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United States Court of Appeals for the Fifth Circuit

No. 21-30448

A True Copy
Certified order issued Feb 23, 2022

Clerk, U.S. Court of Appeals, Fifth Circuit

JIMMIE SPRATT,

Petitioner—Appellant,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary,*

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Louisiana
USDC No. 2:19-CV-9115

ORDER:

Jimmie Spratt, Louisiana prisoner # 595399, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 application, challenging his convictions for aggravated rape and aggravated kidnaping and resulting life sentences. He renews his claim that his constitutional right to a speedy trial was violated, urging that dismissal of the claim as procedurally barred was error because he established cause and prejudice to overcome his procedural default by demonstrating that counsel was ineffective for failing to move to quash the indictment based on the five-year pre-indictment, post-detainer delay in his case.

APPENDIX A

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Spratt has abandoned the remaining ineffective assistance claims raised in his § 2254 application by failing to brief them. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *Beasley v. McCotter*, 798 F.2d 116, 118 (5th Cir. 1986). Because he fails to demonstrate that reasonable jurists would debate the correctness of the district court's procedural ruling, a COA is DENIED. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

/s/ Carl E. Stewart

CARL E. STEWART
United States Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JIMMIE SPRATT	**CIVIL ACTION**
VERSUS	**NO. 19-9115**
DARREL VANNOY, WARDEN	**SECTION "F"(4)**

ORDER

The Court, having considered the complaint, the record, the applicable law, the Report and Recommendation and Supplemental Report and Recommendation of the Chief United States Magistrate Judge, and the objections filed by the petitioner on June 17, 2021 (Rec. Doc. No. 31), hereby approves the Report and Recommendation and the Supplemental Report and Recommendation of the Chief United States Magistrate Judge and adopts them as its opinion in this matter. Therefore,

IT IS ORDERED that Jimmie Spratt's objections are **OVERRULED** and his petition for issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED** and **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana, this 1st day of July, 2021.

Martin L.C. Feldman
MARTIN L.C. FELDMAN
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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New Orleans, Louisiana, this 1st day of July, 2021.

MARTIN L.C. FELDMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JIMMIE SPRATT	**CIVIL ACTION**
VERSUS	**NO. 19-9115**
DARREL VANNOY, WARDEN	**SECTION "F"(4)**

JUDGMENT

The Court having approved the Report and Recommendation and Supplemental Report and Recommendation of the Chief United States Magistrate Judge and having adopted them as its opinion herein; accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of the respondent, Warden Darrel Vannoy, and against the petitioner, Jimmie Spratt, dismissing with prejudice Spratt's petition for issuance of a writ of habeas corpus under 28 U.S.C. § 2254.

New Orleans, Louisiana, this 1st day of July, 2021.

Martin L.C. Feldman

MARTIN L.C. FELDMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JIMMIE SPRATT	**CIVIL ACTION**
VERSUS	**NO. 19-9115**
DARREL VANNOY, WARDEN	**SECTION "F"(4)**

REPORT AND RECOMMENDATION

On October 30, 2019, the undersigned Chief Magistrate Judge issued a Report and Recommendation recommending dismissal of petitioner Jimmie Spratt's 28 U.S.C. § 2254 habeas petition for failure to exhaust state court review of two of his original four claims.[1] After adopting the Report and Recommendation, the District Judge granted Spratt leave to amend his petition to exclude the unexhausted claims and pursue the remaining claims.[2] The matter was referred to the undersigned magistrate judge to conduct hearings, including an evidentiary hearing if necessary, and to submit proposed findings and recommendations on the remaining claims pursuant to **28 U.S.C. § 636(b)(1)(B) and (C)**, and as applicable, **Rule 8(b) of the Rules Governing Section 2254 Cases**. Upon review of the record, the Court has determined that the remainder of the matter can be disposed of without an evidentiary hearing. See 28 U.S.C. § 2254(e)(2).[3]

I. Factual and Procedural Background

The petitioner, Jimmie Spratt ("Spratt"), is a convicted inmate incarcerated in the Louisiana State Penitentiary in Angola, Louisiana.[4] On November 18, 2010, an Orleans Parish Grand Jury

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[1]Rec. Doc. No. 17.

[2]Rec. Doc. Nos. 23, 24.

[3]Under 28 U.S.C. § 2254(e)(2), an evidentiary hearing is held only when the petitioner shows that either the claim relies on a new, retroactive rule of constitutional law that was previously unavailable or a factual basis that could not have been previously discovered by the exercise of due diligence and the facts underlying the claim show by clear and convincing evidence that, but for the constitutional error, no reasonable jury would have convicted the petitioner.

[4]Rec. Doc. No. 1.

charged Spratt in a six count indictment with the aggravated rapes and aggravated kidnappings of three victims, D.K., S.M., and M.L.[5] On December 10, 2010, Spratt entered a plea of not guilty to the charges.[6]

The record reflects that, on July 4, 1994, D.K. was 24 years old and living with her parents when she decided to drive to Biloxi, Mississippi to meet friends.[7] She borrowed her mother's debit card and stopped at the automated teller machine ("ATM") at Hibernia National Bank on the I-10 Service Road near Crowder Boulevard in New Orleans, Louisiana. Unfamiliar with the location, she entered through the exit lane forcing her to lean across the front passenger seat to reach the ATM. She withdrew $50 and, as she grabbed for the money, she saw a knife being carried through the passenger window to her throat. The man holding the knife, later identified as Spratt, unlocked and entered the back passenger door and climbed into the front passenger seat. He told D.K. not to look at him and to drive, yelling directions at her as they went. When she began to cry, he told her to shut up. He repeatedly cursed and hit the radio trying to change the channel off of a country music station. He was very angry and kept adjusting the car seat back and forth. Spratt directed D.K. to Old Gentilly Boulevard and had her park in a gravel area behind the Acme Brick Company. As Spratt ordered D.K. out of the car, she begged him not to hurt her because she already had a debilitating neck injury from her teens. Spratt shoved her against a wall and told her to shut up. He pulled her by the ponytail and unzipped her dress. He then forced her to the ground, pulled off her hose and underwear, and raped her. When he was finished, he yelled at D.K. to get dressed

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[5]St. Rec. Vol. 2 of 12, Indictment, 5/19/11; Grand Jury Return, 5/19/11. In accordance with La. Rev. Stat. Ann. §46:1844(W)(1), the Louisiana courts refer to the victims by their initials. This Court will do the same.

[6]St. Rec. Vol. 2 of 12, Minute Entry, 12/10/10.

[7]The facts as determined at trial are taken from the published opinion of the Louisiana Fourth Circuit Court of Appeal on out-of-time direct appeal. State v. Spratt, 129 So.3d 741, 743-50 (La. App. 4th Cir. 2013); St. Rec. Vol. 10 of 12, 4th Cir. Opinion, 2013-KA-0158, pp. 2-18, 11/20/13.

and get back in the car. He continued to yell directions at her before instructing her to stop again. He got out of the car and ran off with the $50 from the ATM.

D.K. drove back to the bank to get the debit card out of the machine. She saw a security guard on duty and told him that she had been raped. The security guard looked at her, got in his truck, and drove off. D.K. then drove to the Real Superstore next to the bank on Crowder Boulevard. An employee there helped her and called the police and her parents. After showing police where the rape occurred, her parents took her to the hospital where she was examined, and a rape kit was prepared. She also provided a description of Spratt with the help of a police sketch artist. The police obtained a surveillance video from the bank that showed Spratt approaching D.K. with a knife and entering the back seat of her car.

On September 19, 1994, S.M. was staying with friends on General Pershing Street while interviewing for jobs in New Orleans. Returning from dinner with her nephew, S.M. parked her car and walked towards the house. She saw an African American male, later identified as Spratt, walking towards her. As he passed her, he grabbed S.M. from behind and put a cold, metal object to her throat. Spratt told her to remain quiet and walked her back towards her car. He then took her into some bushes near the corner of Loyola Avenue and General Pershing Street. Spratt made S.M. lie down and threatened to kill her if she spoke. He pulled down her pants and underwear and raped her while telling her not to look at him. When he was finished, he told S.M. to lie on her stomach and keep her head down. He took her purse and ran off.

S.M. soon heard a car pass and voices coming from a nearby house on Loyola Avenue. She ran to the house and the residents called the police for her. She was taken to the hospital and a rape kit was prepared. She returned to the scene the next day to take pictures of the bushes where the rape occurred.

On December 26, 1994, M.L., a 16-year-old high school student, dropped off her friend at a home in Metairie and drove back towards her home in New Orleans. On the way, she stopped to deposit a check in the ATM at the Whitney National Bank on the corner of South Carrollton Avenue and Plum Street. She was filling out the deposit slip when she felt something being sprayed in her face through the open driver's window. A man, later identified as Spratt, got into the car, pushed her across to the passenger side, and told her to get on the floor. She could not see the man because she was blinded from the spray and having trouble breathing. The man drove the car and took her to two separate locations where he raped her. At the first location which was over some railroad tracks, she saw a big building with a corrugated metal roof. He walked her to a gravel area and told her to take off her pants. He made her lie down and then raped her. She remembered his face being scratchy and oily. Spratt made M.L. dress and get back in the car. He then drove a longer distance to a second location, where he put his arm around her neck and led her to the backyard of a house. He sprayed more mace in her face, took off her clothing, and raped her again. Spratt then drove M.L. to another location where he pulled into a driveway and parked the car. He took $70 from her wallet, her cell phone, and her keys. He sprayed her with mace again and left. M.L. took a few minutes to open her eyes and was able to figure out where she was. She ran to a Kinko's on Carrollton Avenue where an employee let her in and called the police. M.L. also called her parents and a friend. After talking with police, she was taken to the hospital for treatment of her injuries, and a rape kit was prepared. The police obtained photographs and video tapes from the Whitney branch.

The DNA samples from the rape kits of D.K., S.M., and M.L. were run through the Combined DNA Index System ("CODIS") in 2005 and matched Spratt as the rapist. The New Orleans police detectives discovered that Spratt at that time was incarcerated in Tennessee after

convictions for the 1996 rapes of at least five women in Memphis. The New Orleans detectives obtained an arrest warrant and sent it to the Tennessee Department of Corrections and a detainer was placed against Spratt.

Spratt was tried for the three New Orleans rapes before a jury on March 5 through 8, 2012, and unanimously found guilty as charged on all six counts.[8] On March 15, 2012, the Trial Court denied Spratt's motion for a new trial.[9] After waiver of legal delays, the Trial Court sentenced Spratt to life in prison with the sentences for counts one through four (crimes against D.K. and S.M.) to run concurrently, and the sentences on counts five and six (crimes against the minor M.L.) to run concurrent with each other and consecutive to the sentences on counts one through four.[10]

On May 8, 2012, Spratt through counsel filed an out-of-time appeal to the Louisiana Fourth Circuit Court of Appeal in which he asserted two errors for review: [11] (1) the Trial Court erred when it allowed the prosecution to admit evidence of Spratt's prior convictions in violation of La. Code Ev. art. 412.2;[12] and (2) the Trial Court erred in allowing use of the prior convictions because La. Code Ev. art. 412.2 is unconstitutional. On November 20, 2013, the Louisiana Fourth Circuit

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[8]St. Rec. Vol. 2 of 12, Trial Minutes, 3/5/12; Trial Minutes, 3/6/12; Trial Minutes, 3/7/12; Trial Minutes, 3/8/12; St. Rec. Vol. 9 of 12, Trial Transcript, 3/6/12; St. Rec. Vol. 10 of 12, Trial Transcript, 3/7/12; Trial Transcript, 3/8/12.

[9]St. Rec. Vol. 2 of 12, Sentencing Minutes, 3/15/12; St. Rec. Vol. 3 of 12, Trial Court Order, 3/15/12; Motion for New Trial, 3/15/12; St. Rec. Vol. 10 of 12, Sentencing Transcript, p. 4, 3/15/12.

[10]St. Rec. Vol. 2 of 12, Sentencing Minutes, 3/15/12; St. Rec. Vol. 10 of 12, Sentencing Transcript, 3/15/12.

[11]St. Rec. Vol. 2 of 12, Minute Entry, 5/8/12; St. Rec. Vol. 3 of 12, Motion for Out of Time Appeal, 5/8/12; St. Rec. Vol. 10 of 12, Appeal Brief, 2013-KA-0158, 4/15/13.

[12]Article 412.2(A) provides follows:

> A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.

affirmed Spratt's convictions and sentences finding the first claim meritless and the second claim not preserved for appeal by timely objection at trial as required under La. Code Crim. P. art. 841.[13]

On May 30, 2014, the Louisiana Supreme Court denied Spratt's counsel-filed writ application without stated reasons.[14] Spratt's convictions and sentences became final 90 days later, on August 28, 2014, because he did not file for review with the United States Supreme Court. Ott v. Johnson, 192 F.3d 510, 513 (5th Cir. 1999) (period for filing for certiorari with the United States Supreme Court is considered in the finality determination under 28 U.S.C. § 2244(d)(1)(A)); U.S. S. Ct. Rule 13(1); see Jiminez v. Quarterman, 555 U.S. 113, 121 (2009) (when a state court grants a defendant an out-of-time appeal during state collateral review, the conviction judgment is not final for purposes of federal habeas review until the out-of-time appeal is resolved).

On August 7, 2015, Spratt signed and submitted to the state trial court an application for post-conviction relief asserting the following grounds for relief:[15] (1) he was denied effective assistance of counsel when counsel failed to object during trial to the erroneous jury instruction on the definition of rape; (2) he was denied effective assistance of appellate counsel when counsel failed to assign as error the trial court's use of an erroneous jury instruction on the definition of rape; (3) he was denied effective assistance of counsel when trial counsel failed to file motion to sever the counts; (4) prosecutorial misconduct occurred when the State violated his right to a speedy trial and trial counsel was ineffective for failing to file a motion to quash the untimely indictment; and (5) the State failed to disclose exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). In his pro se filed memorandum in support, dated August 17, 2015,

[13]Spratt, 129 So.3d at 741; St. Rec. Vol. 10 of 12, 4th Cir. Opinion, 2013-KA-0158, 11/20/13.

[14]State v. Spratt, 140 So.3d 1173 (La. 2014); St. Rec. Vol. 11 of 12, La. S. Ct. Order, 2013-K-2960, 5/30/14; La. S. Ct. Writ Application, 13-K-2960, 12/20/13 (filed by counsel).

[15]St. Rec. Vol. 3 of 12, Application for Post-Conviction Relief, dated 8/7/15.

Spratt added an additional claim asserting that his constitutional rights were violated based on Louisiana law allowing convictions by non-unanimous jury verdict.[16]

On December 22, 2015, Spratt's state (and now federal) post-conviction counsel filed a supplemental memorandum addressing only three of the claims:[17] (1) he was denied effective assistance of counsel when counsel failed to object to the erroneous jury instruction and failed to object to hearsay testimony from DNA lab witnesses, Anne Montgomery and Gina Pineda; (2) appellate counsel was ineffective for failing to assign as error the state trial court's use of an erroneous jury instruction; and (3) his speedy trial rights were violated by the delay between arrest and trial.

The State initially filed procedural objections asserting that, except for the ineffective assistance of counsel claims, Spratt's claims were procedurally barred under La. Code Crim. P. art. 930.4(B) and (C) because they were not and could have been asserted in prior proceedings.[18] After receiving a reply from Spratt's counsel,[19] the state trial court summarily overruled the State's objections and ordered an answer to the application.[20]

The State sought review of that ruling, and, on August 5, 2016, the Louisiana Fourth Circuit granted the State's writ application and reversed the lower court to sustain the State's procedural objections.[21] The appellate court held that Spratt's speedy trial claim was barred from review, because no motion to quash was filed as required by La. Code Crim. P. art. 535(b) and related state

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[16]St. Rec. Vol. 2 of 13, Pro Se Post-Conviction Memorandum, dated 8/17/15.

[17]St. Rec. Vol. 11 of 12, Supplemental Memorandum, 12/22/15 (filed by counsel).

[18]St. Rec. Vol. 11 of 12, State's Procedural Objections, 2/5/16.

[19]St. Rec. Vol. 11 of 12, Traverse, 2/16/16.

[20]St. Rec. Vol. 11 of 12, Trial Court Judgment, 2/29/16.

[21]St. Rec. Vol. 12 of 12, 4th Cir. Order, 2016-K-0302, 8/5/16; St. Rec. Vol. 11 of 12, 4th Cir. Writ Application, 2016-K-0302, 3/29/16.

case law. The court also held that the Brady claim was not properly presented or supported under La. Code Crim. P. arts. 928 and 926(B)(3). The Court remanded the matter for consideration of the ineffective assistance of counsel claims asserting (1) trial counsel's failure to object to the Trial Court's jury instruction, (2) appellate counsel's failure to assert as error on appeal the Trial Court's use of an erroneous jury instruction, (3) trial counsel's failure to file a motion to sever, and (4) trial counsel's failure to object or file a motion to quash based on speedy trial grounds. The Court inexplicably overlooked Spratt's claim that counsel failed to object to the testimony of the DNA experts.

Spratt's counsel sought review of that ruling in the Louisiana Supreme Court arguing only that the procedural default of the speedy trial claim should have been excused because of trial counsel's error in failing to file a motion to quash.[22] On January 29, 2018, the Louisiana Supreme Court denied the application without stated reasons.[23]

On May 11, 2018, after additional briefing, the state trial court denied relief finding no merit in Spratt's ineffective assistance of counsel claims.[24] On July 9, 2018, Spratt's counsel sought review in the Louisiana Fourth Circuit on three grounds:[25] (1) trial counsel was ineffective for failing to file a motion to quash based on speedy trial grounds; (2) trial counsel was ineffective for failing to correct the erroneous jury instruction on the definition of rape; and (3) trial counsel was ineffective for failing to object to hearsay testimony from the DNA lab witnesses. The writ application also listed a claim asserting excusable failure to timely challenge speedy trial because

[22]St. Rec. Vol. 12 of 12, La. S. Ct. Writ Application, 16-KP-1659, 9/6/16 (filed by counsel).

[23]State v. Spratt, 235 So.3d 1106 (La. 2018); St. Rec. Vol. 12 of 12, La. S. Ct Order, 2016-KP-1659, 1/29/18.

[24]St. Rec. Vol. 1 of 12, Trial Court Judgment, 5/11/18; Minute Entry, 5/11/18; State's Brief, 3/23/18; Defendant's Traverse, 4/6/18.

[25]St. Rec. Vol. 11 of 12, 4th Cir. Writ Application, 2018-K-0567, p. 16, 7/9/18 (mailed by counsel 7/5/18).

of ineffective assistance of counsel, but this claim was not briefed in the supporting memorandum.[26]

The Louisiana Fourth Circuit summarily denied the writ application on July 25, 2018, finding no error in the Trial Court's ruling.[27] On August 27, 2018, Spratt's counsel filed a writ application in the Louisiana Supreme Court asserting the same four grounds for relief.[28] The Louisiana Supreme Court denied relief on March 18, 2019, because Spratt failed to show ineffective assistance of counsel under the Strickland v. Washington, 466 U.S. 668 (1984), standards.[29]

II. Federal Petition

In his amended petition, Spratt asserts his two exhausted claims:[30] (1) violation of his speedy trial rights because of the delayed prosecution; and (2) denial of effective assistance of trial counsel for failure to correct the state trial court's erroneous jury instruction on the definition of aggravated rape and failure to object to hearsay DNA testimony.

The State addressed these claims in its initial response in opposition to Spratt's federal habeas petition asserting that state courts denial of relief was not an unreasonable application of Supreme Court law.[31] The State argues that Spratt's speedy trial claim is in procedural default and alternatively, the claim is meritless. The State further argues that Spratt's ineffective assistance of trial counsel claims are meritless under Strickland.

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[26]Id.

[27]St. Rec. Vol. 11 of 12, 4th Cir. Order, 2018-K-0567, 7/25/18.

[28]St. Rec. Vol. 12 of 12, La. S. Ct. Writ Application, 18-KP-1436, p. 13, 8/27/18.

[29]State v. Spratt, 266 So.3d 281 (La. 2019); St. Rec. Vol. 12 of 12, La. S. Ct. Order, 2018-KP-1436, 3/18/19.

[30]Rec. Doc. No. 24.

[31]Rec. Doc. No. 10. The State contends that, because there are no similar Supreme Court cases, Spratt cannot argue the contrary to component of the AEDPA. The Court notes that was no need for additional briefing after the amended complaint was filed.

In his reply to the State's response, Spratt reiterated that he is entitled to federal habeas relief because the default should be excused and the claims asserted have merit.[32]

III. General Standards of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214,[33] applies to this amended petition, which was electronically filed by Spratt's counsel on January 31, 2020.[34] The threshold questions on habeas review under the amended statute are whether the petition is timely and whether the claim raised by the petitioner was adjudicated on the merits in state court; i.e. the petitioner must have exhausted state court remedies and must not be in "procedural default" on a claim. Nobles v. Johnson, 127 F.3d 409, 419-20 (5th Cir. 1997) (citing 28 U.S.C. § 2254(b), (c)).

Timeliness and exhaustion are no longer at issue in this case. The State asserts, however, that Spratt's speedy trial claim is in procedural default. For the reasons that follow, the speedy trial claim is in procedural default and the state court's denial of relief on the ineffective assistance of counsel claims was not contrary to or an unreasonable application of Strickland.

IV. Procedural Default

In arguing the merits of his speedy trial claim, Spratt concedes that the claim was dismissed on state law procedural grounds during state court post-conviction review.[35] He argues, however, that cause and prejudice exist to excuse the bar to federal review based on ineffective assistance

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[32]Rec. Doc. No. 14.

[33]The AEDPA comprehensively revised federal habeas corpus legislation, including 28 U.S.C. § 2254, and applied to habeas petitions filed after its signature date, April 24, 1996. Flanagan v. Johnson, 154 F.3d 196, 198 (5th Cir. 1998) (citing Lindh v. Murphy, 521 U.S. 320 (1997)). The AEDPA does not specify an effective date for its non-capital habeas corpus amendments. Absent legislative intent to the contrary, statutes become effective at the moment they are signed into law. United States v. Sherrod, 964 F.2d 1501, 1505 n.11 (5th Cir. 1992).

[34]Rec. Doc. No. 24.

[35]Rec. Doc. No. 24, p.21.

of counsel.[36] The State affirmatively asserts that Spratt's speedy trial claim should be dismissed as procedurally barred and contends that Spratt has failed to prove that ineffective assistance of counsel was cause for the default.[37]

In the last reasoned state court opinion addressing the procedural default, the Louisiana Fourth Circuit held that Spratt waived the right to assert a speedy trial claim because he did not file a pretrial motion to quash the indictment as required by La. Code Crim. P. art. 535(b) and related state case law referencing.[38] This was the last reasoned opinion on the claim. See Wilson v. Sellers, __ U.S. __, 138 S. Ct. 1188, 1192 (2018) ("We hold that the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale . . . then presume that the unexplained decision adopted the same reasoning.")

Generally, a federal court will not review a question of federal law decided by a state court if the decision of that state court rests on a state ground that is both independent of the federal claim and adequate to support that judgment. Cone v. Bell, 556 U.S. 499, 465 (2009) (citing Coleman v. Thompson, 501 U.S. 722, 731-32 (1991)); Ramirez v. Stevens, 641 F. App'x 312, 319 (5th Cir. 2016). This "independent and adequate state law" doctrine applies to both substantive and procedural grounds and affects federal review of claims that are raised on either direct or habeas review. Lee v. Kemna, 534 U.S. 362, 375 (2002).

Procedural default does not bar federal court review of a federal claim in a habeas petition unless the last state court to render a judgment in the case has clearly and expressly indicated that its judgment is independent of federal law and rests on a state procedural bar. Rhoades v. Davis, 914 F.3d 357, 372 (5th Cir. 2019) (citing Harris v. Reed, 489 U.S. 255, 263 (1989)). Procedural

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[36]Id.

[37]Rec. Doc. No. 10.

[38]St. Rec. Vol. 12 of 12, 4th Cir. Order, 2016-K-0302, 8/5/16.

bars also prevail even if the state court alternatively addresses the merits of the claim. Id. at 372; Robinson v. Louisiana, 606 F. App'x 199, 204 (5th Cir. 2015) (citing Woodfox v. Cain, 609 F.3d 774, 796 (5th Cir. 2010)). The federal habeas court looks to the last reasoned opinion of the state courts to determine whether denial of relief was on the merits or based on state law procedural grounds. See Wilson, 138 S. Ct. at 1192.

A. Independent and Adequate Grounds

The parties agree that Spratt's speedy trial claim was denied on state court post-conviction review on state law procedural grounds. As mentioned above, the Louisiana Fourth Circuit held that Spratt waived the claim when no pretrial motion to quash was filed as required by La. Code Crim. P. art. 535(b).&(d).[39]

For the state law procedural bar to prevent review by this federal habeas court, the bar must be independent and adequate. A procedural restriction is "independent" if the state court's judgment "clearly and expressly" indicates that it is independent of federal law and rests solely on a state procedural bar. Rhoades, 914 F.3d at 372; Rogers v. Miss., 555 F. App'x 407, 408 (5th Cir. 2014). To be "adequate," the state procedural rule must be strictly or regularly followed and evenhandedly applied to the majority of similar cases. Walker v. Martin, 562 U.S. 307, 316 (2011); Rogers, 555 F. App'x at 408. A state procedural rule "can be 'firmly established' and 'regularly followed,' - even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." Beard v. Kindler, 558 U.S. 53, 60-61 (2009) (citation omitted). The question of the adequacy of a state procedural bar is itself a federal question. Id. at 60 (citing Lee, 534 U.S. at 375).

[39]Id. at 3-4. Art. 535(d) is the section that specifically declares the claim waived if the pretrial motion to quash is not filed.

The parties here recognize that the rules relied on by the state courts are independent state procedural grounds for having denied the claim. Louisiana's procedural rules requiring timely filing of motions to quash indictments have long been recognized by federal habeas courts as independent state law grounds. See Duncan v. Cain, 278 F.3d 537, 541 (5th Cir. 2002) (citing Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977)) (state law rules governing waiver of objections if not timely preserved are "independent and adequate" state procedural ground which bars federal habeas corpus review); see also Francis v. Henderson, 425 U.S. 536, 540-41 (1976) (failure to file a pretrial motion to quash indictment as required by Louisiana law stands as a waiver of the right); Glover v. Cain, 128 F.3d 900, 902 (5th Cir. 1997); Williams v. Cain, 125 F.3d 269, 276 (5th Cir. 1997) (same).

The Court's research indicates that the Louisiana courts also regularly and evenhandedly find untimely challenges under La. Code Crim. P. art. 535 on speedy trial and other grounds to be waived and barred from review where there is no timely filed pretrial motion to quash. See, e.g., State v. Valentine, 259 La. 1019, 1024-25, 254 So.2d 450, 452 (La. 1971) (La. Code Crim. P. art. 535(b)&(d)); State v. Winters, No. 2017-1115, 2018 WL 1735293, at *4 (La. App. 3rd Cir. Apr. 11, 2018) (La. Code Crim. P. art. 535(b)); State v. Smith, 2017-1333, 2018 WL 1007350, at *4 (La. App. 1st Cir. Feb. 21, 2018) (La. Code Crim. P. art. 535(d)); State v. Van Dyke, 856 So.2d 187, 192 (La. App. 3d Cir. 2003) (same); State v. Williams, 445 So.2d 1264, 1268 (La. App. 3rd Cir. 1984) (same). Therefore, La. Code Crim. P. art. 535 is adequate to bar review of Spratt's speedy trial claim in this federal habeas court. Accord Williams, 125 F.3d at 274-75 (La. Code Crim. P. art. 535(d) adequate to bar review where challenge to indictment not asserted in pretrial motion to quash); Javery v. Cain, No. 06-1113, 2007 WL3004269, at *5 (E.D. La. Oct. 12, 2007) (order adopting Report and Recommendation).

For these reasons, the state courts' rulings were based on Louisiana law establishing procedural requirements for the presentation of claims for review. See Fisher v. Texas, 169 F.3d 295, 300 (5th Cir. 1999) (state courts' clear reliance on state procedural rule is determinative of the issue). The state courts' reasons for dismissal of Spratt's speedy trial claim were therefore independent of federal law and adequate to bar review of his claims in this federal habeas court.

B. Cause and Prejudice

A federal habeas petitioner may be excepted from the procedural bar rule only if he can show "cause" for his default and "prejudice attributed thereto," or demonstrate that the federal court's failure to review the defaulted claim will result in a "fundamental miscarriage of justice." Gonzales v. Davis, 924 F.3d 236, 241-42 (5th Cir. 2019) (citing Coleman, 501 U.S. at 750 and Harris, 489 U.S. at 262). Spratt has not met his burden of proving an exception to the bars imposed by the state courts in his case.

To establish cause for a procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded his efforts to comply with the state's procedural rule. Maples v. Thomas, 565 U.S. 266, 280 (2012) ("Cause for a procedural default exists where something external to the petitioner, something that cannot fairly be attributed to him, impeded his efforts to comply with the State's procedural rule."); Gonzales, 924 F.3d at 242 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). The mere fact that petitioner or his counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default. Murray, 477 U.S. at 486.

As cause for this default, Spratt asserts that his trial counsel provided ineffective assistance when he failed to file a pretrial motion to quash despite the amount of time that passed from when

a detainer was placed against him while in a Tennessee jail and trial.[40] When using ineffective assistance of counsel to excuse procedural default of another independent claim, petitioner must establish that counsel violated his Sixth Amendment rights under the Strickland standards. Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (citing Murray, 477 U.S. at 488-89). Thus, a habeas petitioner who alleges ineffective assistance of counsel must affirmatively demonstrate both that his counsel's performance was deficient and prejudiced his defense such to deny him a fair trial. Strickland, 466 U.S. at 687. Because the Court must address other free-standing claims under Strickland, the undersigned will avoid repetitive discussion and refer the reader to the effective assistance of counsel section of the Report, infra. For the reasons outlined there, Spratt has not met this high burden under Strickland or established that his counsel had reason to file a motion to quash. Thus, he is unable to prove deficient performance or resulting prejudice under Strickland to satisfy the cause exception to his procedural default. "If a petitioner fails to demonstrate cause, the court need not consider whether there is actual prejudice." Matchett v. Dretke, 380 F.3d 844, 848-49 (5th Cir. 2004) (citing Rodriguez v. Johnson, 104 F.3d 694, 697 (5th Cir. 1997)); Meanes v. Johnson, 138 F.3d 1007, 1011 (5th Cir. 1998) (citing Engle v. Isaac, 456 U.S. 107, 134, n.43 (1982)).

C. Fundamental Miscarriage of Justice

A petitioner may avoid procedural bar only if a fundamental miscarriage of justice will occur if the merits of his claim are not reviewed. Gonzales, 924 F.3d at 241-42. To establish a fundamental miscarriage of justice, petitioner must provide this court with evidence that would support a "colorable showing of factual innocence." Murray v. Quarterman, 243 F. App'x 51, 55 (5th Cir. 2007). To satisfy the factual innocence standard, petitioner must establish a fair

[40]Rec. Doc. No. 24, p. 23.

probability that, considering all of the evidence now available, the trier of fact would have entertained a reasonable doubt as to the defendant's guilt. Id. (citing Bagwell v. Dretke, 372 F.3d 748, 756 (5th Cir. 2004)); see Nobles, 127 F.3d at 423 n. 33 (actual innocence requires a showing by clear and convincing evidence that, "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."). When the petitioner has not adequately asserted his actual innocence, his procedural default cannot be excused under the "fundamental miscarriage of justice" exception. Woodfox, 609 F.3d at 793.

Spratt presents no argument and the record contains nothing to suggest his actual innocence on the underlying convictions. His speculation as to another potential perpetrator related to one of the three victims is a matter that was before the jury at his trial and was disproven by the evidence. He, therefore, has failed to excuse the procedural bar. His speedy trial claim must be dismissed with prejudice as procedurally barred.

V. Standards of a Merits Review of the Remaining Claims

The standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, is governed by § 2254(d) and the Supreme Court's decision in Williams v. Taylor, 529 U.S. 362 (2000). It provides different standards for questions of fact, questions of law, and mixed questions of fact and law.

A state court's determinations of questions of fact are presumed correct and the Court must give deference to the state court findings unless they were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2) (2006); see Hill v. Johnson, 210 F.3d 481, 485 (5th Cir. 2000). The amended statute also codifies the "presumption of correctness" that attaches to state court findings of fact and the "clear and

convincing evidence" burden placed on a petitioner who attempts to overcome that presumption. 28 U.S.C. § 2254(e)(1).

A state court's determination of questions of law and mixed questions of law and fact are reviewed under § 2254(d)(1), as amended by the AEDPA. The standard provides that deference be given to the state court's decision unless the decision is "contrary to or involves an unreasonable application of clearly established federal law" as determined by the United States Supreme Court. Hill, 210 F.3d at 485. The "critical point" in determining the Supreme Court rule to be applied "is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." White v. Woodall, 572 U.S. 415, 427 (2014) (citing Harrington v. Richter, 562 U.S. 86, 103 (2011)); Knowles v. Mirzayance, 556 U.S. 111, 122 (2009)); Shoop v. Hill, __ U.S. __, 139 S. Ct. 504, 506 (2019) (quoting Harrington, 562 U.S. at 103). "Thus, 'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" White, 572 U.S. at 426 (quoting Yarborough v. Alvarado, 541 U.S. 652, 666 (2004)); Shoop, 139 S. Ct. at 509 (habeas courts must rely "strictly on legal rules that were clearly established in the decisions of this Court at the relevant time.").

A state court's decision can be "contrary to" federal law if: (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; or (2) the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. Williams, 529 U.S. at 405-06, 412-13; Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Hill, 210 F.3d at 485. A state court's decision can involve an "unreasonable application" of federal law

if it correctly identifies the governing rule but then applies it unreasonably to the facts. White, 572 U.S. at 426-27; Williams, 529 U.S. at 406-08, 413; Penry, 532 U.S. at 792.

The Supreme Court in Williams did not specifically define "unreasonable" in the context of decisions involving unreasonable applications of federal law. See Williams, 529 U.S. at 410. The Court, however, noted that an unreasonable application of federal law is different from an incorrect application of federal law. Id. "'[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [a Supreme Court case] incorrectly.'" Price v. Vincent, 538 U.S. 634, 641 (2003) (quoting Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002)) (brackets in original); Bell v. Cone, 535 U.S. 685, 699 (2002).

Thus, under the "unreasonable application" determination, the Court need not determine whether the state court's reasoning is sound, rather "the only question for a federal habeas court is whether the state court's determination is objectively unreasonable." Neal v. Puckett, 286 F.3d 230, 246 (5th Cir. 2002). The burden is on the petitioner to show that the state court applied the precedent to the facts of his case in an objectively unreasonable manner. Price, 538 U.S. at 641 (quoting Woodford, 537 U.S. at 24-25); Wright v. Quarterman, 470 F.3d 581, 585 (5th Cir. 2006). In addition, review under § 2254(d)(1) is limited to the record before the state court that adjudicated the claim on the merits. Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

VI. Effective Assistance of Counsel

Spratt alleges that he was denied effective assistance of counsel when his trial counsel failed to correct the state trial court's jury instruction on the definition of aggravated rape and object to hearsay testimony from two expert witnesses from the DNA testing lab. As referenced above, Spratt also asserts that his counsel's failure to file a pretrial motion to quash was ineffective

assistance that stands as cause to excuse his procedural default of the speedy trial claim in light of the delay in bringing him to trial and alleged resulting prejudice to his defense.

The State asserts that Spratt has failed to establish that the denial of relief on these claims was an unreasonable application of Supreme Court law. The State argues that Spratt has no factual support for his claim that the state trial court read an incorrect definition and even if it did, the failure to challenge it was not prejudicial. The State also argues that Spratt has failed to establish that the lab supervisors' testimony was hearsay or introduced contrary to Supreme Court law. As to the final claim, the State argues that Spratt cannot establish ineffective assistance because a motion to quash would not have been successful.

As addressed above, Spratt asserted these arguments on state court post-conviction review. In the last reasoned opinion, the Louisiana Supreme Court denied relief because Spratt failed to prove ineffective assistance under Strickland.

The issue of ineffective assistance of counsel is a mixed question of law and fact. Clark v. Thaler, 673 F.3d 410, 416 (5th Cir. 2012); Woodfox, 609 F.3d at 89. Under the AEDPA, the question for this Court is whether the state courts' denial of relief was contrary to, or an unreasonable application of, federal law as determined by the Supreme Court, in this case Strickland.[41]

In Strickland, the Supreme Court established a two-part test for evaluating claims of ineffective assistance of counsel in which the petitioner must prove deficient performance and

[41]The Court notes that it is unclear if and when the state courts addressed ineffective assistance related to the motion to quash on speedy trial grounds on the merits, although it appears that Spratt's counsel asserted the argument to each state court. If a claim is not considered on the merits by a state court courts, the deferential AEDPA standards of review do not apply and the federal courts use pre-AEDPA de novo standards. Henderson v. Cockrell, 333 F.3d 592, 598 (5th Cir. 2003) (citing Jones v. Jones, 163 F.3d 285, 299-300 (5th Cir. 1998) (applying de novo standard of review to ineffective assistance of counsel claims asserted state courts, but not adjudicated on the merits)); Carty v. Thaler, 583 F.3d 244, 253 (5th Cir. 2009). To the extent necessary, I have applied Strickland to this part of the claim de novo although it fails under either standard. See Berghuis v. Thompkins, 560 U.S. 370, 390 (2010) (a claim that fails under a de novo review would necessarily fail under AEDPA's deferential standard of review).

prejudice therefrom. See Strickland, 466 U.S. at 687. The petitioner has the burden of proving ineffective assistance of counsel by a preponderance of the evidence. Montoya v. Johnson, 226 F.3d 399, 408 (5th Cir. 2000); Jernigan v. Collins, 980 F.2d 292, 296 (5th Cir. 1992). In deciding ineffective assistance claims, a court need not address both prongs of the conjunctive Strickland standard, but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test. Amos v. Scott, 61 F.3d 333, 348 (5th Cir. 1995).

To prevail on the deficiency prong, petitioner must demonstrate that counsel's conduct failed to meet the constitutional minimum guaranteed by the Sixth Amendment. See Styron v. Johnson, 262 F.3d 438, 450 (5th Cir. 2001). "The defendant must show that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-88. The analysis of counsel's performance must take into account the reasonableness of counsel's actions under prevailing professional norms and in light of all of the circumstances. See id. at 689; Carty v. Thaler, 583 F.3d 244, 258 (5th Cir. 2009). The reviewing court must "judge . . . counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (quoting Strickland, 466 U.S. at 690). Petitioner must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable representation. Harrington, 562 U.S. at 104 (citing Strickland, 466 U.S. at 689). "[I]t is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." Bell, 535 U.S. at 702 (citing Strickland, 466 U.S. at 689). As a result, federal habeas courts presume that trial strategy is objectively reasonable unless clearly proven otherwise. Strickland, 466 U.S. at 689; Johnson v. Dretke, 394 F.3d 332, 337 (5th Cir. 2004) (counsel's "'conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the

entire trial with obvious unfairness.'") (quoting United States v. Jones, 287 F.3d 325, 331 (5th Cir. 2002)); Geiger v. Cain, 540 F.3d 303, 309 (5th Cir. 2008).

To prove prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; Williams v. Thaler, 602 F.3d 291, 310 (5th Cir. 2010). Furthermore, "[t]he petitioner must 'affirmatively prove,' and not just allege, prejudice." Day v. Quarterman, 566 F.3d 527, 536 (5th Cir. 2009) (quoting Strickland, 466 U.S. at 695). In this context, "a reasonable probability is a probability sufficient to undermine confidence in the outcome." Cullen, 563 U.S. at 189 (quoting Strickland, 466 U.S. at. 694). This standard requires a "substantial," not just "conceivable," likelihood of a different result. Harrington, 562 U.S. at 112. To determine whether prejudice occurred, courts must review the record to determine "the relative role that the alleged trial errors played in the total context of [the] trial." Crockett v. McCotter, 796 F.2d 787, 793 (5th Cir. 1986). Thus, conclusory allegations of ineffective assistance of counsel, with no showing of effect on the proceedings, do not raise a constitutional issue sufficient to support federal habeas relief. Miller v. Johnson, 200 F.3d 274, 282 (5th Cir. 2000) (citing Ross v. Estelle, 694 F.2d 1008, 1012 (5th Cir. 1983)).

On habeas review, the Supreme Court has clarified that, in applying Strickland, "[t]he question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Harrington, 562 U.S. at 105. The Harrington Court went on to recognize the high level of deference owed to a state court's findings under Strickland in light of AEDPA standards of review:

> The standards created by Strickland and §2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland

> with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Id., at 105 (citations and quotation marks omitted).

Thus, scrutiny of counsel's performance under § 2254(d) is "doubly deferential." Cullen, 563 U.S. at 190 (quoting Knowles, 556 U.S. at 112). The federal courts take a "highly deferential" look at counsel's performance under the Strickland standard through the "deferential lens of § 2254(d)." Id. (citing Strickland, 466 U.S. at 689, and quoting Knowles, 556 U.S. at 121 n.2).

In assessing the deference due, the habeas court must also apply the "strong presumption" that counsel's strategy and defense tactics fall "within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 690; Moore v. Johnson, 194 F.3d 586, 591 (5th Cir. 1999). Federal habeas courts presume that trial strategy is objectively reasonable unless clearly proven otherwise by the petitioner. Strickland, 466 U.S. at 689; Geiger, 540 F.3d at 309; Moore, 194 F.3d at 591. A federal habeas court makes every effort to eliminate the distorting effects of hindsight, reconstruct the circumstances of the challenged conduct, and evaluate the conduct from counsel's perspective at the time of trial. Strickland, 466 U.S. at 689; Neal, 286 F.3d at 236-37; Clark v. Johnson, 227 F.3d 273, 282-83 (5th Cir. 2000). Tactical decisions supported by the circumstances are objectively reasonable and not unconstitutionally deficient performance. Lamb v. Johnson, 179 F.3d 352, 358 (5th Cir. 1999) (citing Rector v. Johnson, 120 F.3d 551, 564 (5th Cir. 1997) and Mann v. Scott, 41 F.3d 968, 983-84 (5th Cir. 1994)).

A. Failure to File Pretrial Motion to Quash on Speedy Trial Grounds

As discussed above, Spratt argues that his counsel's ineffective assistance in failing to file a pretrial motion to quash is cause to excuse the default of his speedy trial claim.[42] He also argues

[42]Rec. Doc. Nos. 24, 14.

that he can establish prejudice from counsel's failure because his speedy trial claim has merit. He argues that there was an inordinate delay in bringing him to trial. He also argues that the delay caused prejudice because another potential perpetrator in the S.M. rape, former officer Abreace Daniels, died in 2009 which denied him the opportunity to call Daniels as a witness. In addition, Spratt claims his father and grandmother died before they could be called as alibi witnesses.

The State argues that Spratt cannot establish ineffective assistance as cause because, if counsel had filed a motion to quash, it would not have been successful.[43] The State contends that Spratt's constitutionally protected speedy trial rights did not attach until he was transferred to Louisiana in 2010, and he was tried within the statutory time limit. The State also notes that under state statutory law, there was no time limit to bring him to trial for the anticipated felony charges for which he faced life in prison.

Spratt focuses his speedy trial challenge on the lengthy delay between 2005 and the 2012 trial. By 2005, as Spratt served his sentence for the Tennessee rapes, New Orleans police officers matched his DNA with the three 1994 rapes at issue here. He was facing three counts of aggravated rape and three counts of aggravating kidnapping, both of which are punishable by life sentence. For the reasons that follow, however, these circumstances did not provide Spratt's counsel with state or federal speedy trial grounds on which to base a motion to quash. As will be discussed, Spratt's counsel was not deficient or ineffective for failing to file a baseless or meritless objection. See Johnson v. Cockrell, 306 F.3d 249, 255 (5th Cir. 2002) (counsel is not required to make futile motions or frivolous objections); Smith v. Puckett, 907 F.2d 581, 585 n. 6 (5th Cir. 1990) ("Counsel is not deficient for, and prejudice does not issue from, failure to raise a legally meritless claim.");

[43]Rec. Doc. No. 10.

see also Wood v. Quarterman, 503 F.3d 408, 413 (5th Cir. 2007) ("'[f]ailure to raise meritless objections is not ineffective lawyering; it is the very opposite.'") (citation omitted).

1. State Statutory Speedy Trial Rules

The Louisiana courts recognize "two separate and distinct bases for a defendant's right to a speedy trial: a statutory right granted by La. C.Cr.P. arts. 701 and 578, and a constitutional right guaranteed by the Sixth Amendment to the United States Constitution and Article I, § 16 of the Louisiana Constitution." State v. Andrews, 255 So.3d 1106, 1113 (La. App. 4th Cir. 2018). "The two are not equivalent" and involve "wholly separate inquiries." Id. The Court will address each standard.

Under Louisiana statutory law, a criminal defendant may file a motion to quash at any time when the commencement of trial has expired and any time before trial when the time limitation for the institution of prosecution has lapsed. La. Code Crim. P. arts. 532(7) & 535(A)(4), (B). The date of "institution of prosecution" is the date when the indictment is returned or the bill of information is filed. La. Code Crim. P. art. 934(7); State v. Smith, 982 So.2d 831, 834 (La. App. 5th Cir. 2008). Following indictment, the State had two years to commence the non-capital felony trial barring other allowable interruptions or suspensions. La. Code Crim. P. art. 578(A)(2).

In Spratt's case, his counsel had no grounds to challenge the timeliness of the filing of the indictment. Under Louisiana law, then and now, there is no time limitations for the institution of prosecution (filing of the indictment) for a crime punishable by life imprisonment. La. Code Crim. P. art. 571. Spratt's counsel, therefore, had no timeliness grounds under state procedural law on which to base a motion to quash the indictment filed November 18, 2010.

Under the law cited above, the state had two years from that filing to commence Spratt's trial. See La. Code Crim. P. art. 578. Spratt's trial commenced on March 5, 2012, which was less

than two years after the indictment was filed on November 18, 2010. His counsel, therefore, had no state statutory ground to challenge the timeliness of his trial.

For these reasons, Spratt's trial counsel had no state statutory basis to file a motion to quash where there was no delay under Louisiana law in the filing of the indictment or the commencement of his trial. His counsel simply had no speedy trial grounds under Louisiana statutory law on which to base a motion to quash.

2. Constitutional Speedy Trial Considerations

Apart from the state statutory provisions, the Louisiana courts appropriately recognize a defendant's constitutional rights to a speedy trial. State v. Wisham, 2014-KA-1394, 2015 WL 4556989, at *7 (La. App. 1st Cir. Jul. 29, 2015) (citing U.S. Const. amend. VI and La. Const. art. I, § 16). Although based in the federal constitution (as adopted in the state constitution and the Due Process Clause), these grounds must also be asserted by timely motion to quash. State v. Gordon, 896 So.2d 1053, 1063 (La. App. 1st Cir. 2004). To address constitutional speedy trial rights, the Louisiana Court's properly rely on the United States Supreme Court standards set forth in Barker v. Wingo, 407 U.S. 514 (1972). State v. Love, 847 So.2d 1198, 1209-10 (La. 2003).

In Barker, the Supreme Court recognized that "[i]t is . . . impossible to determine with precision when" a specific trial delay crosses the line and becomes unconstitutionally long. Barker, 407 U.S. at 521; Laws v. Stephens, 536 F. App'x 409, 412 (5th Cir. 2013). The Supreme Court declared that "'[t]he right of a speedy trial is necessarily relative,'" and required the courts to apply "a functional analysis of the right in the particular context of the case [.]" Id. at 522 (citation omitted). Courts must consider and balance the following factors: (1) the length of delay between indictment or arrest (whichever is earlier) and trial; (2) the reason for the delay; (3) the defendant's assertion of his right to speedy trial; and (4) prejudice to the defendant. Barker, 407

U.S. at 530; Amos, 646 F.3d at 205 (citing Goodman v. Quarterman, 547 F.3d 249, 257 (5th Cir. 2008)); Doggett v. United States, 505 U.S. 647, 651 (1992). No single factor is necessary or sufficient to establish a violation. Id. at 533. "In applying a Barker balancing, the court must weigh the first three Barker factors - length of the delay, reason for the delay, and defendant's diligence in asserting his right - against any prejudice suffered by the defendant due to the delay in prosecution." United States v. Serna-Villarreal, 352 F.3d 225, 230 (5th Cir. 2003).

Before applying Barker, the Court is compelled to resolve Spratt's focus on the pre-indictment delay between his identification as the perpetrator, marked by the detainer placed in January 2005,[44] and November 2010 when he was arrested and indicted. During that five-plus years, Spratt was incarcerated and serving his sentence in Tennessee for the multiple rape convictions he received there. This delay, however, does not factor in to the Barker analysis. As the Supreme Court has explained:

> In United States v. Marion, 404 U.S. 307 [. . .] (1971), this Court considered the significance, for constitutional purposes, of a lengthy pre indictment delay. We held that as far as the Speedy Trial Clause of the Sixth Amendment is concerned, such delay is wholly irrelevant, since our analysis of the language, history, and purposes of the Clause persuaded us that only 'a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections' of that provision. Id., at 320 [. . .].

United States v. Lovasco, 431 U.S. 783, 788-89 (1977) (emphasis added)

The United State Fifth Circuit also has held that a detainer, like that addressed by Spratt, does not render a person "actually restrained" for speedy trial purposes. Rather, a detainer "merely puts the officials of the institution in which the prisoner is incarcerated on notice that the prisoner is wanted in another jurisdiction" for prosecution on other crimes. Dickerson v. Guste, 932 F.2d 1142, 1144 (5th Cir. 1991) (quoting United States v. Mauro, 436 U.S. 340, 358 (1978)); Cowart

[44]Spratt asserts that the January 7, 2015 arrest warrant and related detainer were placed against him in Tennessee on January 14, 2005. Rec. Doc. Nos. 24-5, p. 6 & 24-8, pp. 3-7, 12-14.

v. Hargett, 16 F.3d 642 (5th Cir. 1994) (holding that a criminal prosecution does not "begin" for speedy trial purposes until a defendant is formally charged or actually restrained in connection with the crime charged). Thus, when there is an unexecuted arrest warrant and no indictment, "there was no trial to 'speed up.'" Dickerson v. Louisiana, 816 F.2d 220, 228 (5th Cir. 1987).

Here, Spratt relies on the January 2005 issuance of an arrest warrant and placement of a detainer as the trigger for his speedy trial rights. However, like the warrants in Dickerson v. Louisiana, the arrest warrant was not executed and he was not yet indicted to trigger those speedy trial rights. Instead, Spratt was not arrested until November 2, 2010, and he was indicted on November 18, 2010, the earliest of which triggers his constitutionally protected speedy trial rights. Robinson v. Whitley, 2 F.3d 562 (5th Cir. 1993) ("The relevant period of delay is that following accusation, either arrest or indictment, whichever occurs first."); see also, Dillingham v. United States, 423 U.S. 64, 65 (1975) (per curiam) (under federal law, the first Barker factor begins with "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.").

Therefore, under Barker and its progeny, Spratt's speedy trial rights were not implicated by the pre-arrest or pre-indictment delay. Thus, his trial counsel had no basis to file a motion to quash on that ground in the Louisiana courts. His trial counsel was not ineffective for failing to file an unsupportable motion. See Johnson, 306 F.3d at 255.

In the interest of thoroughness, the Court will consider the Barker factors as they related to any potential delay post-arrest, when Spratt's speedy trial rights were finally triggered. Under the first Barker factor, cited above, the Court must consider the length of any delay after the arrest in Spratt's case. The length of delay, is a "threshold requirement" courts must consider before

examining the other factors. See Laws, 536 F. App'x at 412. Only if the delay between the trigger, i.e. arrest or indictment, and trial is greater than one year must a court "undertake[ ] a full Barker analysis, looking to the first three factors to decide whether prejudice will be presumed." United States v. Molina-Solorio, 577 F.3d 300, 304 (5th Cir. 2009); Amos v. Thornton, 646 F.3d 199, 206 (5th Cir. 2011).

As indicated above, Spratt was arrested on the Louisiana charges on November 2, 2010. Under the Barker doctrine, he should have been tried within the threshold one-year from that date, or by November 2, 2011. His trial, however, commenced on March 5, 2012. Although this was timely under Louisiana's statutory works, the Barker considerations are different. Here, trial commenced on March 5, 2012, which was just over one year and four months after Spratt's arrest on November 2, 2010, or just over four months beyond the Barker threshold. Although slight, the delay exceeds the Barker "one year" threshold which requires the court to consider the other factors. See Amos, 646 F.3d at 206.

The second Barker factor considers the reasons for the delay. Id. at 207. A court gives different weight to different reasons, and "delays explained by valid reasons or attributable to the conduct of the defendant weigh in favor of the state." Id. In this case, the state court record demonstrates valid reasons for the short delay beyond the one-year threshold.

Under Louisiana law, the state legitimately had 120 days from Spratt's arrest to file the indictment. La. Code Crim. P. art. 701(B)(1)(b). Spratt's indictment was filed November 18, 2010, which was only sixteen (16) days after his November 2, 2010 arrest. This does not exhibit unnecessary delay by the prosecution.

In addition, under state law, the State had two years from filing of the indictment, or until Monday, November 19, 2012,[45] to commence Spratt's trial. La. Code Crim. P. art. 578(A)(2). His trial commenced well-within that time on March 5, 2012. The State complied with the state law statutory scheme in speedily pursuing the trial, and any brief delay beyond the Barker threshold was not inappropriate.

In addition, Barker would allow for any state law interruption or suspension of the scheduling of trial. In Louisiana, this would include interruption for the filing and resolution of the defendant's pretrial motions and any trial continuances requested or joined by the defendant. See La. Code Crim. P. art. 580(A). Specifically, the two-year time limit to commence Spratt's trial could be suspended by La. Code Crim. P. 580(A) "[w]hen a defendant files a motion to quash or other preliminary plea . . . until the ruling of the court thereon . . ." See State v. Joseph, No. 2018-0867, 2019 WL 1284579, at *3 (La. App. 4th Cir. Mar. 20, 2019); State v. Ladmirault, 286 So.3d 1206 (La. App. 4th Cir. 2019).

Louisiana jurisprudence considers a "preliminary plea" under Article 580(A) to be "any plea filed after prosecution is instituted, but before trial, that causes the trial to be delayed," including motions to suppress, motions for continuance filed by defendant, and joint motions for continuance. State v. Ramirez, 976 So.2d 204, 208 (La. App. 4th Cir. 2008). When a suspension occurs, "the state must commence the new trial within one year from the date the cause of interruption no longer exists." Id. (quoting La. Code Crim. P. art. 583) (emphasis added). The Louisiana courts apply these provisions to provide the prosecution one year from the ruling on

[45]The final day fell on Sunday, November 18, 2012, which caused the deadline fall on the next business day, Monday, November 19, 2012. See La. Code Crim. P. art. 13; Fed. R. Civ. P. 6.

each defense pretrial plea/motion and/or defense or joint motion for continuance. Id.; Ladmirault, 286 So.3d at 1206.

The record reflects several filings that interrupted and extended Spratt's speedy trial period beyond the Barker one-year threshold date of November 2, 2011. For example, on January 14, 2011, almost two months after the indictment was filed, Spratt's counsel filed, inter alia, motions to suppress the confession, for exculpatory material, and for discovery and inspection.[46] On March 31, 2011, after multiple continuances requested by defense counsel or resulting from conflicts in the state trial court's docket, the parties resolved the discovery matters and the state trial court denied Spratt's motion to suppress.[47]

Under Louisiana law outlined above, the State had one year from that ruling date, or until Monday, April 2, 2012,[48] to commence Spratt's trial. Spratt's trial commenced on March 5, 2012, well within this extended period, a period that was not attributable to the State under Barker.[49] Considering the foregoing valid reasons for the four month delay beyond the Barker threshold, this second Barker factor favors the State.

The third Barker factor examines whether the defendant "diligently asserted his speedy trial right." United States v. Parker, 505 F.3d 323, 329 (5th Cir. 2007). The record reflects that Spratt did not file a motion for a speedy trial at any time during the Barker concern, i.e. after his arrest or indictment and before trial. This is likely attributable to the fact that, as already discussed,

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[46]St. Rec. Vol. 2 of 12, Minute Entry, 1/14/11.

[47]St. Rec. Vol. 2 of 12, Minute Entry, 3/31/11; see also, Minute Entry, 1/21/11; Minute Entry, 3/25/11.

[48]The final day fell on Saturday, March 31, 2012, which caused the deadline fall on the next business day, Monday, April 2, 2012. See La. Code Crim. P. art. 13; Fed. R. Civ. P. 6.

[49]This timely commencement is without regard for the fact that on January 17, 2012, the state trial court also granted the defense's oral motion to continue trial which would have allowed the State one year, or until January 17, 2013, to commence Spratt's trial. St. Rec. Vol. 2 of 12, Minute Entry, 1/17/12.

his trial counsel had no legal basis under state statutorily law to do so. Despite any pre-arrest efforts he made from jail, this factor does not weigh in Spratt's favor.

Finally, the fourth Barker factor examines the prejudice to the petitioner because of the delay. Barker, 407 U.S. at 530. The habeas petitioner carries the burden to demonstrate actual prejudice unless, the weight of the first three factors warrants that prejudice be presumed. See Amos, 646 F.3d at 208. Because only one of the first three factors falls in Spratt's favor, the test does not compel a presumption of prejudice in this case. To reiterate, while the delay went beyond the Barker one-year threshold, Spratt did not pursue his speedy trial rights after his arrest until post-conviction review and valid reasons not attributable to the State existed for the slight trial delay. Accordingly, for Spratt to prevail on a speedy trial claim, he must establish actual prejudice and demonstrate that the prejudice adequately exceeds the weight of the other factors. United States v. Frye, 489 F.3d 201, 212 (5th Cir. 2007); see also Amos, 646 F.3d at 208 n.42 (no presumption of prejudice even when two of the first three Barker factors weighed in favor of petitioner).

Under Barker, prejudice is based on consideration of three interests: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern accompanying public accusation; and (3) to limit the possibility that the defense will be impaired. Barker, 407 U.S. at 532. Of those, the third consideration is most significant. Frye, 489 F.3d at 212 (citing Barker, 407 U.S. at 532).

As prejudice, Spratt essentially relies on the delay from 2005 to 2010 claiming that this caused him anxiety because he was unable to adequately determine why he was wanted in Louisiana. In addition, he claims that the delay after 2005 prejudiced the defense by the passing

of Officer Daniels as a potential perpetrator in the S.M. rape and kidnapping and the deaths of his father and grandmother whom he would have called as alibi witnesses.

As to his anxiety, Spratt refers to his prearrest incarceration between 2005 and 2010 not his "pretrial" incarceration as defined in Barker. As noted above, pre-arrest and pre-indictment incarceration are not relevant to speedy trial under Barker. Lovasco, 431 U.S. at 788-89. In addition, Spratt was already in jail serving a sentence on other felony convictions in Tennessee when the arrest warrant and detainer were placed in 2005. Thus, his pre-arrest incarceration was not wholly attributable to these charges.

Furthermore, the Supreme Court made clear that not every angst of the defendant is protected by the speedy trial right:

> The Speedy Trial Clause does not purport to protect a defendant from all effects flowing from a delay before trial. The Clause does not, for example, limit the length of a preindictment criminal investigation even though "the [suspect's] knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life." [United States v. MacDonald,] 456 U.S. [1,] 9, 102 S.Ct. [1497], 1502 [(1982)].

United States v. Loud Hawk, 474 U.S. 302, 311-12 (1986). Thus, any concern or distress Spratt attributes to his prearrest incarceration is unavailing.

Turning to the impact delay had on his defense, Spratt has not pointed to any concerns during the relevant Barker period after his arrest (or indictment) and before trial. The deaths of his potential witnesses all occurred prior to his arrest and indictment in Louisiana. Without some showing of how the four month Barker pretrial delay caused prejudice to his defense, the fourth Barker factor simply does not fall in his favor. He has not demonstrated prejudice resulting from the brief delay as defined by Barker.

For these reasons, Spratt has failed to establish that he suffered a speedy trial violation under Barker. He therefore has established no basis for his trial counsel to have filed a motion to

quash based on speedy trial concerns. He has not demonstrated that his counsel was ineffective under Strickland or for purposes of establishing cause for the default of his speedy trial claim.

3. Other Due Process Considerations

Even if the Court looks beyond the pretrial limitations in Barker to consider Spratt's alleged prearrest delay, Spratt has not established a due process or speedy trial violation by the State under those general due process standards. The United States Supreme Court has set forth a two-part test for analyzing pre-indictment delay based on due process grounds: (1) whether the prosecution intentionally delayed indictment to gain a tactical advantage over the defendant; and (2) whether there is actual prejudice to the defendant. United States v. Marion, 404 U.S. 307, 325 (1971); see also United States v. Gouveia, 467 U.S. 180, 192 (1984) (Due process may be considered even if prosecution is brought within the statute of limitations when the delay was intentional and actually prejudiced the defense.); United States v. Antonino, 830 F.2d at 800 (citing Lovasco, 431 U.S. at 783). The burden of proving a due process violation based on pre-indictment delay is on the defendant. United States v. Beszborn, 21 F.3d 62, 65-66 (5th Cir. 1994).

"The law is well settled that it is actual prejudice, not possible or presumed prejudice, which is required to support a due process claim." Beszborn, 21 F.3d at 66. In the absence of proof of actual and substantial prejudice despite the defendant's diligence, a due process claim is "merely speculative." Beckwith v. Anderson, 89 F. Supp.2d 788, 808 (S.D. Miss, 2000) (citing Beszborn, 21 F.3d at 67). Thus, "[t]he mere passage of time is insufficient to prove prejudice to the defendant." Id. (citing United States v. Butts, 524 F.2d 975, 977 (5th Cir. 1975)).

Both Spratt and the State recognize a delay period between the January 2005 placement of the initial arrest warrant and detainer against Spratt in Tennessee (where he was imprisoned) until his arrest on the Louisiana charges on November 2, 2010 (after he completed his Tennessee

sentences).[50] Spratt does not per se assert in any detail that the State delayed his trial to gain tactical advantage. Instead, he claims that he was diligent in his efforts to protect his speedy trial rights during that time but was unable to avoid the prejudices caused by the State's delay when three potential witnesses died before trial. The record, however, is not as clear as to his diligence or indicative of an actual prejudice.

For example, in his 2015 affidavit used in state post-conviction proceedings, Spratt attested under oath that he was told about the 2005 warrant and detainer in 2006 when he attempted to get employment through the Tennessee prison.[51] It is in his other counsel-prepared pleadings where the date of discovery changed to "July, 2008."[52] There is no explanation or clarification for the difference in the dates. Spratt also fails to explain how he came to possess a copy of the detainer information printout dated July 15, 2005, if he was not notified about the detainer until 2006.[53]

Spratt also pleads that, around February 2009, he sought assistance through family and hired a paralegal association to gain more information about the detainer. These exhibits indicate that these "efforts" were to have the detainer lifted, not to secure a speedy trial. In addition, these efforts occurred some three years after he claims he first learned of the detainer in 2006 (based on his 2015 affidavit). While his retained assistance apparently sought information on the detainers between February 2009 and his arrest in 2010, the delay until that time, from 2006 to 2009, fell on the idle hands of Spratt. His diligence remains suspect.

Spratt focuses the prejudice argument on his claim that three potential witnesses died prior to his arrest. A petitioner seeking to establish that the death or unavailability of a potential witness

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[50]See Rec. Doc. Nos. 24-5, p. 6 & 24-8, pp. 3-7, 12-14; Rec. Doc. No. 10, p. 25.

[51]Rec. Doc. No. 24-8, p. 36.

[52]Rec. Doc. No. 24-5, p. 7.

[53]Rec. Doc. No. 24-8, p. 9.

caused him prejudice must produce evidence that the potential witness's testimony "was exculpatory in nature, or that it would have actually aided the defense." United States v. West, 58 F.3d 133, 136 (5th Cir. 1995) (citing Beszborn, 21 F.3d at 66). Spratt has not satisfied this burden.

Spratt first points to former police officer, Abreace Daniels, who died on November 2, 2009. Spratt argues that Daniels was a potential suspect in the S.M. rape and kidnapping and died before Spratt could call him to testify. However, the record is very clear that Daniels and another former officer, Charles Ellis, were initially investigated in connection with the rape and kidnapping of M.L., not S.M.[54] Ellis was excluded by the victim in a lineup.[55] Daniels was excluded by the same DNA evidence that led police to Spratt.[56]

The investigation and information related to Daniels and Ellis was presented to the jury by the State and subjected to cross-examination by defense counsel.[57] Spratt has not explained the purpose or anticipated testimony he sought to have gained if he could have called Daniels in person that was not already before the jury. Of course, it is only speculative that Daniels would have been willing to testify on Spratt's behalf or in any way in Spratt's favor. Beszborn, 21 F.3d at 66 (claim of prejudice rejected where defendant failed to show that unavailable witness's testimony would have been exculpatory). Spratt has not met the high burden of proving prejudice from the death of Daniels before his trial.

Next, Spratt asserts that two alibi witnesses, his grandmother and father also died prior to trial on June 30, 2007 and October 27, 2009, respectively.[58] He does not indicate the relevance of

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[54]St. Rec. Vol. 10 of 12, Trial Transcript, pp. 46-54, 3/7/12 (Sergeant Michael Bossetta).

[55]Id. at 46.

[56]Id. at 53-54 (Bossetta); at 119 (Ann Montgomery).

[57]Id. at 46-90.

[58]As support, Spratt references Exhibit 7 of Exhibit 3 which does not exist. See Rec. Doc. No. 24, p. 21.

his grandmother to the defense. Based on the record he has established that she died in 2007, about a year after he discovered the detainer in 2006 and more than one year before he sought assistance in 2009 to learn more information about the detainer. He fails, however, to indicate what exculpatory or alibi testimony his grandmother could have given or how it could counter the DNA and other evidence of his guilt. Without this showing, Spratt has not demonstrated any prejudice resulting from his inability to have her as a witness at trial. Accord United States v. Harris, 566 F.3d 422, 433 (5th Cir. 2009) (prejudice not proven where claim that alibi witness died failed to provide content or relevance of the lost testimony).

A similar conclusion can be reached as to his father, who died in 2009 after Spratt began his efforts to investigate the detainer. He claims that his father could have testified about a trip they took during one of the rapes. Spratt, however, fails to indicate the date of this alleged trip or to which rape or victim it corresponded. Spratt also fails to discuss or preclude the possibility of the existence of other witnesses or evidence to have corroborated his travel. United States v. Crouch, 84 F.3d 1497 (5th Cir. 1996) (quoting Beszborn, 21 F.3d at 67) ("... to establish prejudice based on lost witnesses or documents, the defendant must also show that 'the information ... could not otherwise be obtained from other sources.'"); see United States v. Royals, 777 F.2d 1089, 1090 (5th Cir. 1985) ("[D]efendant has failed to show that such evidence could not have otherwise been obtained."). Spratt's speculative and unsubstantiated claim of prejudice is not sufficient to meet the high burden he bears to prove prejudice or that his father's testimony "would have actually aided the defense" or that its absence actually prejudice him at trial. Crouch, 84 F.3d at 1515 (citations omitted).

For the foregoing reasons, Spratt has failed to establish that the prearrest or preindictment delay violated the general standards of due process. His counsel was not ineffective for failing to

file a pretrial motion to quash on this basis and the failure does not establish cause for default of Spratt's speedy trial claim.

Under the foregoing discussion of all of Spratt's speedy trial arguments, he has failed to establish that his counsel was ineffective under Strickland, that any state court finding under Strickland on this issue was contrary to or an unreasonable application of Strickland, or that his trial counsel's failure to file a pretrial motion to quash was cause to excuse the state court imposed procedural default to review of his speedy trial claim. He is not entitled to relief under Strickland or excused from his procedural default.

B. Failure to Challenge Jury Instruction on Aggravated Rape

Spratt claims that his trial attorney rendered ineffective assistance when he failed to object to the state trial court's incorrect definition of aggravated rape in the jury instructions. He claims that the state trial court used the 2012 definition of aggravated rape that included oral sexual intercourse when that was not included in the definition of aggravated rape when the crimes occurred in 1994.

The State argues that Spratt cannot establish an error because his claim is based solely on his recollection and there is no record proof that an erroneous charge was used. In addition, the State argues that even if the charge was read as Spratt alleges, there was no due process error because there was no allegation or evidence at trial that Spratt engaged in oral sexual intercourse with his victims.

As indicated above, Spratt asserted this claim on post-conviction review and it was rejected by the lower courts and the Louisiana Supreme Court under Strickland. Under the Strickland standard, the state courts resolved that counsel's failure to challenge the charge was neither deficient performance nor prejudicial to the verdict. Spratt failed to prove that there was an

erroneous jury charge and even if there was, he failed to establish that denial of relief was contrary to or an unreasonable application of Strickland.

As an initial matter, Spratt has failed to provide any objective support for his claim that an erroneous charge was read by the state trial court. He has not provided a transcript to establish the error to which he claims counsel should have objected. It is well settled that a habeas petitioner cannot establish a Strickland claim based on speculative and factually unsupported assertions. Ochoa v. Davis, 750 F. App'x 365, 371 (5th Cir. 2018) (quoting Sawyer v. Butler, 848 F.2d 582, 589 (5th Cir. 1988) ("Indeed, '[u]nsupported allegations and pleas for presumptive prejudice are not the stuff that Strickland is made of.'"); Ross, 694 F.2d at 1008 (a court cannot consider a habeas petitioner's bald assertions on a critical issue absent evidence in the record or that are unsupported and unsupportable by anything in the record); see Green v. Johnson, 160 F.3d 1029, 1042 (5th Cir. 1998) ("Mere conclusory allegations in support of a claim of ineffective assistance of counsel are insufficient to raise a constitutional issue.") (citation omitted). Spratt's claim therefore fails to meet any threshold burden under Strickland and fails to prove that the denial of relief was contrary to or an unreasonable application of Strickland.

Spratt's claim also fails, looking beyond his fatal lack of proof, because he has not shown deficient performance or prejudice from his counsel's failure to object. For a jury charge to amount to error and to have warranted objection by counsel, the instructions, when read as a whole, had to have relieved the State of its burden to prove each element of the crime beyond a reasonable doubt in violation of the principles set forth in In re Winship, 397 U.S. 358 (1970). See Francis v. Franklin, 471 U.S. 307, (1985). A reviewing Court must consider whether the specific language involved creates a constitutionally objectionable "mandatory presumption" or "merely a permissive inference" on an essential element of the crime. Franklin, 471 U.S. at 314. In

examining the challenged instruction, the Court does not look at it in "artificial isolation," but must consider it in the "context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (citation omitted). When a jury charge is challenged as erroneous, the question is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." Id. (citation omitted); accord Flowers v. Blackburn, 779 F.2d 1115 (5th Cir. 1986).

By his self-serving, unsupported recollection, Spratt claims that the state trial court read to the jury the definition of aggravated rape as it existed in 2012 when trial was held (rather than 1994 when the rapes occurred) which included a reference to oral sexual intercourse as a component of the underlying rape. Assuming the 2012 definition was read to the jurors, at that time, La. Rev. Stat. Ann. § 14:42 defined aggravated rape as "a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse" occurring without consent under certain circumstances. However, in 1994 when Spratt committed the multiple rapes, the statute clearly did not include reference to "oral" sexual intercourse. Instead, it defined aggravated rape to be "a rape committed upon a person sixty-five years of age or older or where the anal or vaginal sexual intercourse" without consent under the listed circumstances. See State v. Styles, 692 So.2d 1222, 1232 (La. App. 5th Cir. 1997) (referencing the statute).

In assessing prejudice arising from counsel's failure to challenge the erroneous definition and prejudice in terms of a fair trial, the court must consider whether the erroneous definition effected the jury's verdict and the outcome of the trial. Strickland, 466 U.S. at 694; Brecht, 507 U.S. at 623-24; Galvan v. Cockrell, 293 F.3d 760, 764-65 (5th Cir. 2002). To determine prejudice under Strickland and under a due process harmless error analysis, the Court must consider "the instruction as a whole and the trial record." Estelle, 502 U.S. at 72.

As noted, Spratt has failed to provide a transcript or discuss any other aspect of the jury charges to establish that this single error could have tainted the entirety of an otherwise proper instruction to the jury. Considering the trial record, there was no prejudice or likely impact on the jury's verdict because there was no evidence or testimony of oral sex during the course of any of the kidnappings or rapes. Each victim testified about the non-consensual vaginal sexual intercourse they endured and no other type. There is no indication that the jury would have been confused by the type of intercourse Spratt forced upon the victims or that the State was relieved of its burden to prove the elements of the vaginal rapes and kidnappings with which Spratt was charged.

Having reached this conclusion, as did the state courts, this Court cannot find that counsel's alleged failure to object to the allegedly erroneous charge, if any, would have been prejudicial under Strickland. Therefore, the state courts' denial of relief on this claim was not contrary to or an unreasonable application of Strickland. Spratt is not entitled to relief on this claim.

C. Failure to Object to Witness Testimony

Spratt alleges that his trial counsel provided ineffective assistance when he failed to object to the hearsay testimony of two of the State's DNA experts, Anne Montgomery and Gina Pineda, concerning the DNA testing of the victims' rape kits and related lab reports. Citing the Supreme Court's holding in Bullcoming v. New Mexico, 564 U.S. 647 (2011), Spratt claims that the testimony of these lead workers with regard to the lab reports violated the Sixth Amendment Confrontation Clause because neither Montgomery nor Pineda conducted the testing on which the reports relied.

The State argues that trial counsel's decision to not object to the testimony of these witnesses or require the presence of the other analysts should be afforded deference as a matter of

trial strategy. In addition, the State argues that the testimony of these two witnesses did not violate the Confrontation Clause or the mandates of Bullcoming because they each co-signed the reports about which they testified and testified in their capacities as experts which is not prohibited by Bullcoming or Williams v. Illinois, 567 U.S. 50 (2012).

Spratt asserted this claim on post-conviction review. The Louisiana Supreme Court denied relief as to all of his ineffective assistance claims by the state courts under Strickland.

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Under the Confrontation Clause, out-of-court statements are not admissible to prove the truth of the matter asserted unless they fall "within a firmly rooted exception to the hearsay rule." Williams, 567 U.S. at 64 (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980). The Supreme Court has recognized exceptions to the general rule to hold that the Confrontation Clause permits admission of "[t]estimonial statements of witnesses absent from trial . . . only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Crawford v. Washington, 541 U.S. 36, 53-54 (2004). The Court deemed testimonial statements to include "ex parte in-court testimony or its functional equivalent - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." Id. at 51; see Bullcoming, 564 U.S. at 657-58 (defendant has the right to cross-examine the person who actually performed testing or examination of evidence obtained from defendant); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11 (2009) (expert report is "functionally identical" to testimonial statement when presented to prove truth of its content).

The Supreme Court has placed the burden of asserting a timely Confrontation Clause objection on the defendant and has allowed states to adopt procedural rules governing the timing of the State's notice regarding hearsay and a defendant's objections. See Wainwright, 433 U.S. at 86-87; Melendez-Diaz, 557 U.S. at 327. The Supreme Court revisited its approval of the so-called "notice-and-demand procedures," adopting the concept that these procedures "typically 'render . . . otherwise hearsay forensic reports admissible[,] while specifically preserving a defendant's right to demand that the prosecution call the author/analyst of [the] report.'" Bullcoming, 564 U.S. at 666 (quoting Melendez-Diaz, 557 U.S. at 326-27). Thus, the Supreme Court has mandated that notice-and-demand procedures imposed by the states are sufficient to protect a defendant's rights where they "permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report." Melendez-Diaz, 557 U.S. at 326.

Louisiana law incorporates this type of notice-and-demand procedure. Under Louisiana law, forensic laboratories are authorized to provide proof of examination and analysis of physical evidence by providing a certificate from the person conducting the examination or analysis which provides certain particulars related to the transfer of the evidence and the details and results of the examination and analysis. La. Rev. Stat. Ann. § 15:499. When the State intends to introduce a laboratory certificate, the prosecutor must provide written notice of its intent to do so at least 45 days before trial. La. Rev. Stat. Ann. § 15:501. If the State's certificate and notice comply with the provisions of La. Rev. Stat. Ann. § 15:499 and § 15:501, the certificate is admissible and shall be received into evidence as prima facie proof of the facts it contains. La. Rev. Stat. Ann. § 15:500.

Neither Spratt nor the State address whether the prosecution complied with the "notice and demand" provisions. The record reflects, however, that the State identified the DNA analysts to

the defense in court well before trial on February 16, 2012, and the state trial court made note of Spratt's objection.[59] The Court references this exchange in light of the State's contention that Spratt's counsel may have made a strategic decision not to challenge the testimony. As noted by the State, Strickland directs the courts to give great deference to counsel's tactical and strategy decisions related to the presentation of witnesses and evidence. See, e.g., Williams v. Cockrell, 31 F. App'x 832 (5th Cir. 2002).

In addition, Spratt has not presented a basis for counsel to have challenged the testimony of Montgomery and Pineda in light of Bullcoming or Melendez-Diaz. As will be discussed further, the mere fact that these experts testified rather than the co-signing analysts is not enough to establish a Confrontation Clause violation under Supreme Court precedent. As background, the Court will briefly review the testimony of Montgomery and Pineda to determine whether Spratt's counsel had grounds to object.

Anne Montgomery was qualified as an expert in forensic and DNA analysis.[60] Montgomery testified that, in 2003, she was the Technical Leader for the New Orleans DNA Laboratory.[61] She testified about the DNA lab's protocols, including avoidance of contamination of specimens, and her duties as the Technical Leader for the operations of the lab.[62] She testified that, between 2003 and 2005, due to certain funding and to reduce backlogs back to 1986, rape cases with unknown offenders typically were sent to outside labs and typically and those with known suspects would be tested in the DNA lab.[63] She provided detailed testimony about how

[59]St. Rec. Vol. 2 of 12, Minute Entry, 2/16/12.

[60]St. Rec. Vol 10 of 12, Trial Transcript, p. 93, 3/7/12.

[61]Id.

[62]Id. at 94, 100.

[63]Id. at 96-98.

DNA testing works and how reports are generated.[64] The specific testing and report Montgomery addressed was the rape kit for M.L., which included a vaginal swab and blood sample.[65] Montgomery explained that, after the analyst generated an initial report, she as the reviewer, looked at the raw data and formed an opinion on the raw data independent of the analyst, Karen Holmes.[66] If as here a comparison of their independent findings concur, "a report is issued and both the analyst on the case [Holmes] and the reviewer [Montgomery] sign off on that report."[67] It was this August 26, 2003, corroborative report that was introduced by the State at Spratt's trial.

According to Montgomery, the purpose of the testing done was to separate M.L.'s DNA from any other DNA source in the sample.[68] The DNA of one other donor, a male, was isolated. It was compared by separate testing to a known sample from a possible suspect, Abreace Daniels.[69] Daniels was "100%" excluded as a contributor.[70] The male DNA sample was then uploaded into the state DNA index system for posterity.[71] On cross-examination, Montgomery confirmed that when doing these tests "they have no idea who [the police] [a]re trying to match what to."[72]

Gina Pineda testified at Spratt's trial as an expert in DNA analysis.[73] She testified that, in 2005, she worked as a Technical Leader and Assistant Lab Director at ReliaGene Technologies, a private company that performed DNA testing for the New Orleans Police Department.[74] Pineda

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[64] Id. at 100-04.

[65] Id. at 106.

[66] Id. at 111.

[67] Id.

[68] See Id. at 106-07, 112-17.

[69] Id. at 118.

[70] Id. at 119.

[71] Id. at 121-22, 124-25.

[72] Id. at 129.

[73] Id. at 140.

[74] Id. at 141.

explained that, when the lab received blood and vaginal swabs for testing, they would do testing to generate DNA profiles.[75] At trial Pineda reviewed the case files and related reports generated in 2005 from the rape kits for D.K. and S.M.[76] Pineda explained in detail the reports and charts, including the date related to the male DNA profile isolated in each case.[77] Pineda signed both final reports which were turned back over for the police.[78]

On cross-examination, Pineda testified regarding the protocol for handling samples received at the lab and her duties as Technical Leader.[79] She was not certain whether she was present during the testing in these cases.[80] She also testified that the test results are obtained from a machine and the results are reviewed by two qualified analysts who look at the data and draw conclusions.[81] Pineda testified that her signature on the reports signifies that she was one of the two analysts in each case.[82] She testified that her signature indicates that she reviewed the data from the machine and drew her "own independent conclusions from the data that are listed in the report."[83]

In Crawford, the Supreme Court made clear that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Id., 541 U.S. at 59-60, n.9 (citing Tennessee v. Street, 471 U.S. 409 (1985)). The Court has clarified in subsequent cases that Crawford applies to bar testimony of experts and technical

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[75]Id. at 143.

[76]Id. at 141-42, 157-58.

[77]Id. at 153-57.

[78]Id. at 146, 164.

[79]Id. at 174-78.

[80]Id. at 178.

[81]Id. at 179.

[82]Id.

[83]Id.

laboratory reports only when the witness either did not prepare the report and the report seeks to prove defendant's guilt. Williams, 567 U.S. at 79-83. Two of these cases, Melendez-Diaz and Bullcoming, are relied upon by Spratt and as will be discussed, are wholly distinguishable from his case.

In Melendez-Diaz, the Court considered the admissibility of three "certificates of analysis," that were notarized under oath, from a state forensic laboratory which indicated that the substance seized from defendant had been examined and determined to be cocaine. Melendez-Diaz, 557 U.S. at 308. The certificates were relied upon to establish that the contents of the bags of cocaine introduced by the prosecution. The Supreme Court held that the admission of the certificates violated the Confrontation Clause because they were generated solely to provide evidentiary support against this particular defendant and should have been subject to cross-examination. Id. at 311 & 323. The Court concluded that, because the certificates were used to prove the truth of the matter they asserted, i.e. the substance was cocaine, the certificates were "testimonial statements" that could not be introduced unless the authors were subject to cross-examination. Id. at 311 & 317.

In Bullcoming, the Supreme Court considered the admissibility of forensic report certifying the alcohol concentration of the defendant's blood sample, which placed it above New Mexico's legal limit for purposes of defendant's conviction for driving while intoxicated. Bullcoming, 564 U.S. at 651-653. Instead of calling the analyst who signed and certified the report, the prosecution called another scientist "who had neither observed nor reviewed" the analysis in the report. Id. at 655. The Supreme Court held that the report was testimonial and could not be used as substantive evidence against the defendant unless the analyst who prepared and certified the report was subject to confrontation. Id. at 657-58 & 665; see Williams, 567 U.S. at 66. The Court concluded that,

because the report was created to "prove a fact at a criminal trial," the defendant had the right "to be confronted with the analyst who made the certification." Id. at 652 & 657.

In Williams, referenced by the State in its opposition, the Supreme Court distinguished Bullcoming and Melendez-Diaz with respect to DNA reports and related expert testimony. In Williams, the Court considered the admissibility of the expert testimony of a forensic specialist at the state lab who testified that she matched a DNA profile produced by an outside laboratory to a profile the state lab produced using a sample of the defendant's blood. The outside lab had prepared a DNA profile report based on the rape victim's vaginal swab. The defendant challenged the forensic specialist's expert testimony about the outside lab report when she was not involved in the testing or preparation of that report. The Williams Court found no Confrontation Clause violation because the "expert witness referred to the report not to prove the truth of the matter asserted in the report, i.e., that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood." Id. at 79.

The Williams Court distinguished Bullcoming and Melendez-Diaz because those cases involved reports prepared and signed by non-testifying analysts created and admitted for the substantive purpose of proving the truth of the matter asserted in each, which was a fact central to that particular defendant's guilt. Williams, 567 U.S. at 66. In the Williams case, the Court concluded that the outside lab report "was not to be considered for its truth but only for the 'distinctive and limited purpose' of seeing whether it matched something else." Id. (quoting Street, 471 U.S. at 417). The relevance of the match could later be "established by independent circumstantial evidence" proving that the sample used by the outside lab was taken from the crime scene. Id. at 79.

The same is true in Spratt's case. The testimony of Montgomery and Pineda do not fit in the limitations of either Bullcoming or Melendez-Diaz. Notably, each of these experts testified that she had a specific role in assessing the raw DNA data and formulating the conclusions in the reports they each signed and discussed in their respective testimony. In such a case, there is no Confrontation Clause violation. Unlike the witnesses/reports in Bullcoming and Melendez-Diaz, Montgomery and Pineda each participated in the assessment and calculations included in their signed reports; they were preparers not just figureheads and competent to testify as to the content of the reports. In addition, for the same reasons, the supervisor of a DNA lab can testify as an expert regarding the results in a DNA report without violating the Confrontation Clause when the supervisor has a "a personal connection to the scientific testing and actively reviewed the results of the forensic analyst's testing and signed off on the report." Williams v. Vannoy, 669 F. App'x 207, 208 (5th Cir. 2016) (per curiam) (citing Bullcoming, 564 U.S. at 652); Grim v. Fisher, 816 F.3d 296, 310-11 (5th Cir. 2016) (finding that some involvement is sufficient because the Supreme Court has not explained degree of involvement that a testifying witness must have under Bullcoming). This is exactly what occurred in Spratt's case when Montgomery and Pineda testified.

In addition, as in Williams, neither Montgomery's nor Pineda's testimony nor the reports they introduced were prepared or admitted as "critical evidence" of Spratt's guilt. The testimony and reports were not used to identify Spratt, but instead were introduced "only to establish that the report contained a DNA profile." Williams, 567 U.S. at 79. Montgomery introduced a DNA profile report in M.L.'s case that merely isolated a male DNA profile. She made no comparisons to any sample of Spratt's DNA nor did she testify that the DNA profile they isolated matched that of Spratt. To the extent she compared that profile to exclude Daniels, she specified her

involvement in that testing and comparison and therefore satisfied any Confrontation Clause right Spratt may have had related to that resolve.

The same is true of Pineda. She introduced two reports for D.K. and S.M. in which she participated in assessing the data and reaching the conclusions that isolated an unidentified male DNA profile. Pineda made clear that the results were simply turned over to police. Her testimony contained nothing to indicate that she or her reports could speak to Spratt's guilt or that she determined the profile to match that of Spratt.

Thus, Spratt has not established a Confrontation Clause violation arising from the testimony of the experts Montgomery and Pineda to which his trial counsel should have objected. Spratt cannot establish that his counsel acted deficiently or that his failure to object prejudiced the outcome of the case. Without this showing, he also has not demonstrated that the state courts' denial of relief on this claim was contrary to or an unreasonable application of Strickland. Spratt is not entitled to relief on this claim.

VII. Recommendation

For the foregoing reasons, it is **RECOMMENDED** that Jimmie Spratt's petition for issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 be **DENIED** and **DISMISSED WITH PREJUDICE**.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation **within fourteen (14) days** after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will

result from a failure to object. Douglass v. United Servs. Auto. Assoc., 79 F.3d 1415, 1430 (5th Cir. 1996).[84]

New Orleans, Louisiana, this 15th day of June, 2020.

KAREN WELLS ROBY
CHIEF UNITED STATES MAGISTRATE JUDGE

[84]Douglass referenced the previously applicable ten-day period for the filing of objections. Effective December 1, 2009, 28 U.S.C. § 636(b)(1) was amended to extend the period to fourteen days.