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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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JEAN PHILIPPE,

Petitioner,

95 CV 4545 (NG)

MEMORANDUM AND ORDER

-against-

**PETER LACY, Superintendent,
Bare Hill Correctional Facility,**

Respondent.

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GERSHON, United States District Judge:

Jean Phillipe, *pro se*, petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner was arrested on December 17, 1985 and charged with second degree murder in the killing of his wife; attempted murder of his stepson and stepdaughter; assault in the first degree for injuring his stepson; and criminal possession of a weapon. Following a four day non-jury trial, the Supreme Court, Queens County (Leahy, J.), determined, as to the first count, that the People had proven the petitioner's guilt of second degree murder, N.Y. Penal Law § 125.25(1). However, because the court determined that the defense had sustained the affirmative defense of extreme emotional disturbance, the petitioner was convicted of first degree manslaughter, N.Y. Penal Law § 125.20(2), and not murder. As to the rest of the charges, the petitioner was found guilty of two counts of attempted murder in the second degree, N.Y. Penal law §§ 110.00, 125.25(1), one count of assault in the first degree, N.Y. Penal Law § 120.10(1), and one count of criminal possession of a weapon in the second degree, N.Y. Penal Law § 265.03. On October 8, 1986, the petitioner was sentenced to eight and one-third years to twenty-five years on the first degree manslaughter count and on each count of attempted murder. For each of the counts of assault in the first degree and criminal possession of

a weapon in the second degree, the petitioner was sentenced to between five and fifteen years. The court ordered that all sentences were to run concurrently.

FACTS

Trial.

At trial, the prosecution called the petitioner's stepdaughter, Toni Corker, and stepson, Tyrone Corker, to testify. Both testified, with minor variations, that the petitioner shot Tyrone Corker three times, shot Juanita Phillipe, the petitioner's wife, once, and attempted to shoot Toni Corker. Specifically, they testified that on the night of December 16, 1985, the petitioner arrived home at approximately 8 p.m. After dinner, the petitioner left the apartment and returned around 9:15 p.m., shortly after Toni Corker had returned from school. Toni Corker testified that she had asked about the petitioner's absence and had been told that he had left the apartment crying because Tyrone Corker had pretended to shoot the family dog.

When the petitioner returned to the apartment, he proceeded to his bedroom. Toni and Tyrone Corker, and Juanita Phillipe were in the living room, and the petitioner's mother-in-law was in her bedroom. Juanita Phillipe was asleep on a cot that she had asked Tyrone Corker to put in the living room for her. Around 10:30 p.m., the petitioner called to his wife several times for her to join him in the bedroom. Each time, Tyrone Corker responded that his mother was sleeping and to leave her alone. Armed with a gun, Jean Phillipe emerged from the bedroom and said to Tyrone Corker, "You want to start trouble?" At that point, the petitioner pointed the gun at Tyrone Corker and fired four shots, hitting him three times, once in the jaw, once on the left wrist, and once on the right middle finger (during his testimony Tyrone Corker showed the court his three scars from the gunshot

wounds). Afterwards, the petitioner walked over to Juanita Phillipe and shot twice, hitting her once in the left temple. Finally, the petitioner walked over to Toni Corker and pulled the trigger several times, but the gun had no more bullets, causing the petitioner to remark that she was lucky that there were no more bullets in the gun. Toni Corker then ran out of the apartment to the first floor Tenant Association apartment, and the petitioner followed, running outside and down the street.

Tyrone Corker immediately sought help from his neighbors, who called the police. After the police and medics arrived, Tyrone Corker was taken to Queens General Hospital, and his mother, Juanita Phillipe, was taken to Mary Immaculate Hospital, where, according to the medical evidence stipulated at trial, she died on December 25, 1985 from a bullet wound to the head and brain.

The prosecution then called Officer Ward and Officer Lyles, court officers in Supreme Court, Queens County. Both testified that, at approximately 11:40 a.m. on December 17, 1985, the petitioner walked into the courthouse and declared that he had shot his wife. The two officers then took the petitioner to the security office, where Officer Ward made a phone call to the 102nd precinct and Officer Lyles read the petitioner his *Miranda* rights. Both officers also testified that the petitioner requested that they shoot him if it happened that his wife had died of the gunshot wound. Subsequently, both officers accompanied the petitioner to the 102nd precinct where he was questioned and arrested.

Finally, the prosecution called Detective Frakaloss of the New York Police Department, 103rd precinct, who testified to finding the murder weapon, a .22 caliber revolver, two blocks from the Phillipe residence. New York Police Department Detective Granshaw, of the 103rd precinct, who headed the investigation on this case, testified that on December 17, 1985, he met with the petitioner at the 102nd precinct. First, he read the petitioner his *Miranda* rights, which the petitioner

waived, then he took the petitioner's statement. The petitioner admitted that he and his wife were having marital problems due to his jealousy. He also stated that he found the gun under a pillow in his bedroom and that he brought it into the living room to question his wife whether she intended to use it on him. At this, she began to yell, and he responded by shooting. The petitioner also stated that Tyrone Corker had attempted to intervene and, as a result, was hit by a bullet in the finger.

The petitioner was the only witness for the defense. He testified that he and his wife had gotten into an argument, so she decided to sleep in the living room. Upon going to bed, the petitioner found the gun behind a small brown table in the bedroom. He brought the gun into the living room to show to his wife because he was angry that there was a gun in the house. Tyrone Corker then tried to seize the gun from the petitioner's hands, a struggle ensued, and several shots were fired. The petitioner testified that only one bullet hit Tyrone Corker and that his wife was shot in the leg. The petitioner also testified that he had seen the gun before the night of the shooting and that he had contacted the police in July 1985 about the gun. He had wanted the police to come and take the gun, but was unable to locate it again, so the police sent him a letter which said to contact them should he see it, and they would pick it up.

Defense counsel argued lack of intent to murder and raised the affirmative defense of extreme emotional disturbance. N.Y. Penal Law § 125.20(2). Counsel argued that the petitioner was extremely jealous and suspicious of his wife's activities and introduced into evidence pictures of the petitioner's wife with other men, which the petitioner had shown to the police when he was arrested. Defense counsel also questioned the petitioner, and the petitioner's stepchildren, in order to establish a pattern of jealousy leading to the night of the shooting. In his closing, defense counsel contended that the pictures established the petitioner's emotionally disturbed state of mind at the time of the

shooting. As noted above, the trial court accepted this defense which, under N.Y. Penal Law § 125.20(2), reduces second degree murder to first degree manslaughter.

Post-Trial Proceedings.

The petitioner appealed his conviction to the Appellate Division, Second Department, on the grounds that the prosecution failed to prove beyond a reasonable doubt that he acted with the intent to cause the death of another person and that his sentence was excessive. The Appellate Division affirmed the conviction on June 6, 1988, finding the evidence legally sufficient to establish beyond a reasonable doubt that the petitioner intended to kill his wife and stepchildren and that the petitioner's sentence was not excessive. *People v. Phillippe*, 141 A.D.2d 568 (2d Dep't 1988). The Court of Appeals denied leave to appeal. *People v. Phillippe*, 72 N.Y.2d 922 (1988).

In November 1994 the petitioner filed his first petition for a writ of habeas corpus in this District. The court denied the petition because only two of the petition's asserted five claims had been exhausted in state court. *Phillippe v. Lacy*, Docket No. 91-CV-2449 (E.D.N.Y. January 16, 1995) (Ross, J.).

Accordingly, the petitioner filed a motion with the trial court to vacate his conviction pursuant to N.Y. Crim. Proc. Law § 440.10. He raised three claims: (1) that the petitioner was denied his rights because he did not understand the *Miranda* warnings, which were read to him in English instead of his native language, French; (2) that the petitioner did not waive his right to a jury trial; and (3) and that the petitioner's trial counsel was ineffective for failure to call a key witness. The People opposed the motion on the grounds that the first two issues raised were procedurally barred, because they involved facts appearing on the record and could have been raised on direct

appeal, and that the ineffectiveness of counsel claim was not adequately supported. Justice Leahy denied the petitioner's motion, stating that the petitioner's grounds were "not appropriate grounds under C.P.L. 440." In addition, he found the entire application was without merit. *People v. Phillipe*, Ind. No. 309/86 (Queens Cty. Sup. Ct. May 16, 1995). The petitioner sought leave to appeal, which the Appellate Division, Second Department, denied on August 22, 1995. On October 25, 1995, the Court of Appeals dismissed the appeal of the Appellate Division's order.

The petitioner then filed the instant petition, challenging his conviction on five grounds: (1) that the prosecution failed to prove beyond a reasonable doubt that the petitioner acted intentionally; (2) that the petitioner's sentence is excessive; (3) that any admissions made by him during his arrest were inadmissible because he did not understand his *Miranda* warnings, which were read to him in English instead of his native language, which is French; (4) that he did not waive his right to a jury trial; and (5) that the petitioner's trial counsel was ineffective for three reasons: (i) because trial counsel failed to call a favorable witness to the stand⁴ (ii) because trial counsel should have insisted that the ballistics expert testify so that he could cross-examine him, instead of stipulating to the admission of the ballistics report; (iii) because trial counsel did not offer into evidence the police letter regarding the gun.

DISCUSSION

Preliminarily, the respondent argues that the *Miranda* claim and the jury waiver claim, raised in the Section 440.10 motion, are procedurally barred. If they are, these claims cannot be reviewed in this court absent a showing of both cause and prejudice, *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), or by showing a "fundamental miscarriage of justice" by making a "colorable" claim of

factual innocence. *McClesky v. Zant*, 499 U.S. 467, 495 (1991).

A procedural bar will be found where a state court judgment is based on an “adequate and independent state ground.” *Harris v. Reed*, 489 U.S. 255, 261 (1989). Here, a fair reading of the Section 440 proceedings indicates that the trial Judge did rely, at least with regard to the *Miranda* issue and the jury waiver issue, on an adequate and independent state ground, which was the only ground raised by the People in opposition to these claims in their Section 440.10 papers. That the judge also reached the merits does not preclude a finding of procedural bar. “A state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court’s judgment, even when the state court also relies on federal law.” *Harris v. Reed*, 489 U.S. at 264, n.10. Thus, the state procedural bar itself presents an adequate and independent state ground which the federal courts must honor.

A. Sufficiency of the Evidence.

The petitioner claims that testimony at trial was so conflicted as to preclude proof beyond a reasonable doubt of the element of intent necessary to convict him of manslaughter in the first degree and of attempted murder. The petitioner urges that this lack of proof of intent calls for a reduction of his conviction from first degree manslaughter to second degree manslaughter and a reversal of the attempted murder conviction.

A district court should grant habeas corpus relief if it finds, upon the record evidence adduced at trial, that no rational trier of fact could have found proof beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). This question must be reviewed in the light most

favorable to the prosecution. *Id.* at 319. To determine the essential elements of the crime, the habeas corpus court must look to state law, *Id.* at 324, n.16, and the evidence must be reviewed as a whole. *Maldonado v. Scully*, 86 F.3d 32, 35 (2d Cir. 1996). “Assessments of the weight of the evidence or the credibility of witnesses are for the [factfinder] and not grounds for reversal on appeal; we defer to the [factfinder’s] assessments of both these issues.” *Id.* When faced with a record from which conflicting inferences may be drawn, the habeas corpus court must presume, even if the record does not show it affirmatively, that the trier of fact resolved the conflict in favor of the prosecution and must defer to that resolution. *Wright v. West*, 505 U.S. 277, 297 (1992).

Intent is an element of both second degree murder and first degree manslaughter. N.Y. Penal Law §§ 125.25, 125.20. The petitioner asserts that, because of the conflicting evidence adduced at trial, namely, the testimony of his stepchildren, there was insufficient evidence to convict him beyond a reasonable doubt of the element of intent.

Viewing the evidence in the light most favorable to the prosecution, the trier of fact reasonably could have found that the petitioner intentionally killed his wife and attempted to kill his stepson and stepdaughter. Two eyewitnesses testified that the petitioner shot at Juanita Phillipe twice, hitting her once, and that the petitioner stood approximately a foot from the victim, pointing the gun directly at her. Also, the petitioner admitted to purposely bringing the gun into the living room while having an argument with his wife; therefore, he initiated the violence. At trial, the court officers and Detective Granshaw testified that the petitioner admitted, on the day after the shooting, that he shot his wife. Based on all the testimony and evidence presented at trial, there was sufficient evidence for the trier of fact to find the petitioner guilty beyond a reasonable doubt of intent to kill his wife.

Section 110.00 of the Penal Law provides that, to find attempt, the petitioner must have intended to commit a specific crime and that he must have acted in a way to carry out that crime. The prosecution presented two eyewitness accounts that the petitioner fired at Tyrone Corker and hit him three times. The multiple injuries were sufficient bases for a rational trier of fact to find that the petitioner intentionally shot and intended to kill Tyrone Corker. Both eyewitnesses also provided testimony supporting the petitioner's intention to kill Toni Corker and that she was spared only because the gun was fully discharged. Therefore, there was sufficient evidence to prove that the petitioner intended to kill both Tyrone and Toni Corker, but did not succeed, so that he was guilty of attempted murder.

B. Excessive Sentence.

Sentences that are "grossly disproportionate" to the crime violate the Eighth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991). Here, no such disproportionality is present. The petitioner claims that since he should have been convicted of the lesser offense of manslaughter in the second degree, he was given an excessive sentence. Since the petitioner was properly convicted of manslaughter in the first degree, and since he does not contest the legality of the sentence for that crime or for the attempted murder sentences, the petitioner's excessive sentence claim does not raise a constitutional question and is unreviewable here. *Underwood v. Kelly*, 692 F. Supp. 146, 152 (E.D.N.Y. 1988), *aff'd* 875 F.2d 857 (2d Cir. 1989).

C. Miranda Rights.

The petitioner claims that he was denied his constitutional right against self-incrimination

because he did not understand the *Miranda* rights, *U.S. v. Miranda*, 384 U.S. 436 (1966), which were read in English, a language he claims he does not understand very well. He asserts that, without a French translation, he was denied procedural safeguards. As noted above, this claim is subject to a procedural bar. The petitioner has not shown cause for failure to raise the issue properly in the state court; nor can he make a colorable claim of factual innocence. The claim is therefore unreviewable in this court.

D. Waiver of Right to Jury Trial.

The petitioner also argues that he did not waive his right to a jury trial and was thus denied his Fourteenth Amendment right to Due Process when he received a bench trial. This claim is also procedurally barred. Additionally, it is clearly without merit as the record reveals an express waiver of the petitioner's right to a jury trial, which was signed by the petitioner, his counsel, and the judge presiding over the case.

E. Ineffective Assistance of Trial Counsel.

Lastly, the petitioner alleges that he was denied effective assistance of counsel. Specifically, he claims that his attorney did not call a favorable witness to testify at trial, that his attorney should have insisted that the ballistics expert testify, instead of stipulating to the admission of the ballistics report, and that his counsel failed to offer into evidence the letter sent by the police, in July 1985, acknowledging the petitioner's concerns about the gun. Although the last two factual bases of the ineffectiveness of counsel claim were never presented to the state courts and are not exhausted, they are clearly without merit and therefore can be addressed despite the lack of exhaustion, pursuant to

28 U.S.C. § 2254(b)(2)(enacted after Judge Ross's earlier decision dismissing the petition for lack of exhaustion).

To succeed on a claim of ineffective assistance of counsel, the conduct of trial counsel must have so undermined the functioning of the adversarial process that the trial outcome is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The petitioner must show that counsel's performance was deficient and that this deficient performance prejudiced the defense to the extent that the petitioner failed to receive a fair trial. *Id.* There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689. With regard to the determination of prejudice, the court must consider all the evidence and find with a reasonable probability that the result would have been different. *Id.* at 695. Failure to make the required showing of either deficient performance or prejudice defeats an ineffectiveness claim. *Id.* at 700.

Decisions that fall within the ambit of trial strategy are not bases for an ineffectiveness claim. *U.S. v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987). The decision to call any witness on behalf of the defendant is a tactical decision, and the courts in the Second Circuit are "loathe" to second guess these types of strategic choices. *Gatto v. Hoke*, 809 F. Supp. 1030, 1038 (E.D.N.Y. 1992), *aff'd* 986 F.2d 500 (2d Cir. 1992); *see also Kieser v. People of the State of New York*, 56 F.3d 16, 18 (2d Cir. 1995);

The petitioner complains that trial counsel failed to call his mother-in-law as a witness. Since the calling of witnesses is a strategic decision, there is a heavy burden on petitioner to prove that failure to call his mother-in-law resulted in prejudice. The petitioner argues that, since his mother-in-law was in the apartment at the time of the shooting, she could have clarified the allegedly conflicting testimony of his stepson and stepdaughter. The petitioner also urges that his mother-in-

law would have spoken of the petitioner's gentle nature and his inability to kill anyone. These arguments, which are based solely on speculation as to the testimony of the mother-in-law, are insufficient to overcome the presumption that counsel's decision not to call the victim's mother was neither deficient nor prejudicial.

The petitioner alleges that his counsel was ineffective for stipulating to the ballistics report and foregoing cross-examination of the ballistics expert. "Decisions whether to engage in cross-examination, and if so to what extent and in what manner, are similarly strategic in nature." *U.S. v. Nersesian*, 824 F.2d at 1321. The petitioner asserts that, if the ballistics expert had testified, then counsel could have cross-examined him to prove that the gun found by Detective Frakaloss was not the gun he used in the shooting. The petitioner alleges that the gun he used had only three spent casings, not six. However, two eyewitnesses testified that the petitioner fired six bullets, four at Tyrone Corker, hitting him three times, and two at the petitioner's wife, hitting her once. Also, at trial, Tyrone Corker showed the court his three scars from the bullet wounds. In addition, the medical records of both Tyrone Corker and his mother, showing that at least four shots were fired, were admitted into evidence. Cross-examination of the ballistics expert could not have affected the outcome of the trial. The petitioner admitted using a gun that night and firing shots. Although he claimed he fired only three shots, the evidence to the contrary was overwhelming, even had there been no evidence that a gun with six spent shells was found. Therefore, the petitioner fails to overcome the presumption that counsel's decisions met constitutional standards.

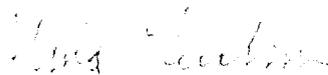
Finally, the petitioner asserts that his trial counsel failed to offer into evidence the police letter, sent in July 1985, regarding the gun. Defense counsel fully explored the issue of the petitioner's state of mind at the time of the shooting. The failure to offer one piece of evidence with

some remote bearing on the issue does not constitute ineffectiveness of counsel.

CONCLUSION

The petition for a writ of habeas corpus is DENIED.

SO ORDERED.



Nina Gershon
United States District Judge

Dated: Brooklyn, New York
July 30, 1998