UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1477
Summary Calendar

ERSKINE LAVERNON THOVER ALLEN, JR.,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director
Texas Dept. of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
(CA5-90-223-C)

(March 4, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Erskine Lavernon Thover Allen, Jr. appeals from the district court's denial of habeas relief. We **AFFIRM**.

I.

In November 1980, Charlene Harden heard someone knocking on the door of her apartment. When she answered the door, she saw a man, whom she later identified as Allen, and recognized him as the UPS employee who had delivered a package to her four days earlier.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

She remembered the delivery, because he commented at the time that she should not have come to the door in what she was wearing. After Harden denied Allen's requests to use the telephone and restroom, he forced his way into her apartment, and pulled a silver-colored gun with white handles from his pocket. Using the gun in a threatening manner, he forced Harden to disrobe and perform oral sex upon him. Afterwards, he forced her to have sexual intercourse with him. Allen then asked Harden if she had any valuables or money. She told him that she had $50, and asked him not to take it; but he pointed the gun at her and began counting down from five, so she gave him the money. Allen then ordered Harden to go into the bathroom, and secured the bathroom door by placing a chair under the doorknob. After three or four minutes, Harden opened the bathroom door and found that Allen had left her apartment. She subsequently reported the attack to the police, and Allen was arrested.[2]

In June 1981, a Texas state jury found Allen guilty of aggravated rape and sentenced him to 99 years imprisonment. The jury implicitly rejected Allen's defense of mistaken identity. In addition, the state trial court affirmatively found that a deadly weapon (a handgun) was used during the commission of the offense. The Texas Court of Appeals affirmed Allen's conviction and sentence on direct appeal. ***Allen v. State***, 658 S.W.2d 642 (Tex. Ct. App.

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[2] Allen was charged with aggravated rape and aggravated robbery, but the trial court granted the prosecutor's motion to dismiss the aggravated robbery charge prior to trial.

1983). Allen then filed a petition for discretionary review with the Texas Court of Criminal Appeals, which was refused.

Allen filed two state applications for habeas corpus relief. The first was refused by the Texas Court of Criminal Appeals in July 1982, because Allen's direct appeal was pending. However, in December 1988, that court granted partial relief on Allen's second application, and reformed the judgment of conviction to delete the finding that a deadly weapon was used.

Allen sought federal habeas relief in November 1990. The magistrate judge found an unexhausted claim in Allen's petition, and recommended dismissal without prejudice for failure to exhaust state court remedies. Allen then amended his petition to withdraw his unexhausted claim.

After an evidentiary hearing, the magistrate judge entered findings and conclusions and recommended denial of Allen's petition. Over Allen's objections, the district court adopted the findings, conclusions, and recommendation, and dismissed the petition with prejudice. The district court issued a certificate of probable cause for an appeal.

II.

Allen's court-appointed attorney has filed a brief, contending that Allen was improperly prejudiced by the trial court's refusal to allow him to discover evidence which might have tended to be exculpatory. In addition, Allen was granted permission to file a supplemental *pro se* brief, in which he raises the same issue, as well as six others: (1) prosecutorial bias and misconduct; (2)

failure to identify the relationship between one of the jurors and the victim; (3) admission of evidence seized in violation of the Fourth Amendment; (4) introduction of false testimony bolstered by false evidence; (5) ineffective assistance of trial counsel; and (6) ineffective assistance of habeas counsel.

A.

Allen makes several related contentions with respect to his first claim, regarding the testimony and report of Dr. Cook, a Texas Department of Public Safety chemist. First, he asserts error in the admission of Dr. Cook's testimony and report. Next, he contends that the prosecutor's failure to preserve specimens obtained from the victim during a medical examination conducted shortly after she was raped, the prosecutor's willful withholding of Dr. Cook's testimony and report until trial, and the trial court's denial of his motion to compel the victim to submit to blood tests during the trial, deprived him of the opportunity to conduct further tests in order to discover results which may have held exculpatory value.

1.

The state trial court's decision to allow Dr. Cook to testify, even though he was not listed as a witness by the State, is a matter of state law, and does not present any grounds for federal habeas relief. *See* ***Moreno v. Estelle***, 717 F.2d 171, 179 (5th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984) (federal courts do not review questions of state procedure).

2.

Allen next contends that the prosecutor's withholding of Dr. Cook's testimony and report, and failure to preserve the specimens, deprived him of a fair trial, because he was unable to conduct additional tests which might have disclosed exculpatory evidence. The district court analyzed this issue as a possible ***Brady***[3] violation, and Allen presents it as such on appeal.

"*Brady* applies to situations involving the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." ***United States v. Stephens***, 964 F.2d 424, 435 (5th Cir. 1992) (citations and internal quotations omitted). "A *Brady* claim involves three elements: (1) the prosecution's suppression or withholding of evidence; (2) which evidence is favorable, and (3) material to the defense." ***Id***. Evidence is material when a reasonable probability exists that its disclosure would have caused a different outcome at trial. ***United States v. Bagley***, 473 U.S. 667, 682 (1985). The omitted evidence must be evaluated in the context of the entire record. ***United States v. Agurs***, 427 U.S. 97, 112 (1976).

The prosecutor did not identify Dr. Cook as a witness until trial, and at that time disclosed Dr. Cook's report to Allen's attorney, Holder. Holder objected to Dr. Cook's report and testimony on the ground of surprise. However, Holder admitted to the trial court that he had previously talked to Dr. Cook and knew what Cook's report contained. The trial court overruled Allen's

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[3] ***Brady v. Maryland***, 373 U.S. 83 (1963).

objection to Dr. Cook's testimony, and denied his motion to compel the victim to submit to a blood test.

At the federal evidentiary hearing, Holder testified that he was surprised by the prosecutor's disclosure of Dr. Cook's report and his presence as a witness. However, Holder testified that he had called Dr. Cook prior to Allen's trial about an unrelated matter, to discuss a medical article regarding blood tests, and conceded that he had, in effect, told the trial judge that he was prepared to cross-examine Dr. Cook. Further, Holder admitted that he was aware of the contents of Dr. Cook's report.

Because evidence that is disclosed during trial is not the proper subject of a ***Brady*** claim, our inquiry with respect to Dr. Cook's testimony and report "is whether [Allen] was prejudiced by a tardy disclosure)) if he received the material in time to put it to effective use at trial, his conviction will not be reversed simply because the material was not disclosed as early as it might have, or should have, been)) such that the fairness of the trial was impugned." ***Stephens***, 964 F.2d at 436.

Dr. Cook testified that his tests of the specimens indicated the presence of spermatozoa and seminal fluid. However, as Holder admitted at the federal evidentiary hearing, Dr. Cook's testimony merely indicated that the victim had had sexual contact, and did not prove anything else. Dr. Cook's testimony and report contain no exculpatory material. Thus, the only issue with respect to the tardy disclosure of Dr. Cook's testimony and report is whether the delay in disclosure violated Allen's due process rights by

depriving him of the opportunity to conduct further tests which might have disclosed exculpatory evidence.

At trial, Dr. Cook testified that he did not perform any tests on the specimens to determine blood types. He further testified that, at the time of trial, such tests would be of dubious value, because he did not "know of any water soluable [*sic*] blood group substance that would have survived this length of time." Allen contends that blood typing of the seminal fluid, and blood tests conducted on samples of his blood and the victim's blood, might have revealed that the semen was from a person with a different blood type.

The Supreme Court addressed a similar claim in ***Arizona v. Youngblood***, 488 U.S. 51, 109 S. Ct. 333 (1988). The Arizona Court of Appeals reversed the defendant's conviction for child molestation, sexual assault, and kidnapping, because the State had failed to preserve semen samples from the victim's body and clothing. ***Id***. at 334. The victim identified the defendant from a photographic line-up nine days after the attack, but the defendant was not arrested until four weeks later. ***Id***. at 335. The State had disclosed police reports to the defendant containing information about the existence of the samples and the clothing, and had provided the defendant's expert witness with copies of the laboratory reports and notes prepared by a police criminologist. In addition, the defendant's expert had access to the semen samples and clothing. ***Id***. at 336. At trial, the defendant's expert testified as to results that might have been obtained from tests

performed on the samples shortly after they were gathered, or by later tests performed on the samples from the boy's clothing, had the clothing been refrigerated. ***Id***. at 335. The Supreme Court reversed the judgment of the Arizona Court of Appeals, stating:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.... We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Id. at 337.

Although Allen asserts that the prosecutor engaged in misconduct in failing to preserve the specimens, he has alleged no concrete acts of bad faith. A habeas petitioner's conclusory allegations do not raise a constitutional issue in a habeas proceeding. ***Ross v. Estelle***, 694 F.2d 1008, 1011-12 (5th Cir. 1983). Allen's trial attorney, Holder, testified at the evidentiary hearing that he had no reason then or now to allege bad faith on the part of the prosecution in withholding evidence from the defense. He also admitted that none of the newly discovered tests he wanted to conduct were available in the area at that time. Moreover, Allen's habeas counsel concedes in his brief here that there is nothing in the record to indicate any bad faith on the part of the prosecution.

In any event, the possibility that further tests could have been conducted, which could have revealed potentially exculpatory evidence, "is not enough to satisfy the standard of constitutional materiality in [***California v. Trombetta***, 467 U.S. 479, 489 (1984)]". ***Youngblood***, 109 S. Ct. at 336 n.**. That standard requires that the exculpatory value of the evidence must be apparent "before the evidence was destroyed." ***Trombetta***, 467 U.S. at 489. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence *at the time it was lost or destroyed*." ***Youngblood***, 109 S. Ct. at 337 n.**. (Emphasis added.) Allen has not shown that the prosecution knew that the specimens would have exonerated him.

Youngblood cannot be distinguished in favor of Allen on the ground that the semen samples and clothing were made available to the defendant in that case. Although the prosecution did not disclose Dr. Cook's report to defense counsel until trial, the record reveals that defense counsel had spoken with Dr. Cook prior to trial, and was aware of the contents of Dr. Cook's report. Moreover, defense counsel was aware of the existence of the specimens. Under these circumstances, no due process violation occurred.

Finally, in light of the other evidence of Allen's guilt, it is unlikely that the blood-type test results, which Allen contends should have been conducted, would have had any effect on the outcome of the trial. *See* ***Johnston v. Pittman***, 731 F.2d 1231, 1234

(5th Cir. 1984) ("[E]ven if [defendant] had introduced blood-type test results tending to prove his innocence, the state adduced enough evidence for a jury nonetheless to conclude beyond a reasonable doubt that [he] committed the rape."), *cert. denied*, 469 U.S. 1110 (1985). Allen's defense was based on mistaken identity. The victim never wavered in her identification of Allen as her attacker. She picked Allen out of a photo line-up, later identified him in a corporeal line-up, and again identified him at trial. She remembered him as the UPS employee who delivered a package to her several days before the attack, because of the inappropriate remark he made to her at that time about her attire. And, she testified that the gun Allen used was silver with white handles. One of Allen's co-workers testified that Allen had shown him a similar gun, three weeks prior to the attack.

Because Allen cannot demonstrate bad faith on the part of the prosecution in failing to preserve the specimens for further testing by Allen, his claim is without merit.

B.

Allen next contends that he was denied his right to a fair and impartial trial when the trial court denied his motion to disqualify the prosecuting attorney on the basis of bias or prejudice. He also contends that such bias was demonstrated by the prosecutor's improper comment during closing argument.

1.

The trial court held a hearing on Allen's motion to disqualify. The apparent basis for the motion was prosecutor

Travis Ware's presence as one of two prosecutors in a 1979 felony prosecution against Allen, in which the jury returned a verdict of not guilty. Ware testified that he held no grudge against Allen for the not guilty verdict, but that he would be zealous in his prosecution of this case. His testimony at the evidentiary hearing was substantially the same.

This evidence does not indicate any bias on the part of the prosecutor. "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his *pro se* petition ..., unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." ***Ross***, 694 F.2d at 1011. "[M]ere conclusory allegations do not raise a constitutional issue in a habeas proceeding." ***Id***. at 1012. Allen's conclusory assertion that the prosecutor was biased, solely because of losing an earlier trial, is unsubstantiated and without merit.

2.

To prevail on his claim of prosecutorial misconduct in closing argument, Allen must show that the prosecutor's comment "`so infected the trial with unfairness as to make the resulting conviction ... a denial of due process.'" ***Rogers v. Lynaugh***, 848 F.2d 606, 608 (5th Cir. 1988) (footnote and citations omitted). Under this test, Allen must demonstrate that the comment rendered his trial "fundamentally unfair," by showing "a reasonable probability that the verdict might have been different had the

trial been properly conducted." ***Id***. at 609 (footnote and citations omitted).

The comment to which Allen refers was not made by Ware, but by the other prosecutor, McBride, when he recounted the physical evidence to the jury. McBride stated:

> Mr. Holder certainly made a big deal about the 64 possible permutations and combinations and four matrixes of blood groupings ... that would be mutually exclusive to indicate a man's guilt in a rape case, but you have none of that evidence before you, do you. Nothing to exclude this man scientifically as the man who deposited that seminal fluid in this woman's body. I submit they have had ample opportunity to supply you that -- with that information.

It is unclear from Allen's brief exactly what he finds objectionable. He merely contends that "the Prosecutor was striking at [him] over the shoulders of his Defense Attorney, in an endeavor to inflame the minds of the jury." At the federal evidentiary hearing, Holder characterized the prosecutor's comment as a burden-shifting argument. In any event, Allen makes no showing that the outcome of his trial would have been different in the absence of the prosecutor's comment. In light of the substantial evidence of Allen's guilt, there is no reasonable probability that the verdict might have been different had the prosecutor not made that remark. Thus, McBride's statement did not render Allen's trial fundamentally unfair. Moreover, McBride's statement does not constitute any evidence of bias or prejudice on the part of the other prosecutor, Ware.

C.

Allen next contends that his right to an impartial jury was violated when the trial court, prosecution, and defense attorney failed to identify an alleged relationship between the victim and one of the jurors.

The victim was not in the courtroom during jury selection. In the voir dire examination, the prosecutor asked the prospective jurors if they knew the victim, and none of them responded affirmatively. During the victim's testimony, however, she indicated to the prosecutor that she recognized one of the jurors. The trial court conducted a discussion with the prosecutor and defense counsel outside the hearing of the jury, but the discussion is not in the record.

At the federal evidentiary hearing, Ware testified that the victim had recognized one of the jurors as someone who had previously been a customer of the convenience store where she worked and that was the extent of any "relationship". Allen's trial counsel, Holder, testified that he had no recollection of the incident, but he thought he would have objected if there had been a problem. Holder further testified that he did not believe there was any "relationship" between the juror and the victim, and that there were not any legal grounds for excluding the juror. The record contains no indication that the juror recognized the victim.

Both defense counsel and the prosecution knew of the victim's acquaintance with the juror, and the trial judge evidently determined that the victim's recognition of the juror was not a

problem. The relationship, if any, between them has not been shown to have violated Allen's right to an impartial jury trial. *See* ***Calloway v. Blackburn***, 612 F.2d 201, 205 (5th Cir. 1980).

D.

Allen contends that the state presented evidence)) longjohn underwear taken from him at the jail following his arrest)) seized pursuant to an unconstitutional search and seizure. Allen did not file a motion to suppress. However, the trial court conducted a hearing outside the presence of the jury, concerning the seizure of two pairs of longjohns and a cap. Following that hearing, the trial court sustained Allen's objection to the admission of the cap and a pair of longjohns seized from Allen's truck. Allen did not, however, object to the admission of the longjohns seized at the jail.

"[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." ***Stone v. Powell***, 428 U.S. 465, 494 (1976) (footnotes omitted). Procedures available under Texas law provided Allen with the opportunity to test the constitutional reasonableness of the search and seizure through a hearing on a motion to suppress evidence. *See* Tex. Code Crim. Proc. Ann. art. 28.01, sec. 1(6).

However, Allen asserts that he was unable to take advantage of this opportunity at the state level, because he was not aware of

the unconstitutional seizure until after his trial. The existence of state procedures pursuant to which a Fourth Amendment claim may be presented constitutes an opportunity for full and fair consideration of a defendant's Fourth Amendment claim under ***Stone***, whether or not that opportunity is exercised, absent proof that the state process is "routinely or systematically applied in such a way as to prevent the actual litigation of fourth amendment claims on their merits." ***Smith v. Maggio***, 664 F.2d 109, 111 (5th Cir. 1981) (citations omitted). Allen has not presented any evidence demonstrating that Texas law is routinely applied to prevent litigation of Fourth Amendment claims. Allen's failure to utilize his opportunity to present his claim at the state level does not justify federal habeas relief.

Because Allen was represented by competent counsel at trial, we also reject his contention that his lack of knowledge of the legal basis of his Fourth Amendment claim prevented him from litigating it at the state level.

E.

Again referring to the longjohns, Allen contends that the State presented false testimony bolstered by false evidence. According to Allen, a detective unconstitutionally seized his longjohns and later had the victim file a false supplemental affidavit in which she stated that Allen was wearing longjohns when he raped her. Allen further contends that the victim later committed perjury at trial, by testifying that he was wearing longjohns during the attack. His perjury assertion is based on the

victim's admission that he unzipped his pants, but did not remove them; accordingly, Allen contends that she had no way of knowing that he was wearing longjohns.

At trial, the victim testified that, although Allen kept his clothing on, and just unzipped his pants when he attacked her, she noticed that he was wearing longjohns. At the federal evidentiary hearing, Holder testified that, although he was surprised that the victim stated that she recalled seeing longjohns under Allen's unzipped pants, he had no reason to believe that the statement was a fabrication. Ware testified that, from the outset, the victim described Allen's underwear.

To prevail on this claim, Allen must "prove that the testimony actually was false, that the prosecutor knew it was false, and that it was material to the issue of [his] guilt." ***Little v. Butler***, 848 F.2d 73, 76 (5th Cir. 1988). Even if we were to accept Allen's contention that the victim's testimony regarding the longjohns was false, Allen has not demonstrated that the prosecutor knew it to be so.

F.

Next, Allen contends that his trial counsel provided ineffective assistance of counsel, in the following respects: (1) he did not object to the prosecutor's prejudicial comment in closing argument; and (2) he failed to fully investigate the case,

in that he did not request certain physical evidence and have additional tests performed on it.[4]

To obtain habeas relief based on a claim of ineffective assistance of counsel, a petitioner "must show not only that counsel's performance fell below a standard of reasonable effectiveness, but also that there is a `reasonable probability' that, but for counsel's unprofessional errors, the result of the trial would have been different, although he need not prove that a different result would be more likely than not." ***McFadden v. Cabana***, 851 F.2d 784, 787 (5th Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989) (citing ***Strickland v. Washington***, 466 U.S. 668, 687, 693-94 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694. If Allen fails to demonstrate prejudice, we need not consider the alleged deficiencies in counsel's performance. ***Czere v. Butler***, 833 F.2d 59, 63 (5th Cir. 1987); *see also* ***Strickland***, 466 U.S. at 700.

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[4] Allen also identified two other instances of allegedly ineffective assistance: (1) defense counsel implied during voir dire that Allen was guilty; and (2) defense counsel did not object to the inconsistent statements given by the State's witnesses. However, he does not argue these points in the body of his brief. [Pro Se Brief, 19-21] "Fed.R.App.P. 28(a)(4) requires that [Allen's] argument contain the reasons he deserves the requested relief `with citation to the authorities, statutes and parts of the record relied on.'" ***Weaver v. Puckett***, 896 F.2d 126, 128 (5th Cir.) (quoting Fed. R. App. P. 28(a)(4)), *cert. denied*, ___ U.S. ___, 111 S. Ct. 427 (1990). Accordingly, these claims are considered abandoned. ***Id***.

1.

Allen's contention regarding his attorney's failure to object to the prosecutor's closing argument refers to McBride's comment, quoted in part II.B.2., *supra*. As discussed, even if the comment was prejudicial, it did not render his trial fundamentally unfair, because there is no reasonable probability that the verdict might have been different if an objection had been made. Thus, Allen has failed to show that he was prejudiced by the failure to object.

2.

Allen also contends that Holder failed to fully investigate the case by not requesting the specimens and not being aware that newly discovered blood tests could be performed on that evidence. "A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." ***United States v. Green***, 882 F.2d 999, 1003 (5th Cir. 1989). Although Allen does not state exactly what such tests would have revealed, we assume that he believes that the results would have shown that he was not the rapist. Such evidence would have been consistent with Allen's defense of mistaken identity.

Holder testified at the federal evidentiary hearing, however, that the enzyme test that he wanted to conduct was not then available in the area. He further testified that the blood-typing and enzyme tests seldom excluded anyone, and therefore would have been of little benefit. According to Holder, DNA testing had not even been heard of in 1981 when the case was tried. In addition,

Dr. Cook testified at trial that, although he had the equipment to conduct a blood-typing test, he did not have the equipment to conduct an enzyme test.

Inasmuch as the DNA and enzyme tests, which Allen contends should have been performed, could not have been conducted at the time of trial, and the one test that could have been done was not of exceptional benefit to the defense, Allen cannot demonstrate that he was prejudiced by his attorney's failure to conduct testing.

G.

Finally, Allen argues for the first time on appeal that his habeas counsel rendered ineffective assistance. As a general rule, we will not review issues so raised. ***United States v. Garcia-Pillado***, 898 F.2d 36, 39 (5th Cir. 1990). In any event, "[c]ounsel competence in habeas proceedings is not a constitutional inquiry, since a state has no constitutional duty to provide counsel in collateral proceedings." ***Jones v. Estelle***, 722 F.2d 159, 167 (5th Cir. 1983), *cert. denied*, 466 U.S. 976 (1984); *see also* ***Pennsylvania v. Finley***, 481 U.S. 551, 556-57 (1987). Therefore, this claim is without merit.

III.

The judgment of the district court dismissing Allen's habeas petition is

AFFIRMED.