UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-3989

(Summary Calendar)

ERIC WHITE,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary and
RICHARD P. IEYOUB, Attorney
General, State of Louisiana.

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(92-CV-2315-E(4))

(April 22, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:[*]

Eric White, proceeding pro se, appeals the district court's denial of his petition for habeas corpus relief under 28 U.S.C. § 2254 (1988). For the reasons set forth below, we affirm.

White is a Louisiana prisoner, having been convicted of attempted armed robbery and sentenced to a term of thirty years

[*] 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

imprisonment. At White's trial, Joseph Jackson testified that he had rented an apartment at 603 First Street in New Orleans. On the evening of February 8, 1980, several people were gambling at Jackson's apartment. An individual named "Jam Jelly" appeared and was asked to leave. After he left, White and a co-defendant, Sterling Lavigne ("Sterling"), appeared at the door. White and Sterling walked directly to the third, or back, room of the apartment and stood near the table in that room. White attempted to lift a pistol from his waistband, but was unable to do so. Meanwhile, Sterling announced "[t]his is a stickup." James London grabbed White and threw him to the floor. White and London then wrestled. Sterling "froze" momentarily, then jumped on the table and started shooting. London shot back at Sterling, hitting him and knocking him off of the table. Sterling got back on the table and began firing again. After emptying his gun, Sterling jumped off the table, picked up White and White's gun, and left the apartment. Jackson saw co-defendant Nathaniel Gibbs and another individual standing outside the apartment. Jackson later saw White and Sterling at Charity Hospital.

Ellis Coleman, Jr., testified that he was at Jackson's apartment on February 8 when Sterling and White appeared and attempted to rob Jackson and his friends. Coleman was in the back room of the apartment. White and Sterling walked into the room and looked around for a while. Sterling announced his intention to rob the people in the apartment. White tried to lift his gun. Earl London grabbed White, and the two men wrestled. Coleman never

actually saw White with a gun. Sterling pulled his gun and began firing. London took White's gun and fired back at Sterling. Coleman was shot in the foot. He did not know who shot him. He later saw and identified White at Charity Hospital.

Frank Powell testified that he was playing cards in the second room of the apartment when White and Sterling appeared and walked back to the back room. Powell went to close the door. Gibbs pulled a gun on Powell and directed him to return into the apartment. Powell saw White with a gun and saw London grab White. He also saw Sterling fire his gun.

After he was convicted and sentenced, and had exhausted his state-law remedies, White filed a petition in the district court for habeas corpus relief, claiming that (1) the state withheld favorable and material evidence in violation of *Brady v. Maryland,* 83 S. Ct. 1194 (1963); (2) his waiver of his right to a jury trial was not knowing and intelligent; and (3) he received ineffective assistance of counsel. The district court entered judgment denying White's request for habeas relief, from which White timely appealed.[1]

White first contends that the state withheld the initial New Orleans Police Department ("NOPD") report in his case, in violation of *Brady.* The *Brady* doctrine requires the prosecution to produce exculpatory evidence and evidence useful for impeachment when requested to do so by the defendant. *See United States v. Bagley,*

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[1] The district court granted White a certificate of probable cause to appeal and leave to appeal in forma pauperis.

105 S. Ct. 3375, 3383 (1985). To prevail on a *Brady* claim, a defendant must establish that (1) the prosecution suppressed evidence (2) favorable to the accused and (3) material to either guilt or punishment. *Cordova v. Collins,* 953 F.2d 167, 171 (5th Cir.), *cert. denied,* 112 S. Ct. 959 (1992). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley,* 105 S. Ct. at 3383.

White specifically argues that had he known of the initial NOPD report, he could used the report as impeachment evidence. According to the report:

> V. London, V. Coleman and V. Sterling all stated that th[ey] were sitting in the middle room of 603 First St when W.1 entered the room with an unknown automatic pistol and started shooting at them. The W.1 fired seven shots and then fled. V. London was shot once in his upper left arm, V. Coleman was shot once in his right foot, V. Sterling was shot once in his right arm.

White claims that this report))containing a summary of witness interviews))conflicts with the trial testimony of Jackson, Coleman, and Powell, to the extent that the summary supports the theory that only a single perpetrator was involved. We initially note that London and Coleman never adopted or ratified the police report as their own statements. "If a witness has not made as his own the investigator's summary, it is unfair for the defense to use the language or interpretations of someone else for impeachment." *Lucas v. Whitley,* No. 90-3232, slip op. at 7 (5th Cir. Jan. 2, 1991) (citing *United States v. Scaglione,* 446 F.2d 182, 184 (5th Cir.), *cert. denied,* 92 S. Ct. 284 (1971)). Because White could

not have used the report as impeachment evidence, the report was not favorable to White.[2] Furthermore, even were we to assume that the NOPD report was favorable to White, we would not be able to conclude that the report was material))i.e., that there is a reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different." White's own testimony supported the theory of more than one perpetrator. Although disagreeing that he had a gun and that Sterling announced a robbery, White testified that he went to Jackson's apartment with Sterling and Gibbs. We therefore cannot conclude that had the report been available to White, the outcome of the proceeding may have been different.

White also contends that his waiver of his right to a jury trial was not knowing and intelligent and that he received ineffective assistance of counsel when his attorney failed to raise the waiver issue on direct appeal. Rather than brief those issues, White states in the final paragraph of his brief the following:

> Although the prisoner who prepared petitioner['s] certificate of probable cause did not raise these issues in that document, petitioner request[s] that this Court consider these issues on the basis of the argument presented in his memorandum of law filed in the district court.

White's failure to brief those issues in the body of his brief constitutes a waiver of those issues. *See* Fed. R. App. P. 28(a)(5) ("The argument must contain the contentions of the appellant on the

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[2] It is undisputed that co-defendant Sterling arrived at the apartment with White, and therefore the summary of Sterling's witness interview would have been of no value to White.

issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on."); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (citing Fed. R. App. P. 28); *see also Price v. Digital Equip. Corp.*, 846 F.2d 1026, 1028 (5th Cir. 1988) ("Although we liberally construe the briefs of pro se appellants, we also require that arguments must be briefed to be preserved." (citation omitted)).

Accordingly, the district court's judgment is AFFIRMED.