it has been held that a defendant may not raise new grounds for suppressing evidence on appeal that he did not raise at the trial court in a motion to suppress. ***State*** *v. Barnett,* 12–816 (La.App.5th Cir.5/16/13), 118 So.3d 1156; ***State*** *v. Carter,* 10–973 (La.App.5th Cir.8/30/11), 75 So.3d 1. On these grounds, **Winzer's** argument is without merit.

Brady Violation

17 18 19 **Winzer** argues that Higgins' trial testimony "put the whole case in such a different light as to undermine confidence in the verdict." He *****19*** contends that his testimony which identified Shelton as the first shooter and him as the second shooter "was withheld from defense," and undermined the outcome of the trial in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). When the defendant requests it, the **state** must produce evidence that is favorable to the accused, if that evidence is material to guilt or innocence. *Brady, supra.* This rule also applies to evidence which

impeaches the testimony of a witness when the credibility of that witness may be determinative of guilt or innocence. ***State*** *v. Bright,* 02–2793 (La.5/25/04), 875 So.2d 37.

We find no merit to **Winzer's** *Brady* claim. *Brady* addresses issues of pretrial discovery. Moreover, Higgins' trial testimony did not include exculpatory evidence. Thus, this portion of **Winzer's** argument is without merit.

Ineffective Assistance of Counsel
Winzer also specifies three areas in which he believes his trial counsel's behavior was ineffective. These include a failure to file a motion for acquittal or a motion for post verdict judgment of acquittal; a failure to impeach Higgins for making two conflicting statements that both Shelton and Higgins shot Johnson twice; and a failure to impeach Simmons and Warden for giving conflicting statements.

20 21 As a general rule, a claim of ineffective assistance is more properly raised in an application for post conviction relief ("PCR") in the trial court than by appeal. This is because PCR creates the opportunity for a full evidentiary hearing under La.C.Cr.P. art. 930. *****20*** ***State*** *v. Cook,* 48,355 (La.App.2d Cir.11/20/13), 127 So.3d 992, *writ denied,* 13–3000 (La.5/30/14), 140 So.3d 1174; ***State*** *v. Ellis,* 42,520 (La.App.2d Cir.9/26/07), 966 So.2d 139, *writ denied,* 07–2190 (La.4/4/08), 978 So.2d 325. However, when the record is sufficient, this issue may be resolved on direct appeal in the interest of judicial economy. ***State*** *v. Ratcliff,* 416 So.2d 528 (La.1982); *Cook, supra.* Therefore, in the interest of judicial economy, those portions of **Winzer's** claims of ineffective assistance ****147*** for which the record is sufficient will be addressed on appeal.

The right of a defendant in a criminal proceeding to the effective assistance of counsel is mandated by the Sixth Amendment to the U.S. Constitution. This requires a showing that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The relevant inquiry is whether counsel's representation fell below the standard of reasonableness and competency as required by prevailing professional standards demanded for attorneys in criminal cases. *Id.* The assessment of an attorney's performance requires that his conduct be evaluated from counsel's perspective at the time of the occurrence. A reviewing court must give great deference to the trial court's judgment, tactical decisions and trial strategy. There is a strong presumption that trial counsel has exercised reasonable professional judgment. *Cook, supra;* ***State*** *v. Tilmon,* 38,003 (La.App.2d Cir.4/14/04), 870 So.2d 607, *writ denied,* 04–2011 (La.12/17/04), 888 So.2d 866.

*****21*** Once the attorney's performance is found to have been deficient, the defendant must show that counsel's deficient performance prejudiced his defense. This element requires a showing that the errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland, supra.* The defendant must prove the deficient performance caused him an actual prejudice so severe that, but for his counsel's deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. *Strickland, supra; Cook, supra.*

22 Ineffective assistance claims must both identify specific acts or omissions by counsel and **state** how these actions resulted in actual prejudice so severe that the defendant was denied a fair trial; general statements and conclusory charges will not suffice. *Id.*

23 To challenge a conviction based upon a claim of insufficiency of the evidence, a defendant should proceed by way of urging a motion for acquittal or a motion for post verdict judgment of acquittal. La.C.Cr.P. art. 778; La.C.Cr.P. art. 821. Motion for acquittal is not authorized in a jury trial of a criminal matter. La.C.Cr.P. art. 778. The defendant may move for a post verdict judgment of acquittal following the verdict; a motion for a post verdict judgment of acquittal must be made and disposed of before sentence. La.C.Cr.P. art. 821(A).

24 In this matter, defense counsel was not authorized to file a motion for acquittal because the defendant opted for a jury trial instead of a bench trial. La.C.Cr.P. art. 778. Moreover, although counsel did not file a motion for post verdict judgment of acquittal, we have reviewed the sufficiency of the *****22*** evidence in connection with the first assignment of error and have concluded the evidence was sufficient for conviction. When the substantive

issue that an attorney has not raised has no merit, then the claim that the attorney was ineffective for failing to raise the issue also has no merit. ***State*** *v. Francois,* 13–616 (La.App. 5th Cir.1/31/14), 134 So.3d 42; ***State*** *v. Williams,* 613 So.2d 252 (La.App. 1st Cir.1992). Accordingly, this portion of **Winzer's** argument is without merit.

25 26 **Winzer** also argues that his trial counsel was deficient because he failed to impeach Simmons, Warden and Higgins with prior inconsistent statements allegedly made by them to police. The basis of **Winzer's** claims regarding Warden and ***148** Simmons is that "both made statements to detectives denying knowing factual elements," and later made "additional statements." Cross examination is a strategy decision and this court affords great deference to a trial counsel's tactical decisions and trial strategy. ***State*** *v. Moore,* 48,769 (La.App.2d Cir.2/26/14), 134 So.3d 1265. **Winzer** fails to specify the content of Simmons' and Warden's statements or how failing to impeach the witnesses based upon these inconsistent statements would have prejudiced his case. Such conclusory allegations are insufficient to establish a claim of ineffective assistance of counsel.

27 **Winzer's** argument that trial counsel's failure to impeach Higgins with his alleged previous statements that each brother shot Johnson two times "undermined confidence in the outcome of the trial," is also unsupported by the record. Despite any inconsistencies in the witness's recollection of how many shots were fired, he consistently identified **Winzer** ***23** as having shot Johnson. Thus, **Winzer** has demonstrated no prejudice in counsel's failure to elicit the subject information on cross-examination.

Moreover, because the overwhelming testimony of the eyewitnesses identified **Winzer** as a knowing and active participant, who aided and abetted in the commission of the crimes, any failure by counsel to cross-examine the eyewitnesses about specific alleged inconsistencies in their identification of the shooter or description of the number of gunshots involved in the event, fails to raise a reasonable probability sufficient to undermine confidence in the outcome of the trial. Thus, **Winzer's** arguments are without merit.

Winzer's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.

All Citations

151 So.3d 135, 49,316 (La.App. 2 Cir. 10/8/14)

Footnotes

1 In his supplemental assignment of error No. 1, **Winzer** also argues that his appellate counsel was unable to "sufficiently challenge defendant's Fourteenth Amendment Due Process violation by **State**" due to an incomplete transcript and this court's determination that no further extension of the return day would be considered after January 26, 2014. The record shows that **Winzer's** trial counsel designated "the entire transcript of each hearing herein and all of the pleadings" for inclusion in the appellate record for review. The subject extensions certified that the entirety of this information be contained in the record. Because the record shows that all designated information was filed into the record on February 28, 2014 and **Winzer's** counsel filed his brief on May 5, 2014, **Winzer's** argument that counsel was without portions of the transcript is without merit.

2 JaMarkus Hamilton testified that as he rang Simmons' doorbell on April 26, 2011, Higgins ran out telling them to go; Higgins' lip was bloody. Hamilton and another man hid behind the building and saw two males and a female exit the apartment. He was not able to identify **Winzer** as one of those males. Hamilton further testified that the three individuals got into a black truck and headed west after backing into the building and damaging the bumper.

3 Regardless of which brother fired the fatal blow or took the money from Johnson, the evidence presented by the **state** would also have been sufficient to convict **Winzer** as a principal to both crimes considering the consistent eyewitness accounts of his active participation in the events leading to

Johnson's death and robbery. All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals. La. R.S. 14:24. Those persons who knowingly participate in the planning or execution of a crime are principals. ***State*** *v. Mason*, 47,642 (La.App.2d Cir.1/16/13), 109 So.3d 429, *writs denied*, 13–0423 (La.7/31/13), 118 So.3d 1116, 13–0300 (La.9/13/13), 120 So.3d 279.

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