

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STANLEY JOHNSON,)
)
) Petitioner,)
)
 v.) No. 4:01 CV 1229 CAS
) DDN
LARRY ROWLEY,)
)
) Respondent.)

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

This matter is before the court upon the petition of Missouri state prisoner Stanley Johnson for a writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to the undersigned United States Magistrate Judge for review and a recommended disposition in accordance with 28 U.S.C. § 636(b). For the reasons set forth below, the undersigned recommends denying habeas relief.

On December 1, 1997, in the Circuit Court of St. Louis County, petitioner Johnson was convicted of burglary in the second degree, stealing credit cards, and tampering in the first degree. (Docs. 4 at 1 and 8 at 1.) At the close of the State's evidence, petitioner moved the court for a judgment of acquittal. (Doc. 8.) Petitioner alleged that the State failed to establish sufficient evidence on all of the elements of the alleged crime. (Id.) Petitioner's motion was denied. (Doc. 4 at 6.) Petitioner was sentenced as a prior and persistent offender to two concurrent terms of 20 years imprisonment for burglary and tampering, and a consecutive term of 10 years imprisonment for stealing credit cards. (Docs. 4 at 1 and 8 at 1.)

Thereafter, petitioner filed a direct appeal in the Missouri Court of Appeals. (Doc. 4 at 2.) Petitioner argued that the trial court erred in precluding him from endorsing two witnesses, denying his motion for judgment of acquittal, and admitting his prior convictions. (Docs. 4 at 2 and 8 at 3, 7, 9.) On May 4, 1999, petitioner's convictions were affirmed. (Doc. 4 at 2.)

Petitioner then filed a motion for post-conviction relief in the Circuit Court, the denial of which was affirmed by the Missouri Court of Appeals. (Id. at 3); Johnson v. State, 36 S.W.3d 419 (Mo. Ct. App. 2001). Petitioner alleged ineffective assistance of trial counsel. (Id.)

On August 14, 2001, petitioner filed his pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this court. (Doc. 4.) Petitioner alleges four grounds for federal habeas relief:

1. The trial court erred when it precluded defense counsel from endorsing witnesses Diane Johnson and Ethel Ellis on the second day of trial. (Id. at 6(A).) Petitioner argues this admission violated due process, equal protection, and his right to an impartial jury and a fundamentally fair trial. (Id.)

2. The trial court erred when it denied the motion for judgment of acquittal on the burglary in the second degree charge. (Id.) Petitioner argues that the State failed to "adduce sufficient evidence from which the jury could conclude that petitioner knowingly unlawfully entered Room 416 of Marillac Hall¹" (Id.) Petitioner argues this admission violates due process and equal protection.

3. The trial court committed plain error in admitting petitioner's prior convictions. (Id. at 6(B).) Petitioner argues this admission violated due process, equal protection, and his right to an impartial jury and a fundamentally fair trial. (Id.)

4. The Circuit Court erred in denying petitioner's Rule 29.15 post-conviction motion regarding ineffective assistance of trial counsel. (Id. at 6(C).) Petitioner alleges trial counsel was ineffective because he failed to investigate, subpoena, and call to testify Carl Jones. (Id. at 6(C)-(D).) In addition, trial counsel was ineffective because he failed to timely endorse, subpoena, and call to testify defense witnesses Diane Johnson and Ethel Ellis. (Id.) Petitioner argues these failures violate due process, equal protection, and his right to an impartial jury and a fundamentally fair trial. (Id.)

¹Under Missouri Revised Statute § 569.170.1, burglary in the second degree is defined as knowingly entering unlawfully or knowingly remaining unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.

EXHAUSTION AND STANDARD OF REVIEW

For a state prisoner to obtain relief under § 2254, he must fully exhaust all remedies available in the state courts for each ground he intends to present in federal court. 28 U.S.C. § 2254(b)(1)(A), (c); Coleman v. Thompson, 501 U.S. 722, 731 (1991). State prisoners must give the state courts a full opportunity to resolve any constitutional issues by invoking one complete round of the state's established hearing and appellate review process in order to proceed on a federal habeas corpus claim. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Failure to raise a claim in the state circuit and appellate courts erects a procedural bar to relief on that claim in this court. Coleman, 501 U.S. at 734-35; Sweet v. Delo, 125 F.3d 1144, 1149-51 (8th Cir. 1997), cert. denied, 523 U.S. 1010 (1998). In the its response, the state concedes that Johnson's claims are exhausted. (Doc. 8 at 2.) Respondent does not argue that any of petitioner's claims are procedurally barred. Therefore, the undersigned has reviewed the merits of each.

Federal habeas relief may not be granted on any claim that was adjudicated on the merits in state court unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d). A state court's decision is contrary to clearly established law, if the controlling case law requires a different outcome either because of factual similarity to the state case or because general federal rules require a particular result in a particular case. Tokar v. Bowersox, 198 F.3d 1039, 1045 (8th Cir. 1999).

The issue a federal habeas court faces when deciding whether a state court unreasonably applied federal law is "whether the state court's application of clearly established federal law was objectively

unreasonable." Williams v. Taylor, 529 U.S. 362, 409 (2000) (plurality opinion). The Supreme Court has distinguished an unreasonable application of federal law from an incorrect one. Id. at 365. The court may not grant relief simply because it concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Id. A federal habeas court may only grant relief if that application is unreasonable. Id. Further, a state court's determination is presumed to be correct, subject to rebuttal by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

DISCUSSION

The Missouri Court of Appeals' rendition of what the trial evidence showed is as follows:

Viewed in the light most favorable to the verdict, the facts are as follows. On April 2, 1996, Defendant was at the home of Gordon Jenkins (Jenkins). Jenkins owned two vehicles which were parked behind his house, a 1982 Lincoln (Lincoln) and a 1987 Ford Tempo (Ford). Only the Ford had license plates. When Jenkins awoke the following morning, the Lincoln and his keys to the Lincoln were missing, along with the Ford license plates. Jenkins did not give anyone permission to use the Lincoln or to remove the Ford license plates. Later that day, he reported to the police the Lincoln and the Ford license plates were stolen.

On that afternoon, Defendant drove Jenkins's Lincoln to the campus of the University of Missouri-St. Louis (UMSL). That afternoon, Maxine Christian (Christian), an employee of UMSL in the School of Education, was in her office on the fourth floor of Marillac Hall. About 4:30 that afternoon, Christian walked down the hall from her office. Her office door was closed, but unlocked; her wallet, containing credit cards, was in her purse in the bottom right hand drawer of her desk. Upon returning to her office approximately ten minutes later, she did not notice anything missing. Christian left her office at approximately 5:15 p.m. to teach her class, taking her purse with her. After teaching her class, at about 8:10 that evening, Christian noticed her wallet was missing.

About 5:00 p.m. the same day, Brandy Berry (Berry), an employee in the UMSL Child Development Center (Center) which adjoins Marillac Hall, noticed Defendant walking in a hall

frequented only by the teachers in the Center. Berry approached Defendant and asked him if he needed assistance. Defendant replied he was there to pick up his nephew Michael Thomas. When Berry told Defendant the Center had no child by that name and that he could speak to a teacher, Defendant exited the building. Berry then called the police and reported "someone suspicious."

Officer McAllister of the UMSL police responded to the call. Upon seeing Officer McAllister, Defendant got into the Lincoln. The Ford's stolen license plates were on the Lincoln. Officer McAllister placed the Defendant under arrest and read him his Miranda rights. During a search of the Lincoln, Officer McAllister found Christian's wallet and credit cards.

Defendant, the sole witness for the defense, testified at trial that Jenkins gave him permission to use the Lincoln. On cross-examination, State questioned Defendant about his prior convictions, inquiring as to the types of crimes, the places, the dates, and the sentences received.

(Resp. Ex. E at 2-3.)

GROUND 1

Petitioner's first claim is that the trial court erred when it precluded defense counsel from endorsing witnesses Diane Johnson and Ethel Ellis on the second day of trial. (Doc. 4 at 6.) Petitioner raised this claim in his direct appeal. The Missouri Court of Appeals denied petitioner's claim holding that:

In his first point, Defendant argues the trial court erred when it precluded the defense from endorsing as witnesses Defendant's two sisters, Diane Johnson and Ethel Ellis, on the morning of the second day of trial. Defendant contends the testimony of these two witnesses was essential to his defense

The trial court denied Defendant's request because "it would work an undue hardship and prejudice on the State and create surprise." After that denial, Defendant presented an offer of proof that these witnesses would testify Jenkins gave Defendant permission to use his Lincoln. However, in Defendant's offer of proof, he did not offer an explanation for the failure to disclose the names of these witnesses in discovery. The trial court overruled the offer of proof.

[Missouri Supreme Court] Rule 25.05(A)(2) provides that, upon the state's written request, a defendant must disclose witnesses he intends to call at trial. Here, State filed such a request. Under Rule 25.16, a trial court has the discretion to exclude evidence for non-compliance with "an applicable discovery rule." Trial courts, however, have "broad discretion in permitting the late endorsement of witnesses." State v. Gardner, 955 S.W.2d 819, 825 (Mo. App. E.D. 1997). "If the witness is not timely disclosed, some explanation should be given as to why it would be inappropriate to enforce . . . the rule requiring disclosure." State v. Miller, 935 S.W.2d 618, 624 (Mo. App. W.D. 1996).

We review the preclusion of witnesses for "an abuse of discretion which results in fundamental unfairness." State v. Jordan, 978 S.W.2d 36, 39 (Mo. App. E.D. 1998) (internal quotation marks excluded) (quoting State v. Bolen, 731 S.W.2d 453, 460 (Mo. App. E.D. 1987)). To determine fundamental unfairness, we must examine the facts and circumstances of the case including: "(1) the nature of the charge; (2) the evidence presented; and (3) the role the excluded evidence would have played in the defense's theory." Id. (internal quotations omitted) (quoting State v. Lopez, 836 S.W.2d 28, 32 (Mo. App. E.D. 1992)). There is no fundamental unfairness where "[d]efense counsel gave no reasonable justification for the late endorsement" and "the testimony of the witness would have been cumulative at best." State v. Bowman, 783 S.W.2d 506, 507 (Mo. App. E.D. 1990). Furthermore, there is no abuse of discretion, as a matter of law, "when the court refuses to allow the late endorsement of a defense witness whose testimony would have been cumulative, collateral, or would have unfairly surprised state." Gardner, 955 S.W.2d at 825.

We find Jordan to be directly on point in this case. In Jordan, the trial court denied the defendant's request for endorsement on the second day of trial, then sustained its decision after defendant's offer of proof. Jordan, 978 S.W.2d at 39-40. There, the defendant knew his uncle was a likely witness and knew the uncle's whereabouts, which "support[ed] a requirement for requested disclosure." Id. at 39. We concluded no abuse of discretion and no fundamental unfairness resulted from the trial court's decision to preclude defendant's uncle from testifying. Id. at 40.

Here, Defendant failed to disclose witnesses prior to trial and the trial court denied his trial request for the endorsement of those witnesses. We find the trial court was within its discretion in denying Defendant's late endorsement of witnesses. It is implausible that Defendant would not have known, prior to trial, that his two sisters would testify on

his behalf and where they could be located. Notably, Defendant did not provide an explanation for his failure to disclose the names of the witnesses during discovery. Finally, the testimony of Defendant's two sisters would have been cumulative of his testimony that Jenkins gave him permission to use the Lincoln. Point denied.

(Resp. Ex. E at 3-5, footnote omitted.)

The issue of the admissibility of evidence raised in Ground 1 is a state law question. Estelle v. McGuire, 502 U.S. 62, 67-70 (1991). Rulings on the admission or exclusion of evidence in state trials rarely rise to the level of a federal constitutional violation. Nebinger v. Ault, 208 F.3d 695, 697 (8th Cir. 2000). Only the exclusion of critical, reliable and highly probative evidence will violate due process. Id.

The Missouri Court of Appeals ruled that the testimony of petitioner's two sisters was cumulative to petitioner's testimony. Therefore, the evidence was not critical or highly probative. Gordon Jenkins, the owner of the car, testified that petitioner's two sisters were not among the four people present at his house the night the car disappeared. (Resp. Ex. A at 183.) Gordon Jenkins further testified at trial that he did not give petitioner permission to take his car. (Id. at 178-80.) In addition, the sisters' testimony would have been unreliable because of their relationship to petitioner. The fact that petitioner did not disclose the names of his two sisters during discovery is further evidence that their testimony would have been unreliable. Petitioner does not dispel these inferences, because he gives no justification for his failure to disclose.

Petitioner cites Taylor v. Illinois, 484 U.S. 400 (1988), for the principles regarding the exclusion of material testimony. (Doc. 11 at 3.) Petitioner's reliance on Taylor is misplaced. In Taylor, the defendant violated a state procedural rule by failing to identify a particular defense witness in response to a pretrial discovery request. Id. at 414. The trial court sanctioned this violation by refusing to allow the undisclosed witness to testify. Id. The court rejected the defendant's argument that, under the Compulsory Process Clause of the Sixth Amendment, preclusion is never a permissible sanction for a

discovery violation. Id. The court's holding was not that preclusion is permissible every time a discovery rule is violated. Id. at 413. However, the trial court concluded that Taylor's discovery amounted to willful misconduct and was designed to attain a tactical advantage. Id. at 417. Based on these findings, the court determined that regardless of whether prejudice to the prosecution could have been avoided by a lesser penalty, the severest sanction was appropriate. Id.

Here, the trial court held that the endorsement would work "an undue hardship and prejudice on the State and create surprise." (Resp. Ex. E at 3.) Petitioner failed to give any explanation regarding the omission of the surprise witness. The trial court could have assumed that the omission was willful and motivated by a desire to attain a tactical advantage. Therefore, petitioner fails to show that the Missouri Court of Appeals' decision is contrary to, or involved an unreasonable application of Taylor.

Ground 1 is without merit.

GROUND 2

Petitioner's second ground is that the trial court erred in denying his motion for judgment of acquittal on the burglary in the second degree charge. (Doc. 4 at 6.) Petitioner argues that there was insufficient evidence that he knowingly unlawfully entered 416 Marillac Hall. (Id.)

The federal habeas standard for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). The Missouri Court of Appeals applied this standard in reviewing petitioner's claim:

In the case before us, the evidence is sufficient to allow a reasonable juror to find that Defendant knowingly and unlawfully entered Christian's office at UMSL. Defendant did not have Christian's permission and was not affiliated with Marillac Hall or the offices therein. Furthermore, upon entering the office, it was apparent the office is not a public place. Point denied.

(Resp. Ex. E at 6).

Under Missouri law, entering or remaining unlawfully occurs when an individual is not licensed or privileged to do so. Mo. Rev. Stat. § 569.010(8). A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. Id.

Unauthorized entrance may be proven by circumstantial evidence. State v. Mayes, 868 S.W.2d 541, 544 (Mo. Ct. App. 1993). In Mayes, the court ruled the evidence was sufficient for a reasonable juror to find the defendant guilty beyond a reasonable doubt of the crime of burglary even though no one saw the defendant in the stockroom. Id. at 545.

Here, the evidence adduced at trial established that petitioner was not an UMSL student, and that Dr. Christian's office was located on the fourth floor of Marillac Hall on the UMSL Campus. (Resp. Ex. A at 223.) Further, the door to Dr. Christian's office was closed but unlocked and Christian's wallet was in a purse in an unlocked drawer. (Id. at 226-27.) In addition, it was apparent that the office was not open to the public and Dr. Christian gave no one permission to enter her office or take those items. (Id. at 240-41.) Petitioner lied about his name, social security number, and date of birth when Officer McAllister confronted him in the UMSL parking lot. (Id. at 265-68.) Officer McAllister found Dr. Christian's black wallet under where Johnson was seated in Jenkins' Lincoln Continental. (Resp. Ex. A at 272-73.) It is clear from this evidence that any rational trier of fact could have found beyond a reasonable doubt that petitioner knowingly and unlawfully entered 416 Marillac Hall. Petitioner fails to show that the Missouri Court of Appeals' decision is contrary to, or involved an unreasonable application of Jackson.

Ground two is without merit.

GROUND 3

Petitioner's third claim is that the trial court erred in admitting petitioner's prior convictions. Petitioner raised this claim in his direct appeal and the Missouri Court of Appeals denied the claim holding that:

In his third point, Defendant argues the trial court committed plain error under Rule 30.20 when it allowed State to introduce sixteen prior convictions of Defendant. Defendant contends the cumulative impact of the use of the prior convictions constitutes the impermissible introduction of propensity evidence, rather than proper impeachment.

Under plain error review, an appellate court will set aside a trial court ruling only if it results in manifest injustice or miscarriage of justice. State v. Yates, 869 S.W.2d 270, 271-72 (Mo. App. E.D. 1994). The state has an absolute right to impeach a defendant's credibility through the use of prior convictions. State v. Nicely, 909 S.W.2d 669, 671 (Mo. banc 1995); Section 491.050. The prosecution can elicit the nature, date, and place of each crime and the sentence received, but cannot delve into the details of the crime. State v. Aye, 927 S.W.2d 951, 955 (Mo. App. E.D. 1996).

Here, on cross-examination of Defendant, the prosecution only elicited the nature, date, and place of the prior crimes and the sentences Defendant received on them. The prosecution did not question Defendant as to details of each crime. Defendant's credibility was an issue because he asserted a version of events different from the other witnesses at trial. We, therefore, find no plain error. Point denied.

(Resp. Ex. E at 7 (footnote omitted)).

The issue of the admissibility of evidence, again, is a state law question. Estelle, 502 U.S. at 67-70. In Missouri, whether the probative value outweighs the prejudicial effect of proffered evidence is a question on which a trial court has wide latitude. State v. Swigert, 852 S.W.2d 158, 163 (Mo. Ct. App. 1993). The United States Supreme Court has emphasized that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle, 502 U.S. at 67. Therefore, this court is limited to addressing whether petitioner's constitutional rights were violated

by admission of the evidence. Rainier v. Dep't of Corrs., 914 F.2d 1067, 1072 (8th Cir. 1990). The court inquires not whether the trial court erred in admitting the particular testimony, but whether the admission resulted in a trial so fundamentally unfair as to deny petitioner due process of law. Id. The court must look at the totality of the facts in the case and analyze the fairness of the trial. Id. Further, to justify a grant of habeas corpus, the error must be so gross, conspicuously prejudicial, or otherwise of such magnitude that it fatally infected the trial and failed to afford petitioner the fundamental fairness which is the essence of due process. Mercer v. Armontrout, 844 F.2d 582, 587 (8th Cir. 1988).

The undersigned concludes under the totality of the circumstances that the admission of petitioner's prior convictions did not deny him the right to a fair trial. The state introduced the prior convictions to impeach petitioner as a witness. Petitioner was not unduly prejudiced because the state did not provide factual details of his crimes or dwell on the prior convictions. Further, even if the trial court erred in admitting the evidence, the effect upon the trial was negligible. The circumstantial evidence linking the petitioner to the stolen wallet and the testimony provided by Gordon Jenkins was sufficient to convict petitioner on all three counts. Therefore, admission of petitioner's prior convictions did not violate his constitutional rights.

Ground three is without merit.

GROUND 4

Petitioner's fourth ground is that the trial court erred in denying the Rule 29.15 post-conviction motion regarding the ineffective assistance of trial counsel. (Doc. 4 at 8.) Petitioner alleges trial counsel was ineffective because he failed to timely endorse his two sisters as witnesses and failed to investigate, subpoena, and call a third witness, Carl Jones. (Id.)

To prevail on this claim, petitioner must demonstrate that his attorney's performance fell below an objective standard of

reasonableness, and that the deficient performance was prejudicial in that the result of the proceeding would have been different absent the error. Strickland v. Washington, 466 U.S. 668, 687 (1984). Petitioner must overcome a strong presumption that counsel has rendered constitutionally effective assistance. Id. at 690. Counsel is given wide latitude in making tactical decisions. Id. at 689. An attorney's decision not to raise an unwinnable issue does not constitute ineffective assistance of counsel. Horne v. Trickey, 895 F.2d 497, 500 (8th Cir. 1990).

a. Testimony of petitioner's two sisters

On direct appeal, the Missouri Court of Appeals denied petitioner's claim concerning the proffered testimony of petitioner's two sisters, holding that:

Johnson would have testified that after the car had stalled, Movant telephoned her and asked her to call the victim and tell him the car was fine and was being fixed. Ellis would have testified that after Movant was arrested, he called her and requested that she call the victim and tell him where he could find his car. Movant claims the testimony of these witnesses would have aided in his defense against the first-degree tampering charge.

In denying an evidentiary hearing, the motion court found that this testimony would not have provided Movant with a viable defense in that it was inadmissible, self-serving hearsay and would provide, at best, only impeachment material.

Movant argues that this testimony is subject to the excited utterances exception to the hearsay rule, and as such, is admissible. The findings and conclusions of the trial court are not clearly erroneous.

To qualify under the excited utterances exception, the utterance must have been made as a spontaneous reaction to a startling event, and the event must have been sufficiently startling so as to "render inoperative the normal reflective thought processes of an observer." State v. Meyer, 694 S.W.2d 853, 856 n.2 (Mo. App. 1985). Since the utterance is spontaneous, made under the complete control of the senses, and made within a period of time such that self-interest does not come to bear on the situation, it is deemed reliable. State v. Post, 901 S.W.2d 231, 234 (Mo. App. 1995).

"Reflective thought is the antithesis of the excited utterance, which requires as its root, spontaneity." Id. at 235.

The testimony sought to be admitted here under the excited utterances exception was not spontaneous. Neither of the claimed "utterances" was contemporaneous to either the car stalling or the arrest of Movant. In both instances, Movant's phone calls to his sisters represents a reflective thought about the situation. Id. As such, the testimony cannot be classified as an excited utterance and lacks reliability.

Moreover, the testimony does not fall within any other recognized exception to the hearsay rule and is, therefore, inadmissible hearsay. An ineffective assistance of counsel claim cannot be premised upon counsel's failure to offer inadmissible evidence. State v. Chambers, 891 S.W.2d 93, 110 (Mo. banc 1994). Point two is denied.

(Resp. Ex. J at 5-6.) Petitioner does not demonstrate that the Missouri Court of Appeals' decision was contrary to Strickland. Petitioner has failed to establish his attorney's deficient performance was prejudicial because the result of the proceeding would not have been different absent the error. The Missouri Court of Appeals ruled that the testimony of petitioner's two sisters was inadmissible hearsay. Therefore, petitioner's ineffectiveness of counsel claim is unpersuasive. If petitioner fails to make an adequate showing on either of the two prongs of his ineffectiveness claim, the court may dispose of the claim without examining the other prong. Strickland, 466 U.S. at 689. Therefore, it is unnecessary to address whether the performance of petitioner's attorney fell below an objective standard of reasonableness.

b. Testimony of Carl Jones

The Missouri Court of Appeals denied petitioner's claim concerning the proffered testimony of Carl Jones, holding that:

Jones' testimony would not provide a viable defense in that his testimony was not credible and was in direct contravention of portions of Movant's testimony. Moreover, the motion court found that trial counsel's testimony conflicted with the testimony of Movant that he informed counsel of Jones' potential testimony and willingness to come to court.

Reviewing the transcript of the evidentiary hearing, we hold that the findings and conclusions of the motion court are not clearly erroneous. Jones' testimony would not have provided Movant with a viable defense as Jones lacks credibility for a myriad of reasons.

(Resp. Ex. J at 4.) The court noted that Jones has five different aliases, is incarcerated, has served time in prison, is a good friend of Movant, and was getting high at the time of the events he would have testified about. (Id.)

The cardinal issue before this court regarding Jones' testimony is whether the Rule 29.15 hearing court reasonably determined that Johnson's trial counsel's failure to secure Jones as a defense witness amounted to constitutionally ineffective assistance of counsel. That court's finding that petitioner's witness was not credible is entitled to the presumption of correctness under § 2254(e)(1).² See Bailey v. Weber, 295 F.3d 852, 855 (8th Cir. 2002). Petitioner has not rebutted the presumption by clear and convincing evidence, as required by § 2254(e)(1).

In this case, petitioner has failed to sustain the Strickland test. A review of the record from the Rule 29.15 motion and the observations of the Missouri Court of Appeals leads to the conclusion that the Missouri courts' adjudication of Johnson's claim was neither contrary to, nor an unreasonable application of Strickland, nor based on an unreasonable determination of the facts. Further, counsel's decision to not endorse Jones as a witness can be viewed as a tactical decision because Jones was not a reliable witness. In sum, petitioner has not shown that the state courts' decision to deny him relief on this ground was objectively unreasonable.

Ground four is without merit.

For these reasons, the habeas petition of Stanley Johnson should be denied.

²The state court's determination of a factual issue is presumed to be correct, and that presumption of correctness can only be rebutted by clear and convincing evidence. 28 U.S.C § 2254(e)(1).

The parties are advised they have ten days in which to file written objections to this Report and Recommendation. The failure to file timely written objections will waive the right to appeal issues of fact.

A handwritten signature in black ink that reads "David D. Noce". The signature is written in a cursive style with a large, looping 'D' at the beginning and a long, sweeping tail at the end.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this 29th day of April, 2004.