

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

Daniel E. Ayer, Sr.,  
Petitioner

v.

Case No. 07-cv-304-SM  
Opinion No. 2015 DNH 081

Warden, New Hampshire State Prison,  
Respondent

**O R D E R**

In August of 1999, petitioner, Daniel Ayer, shot and killed Mark Rowland. Ayer was tried and convicted of first degree murder. The New Hampshire Supreme Court affirmed his conviction on appeal, and the United States Supreme Court denied his petition for writ of certiorari. Ayer's efforts to obtain habeas corpus relief in the state courts were similarly unsuccessful. He then sought habeas relief in this court, advancing nine claims.

Pending before the court are: (1) Ayer's motion to amend his habeas corpus petition; and (2) the State's motion for summary judgment as to all claims advanced in that petition. For the reasons discussed, Ayer's motion to amend is denied and the State's motion for summary judgment is granted.

I. Motion to Amend Habeas Petition.

In his motion to amend, Ayer seeks to add a new claim to his pending petition for a writ of habeas corpus. Specifically, he asserts that his constitutionally protected right to access the court has been violated because he did not receive copies of three of the State's filings in this case. In her Report and Recommendation, the magistrate judge properly concluded that Ayer's proposed claim is not appropriate for habeas relief and recommended that the court deny his motion.<sup>1</sup>

After due consideration, I herewith approve the Report and Recommendation of Magistrate Judge Andrea K. Johnstone dated March 30, 2015 (document no. 90), for the reasons set forth therein. Ayer's motion to amend his habeas corpus petition (document no. 87) is denied.

II. Motion for Summary Judgment on Ayer's Petition.

The court now turns to the nine claims for relief advanced in Ayer's petition, all of which are the subject of the State's motion for summary judgment.

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<sup>1</sup> Parenthetically, the court notes that upon receipt of the Report and Recommendation, the State immediately provided Ayer with copies of the documents he claimed not to have received. See Letter of Assistant Attorney General Elizabeth Woodcock, dated March 31, 2015 (document no. 91). Consequently, Ayer's assertion that he has been denied meaningful access to the court in that respect now appears to be moot.

### **Standard of Review**

Since passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and its amendments to 28 U.S.C. § 2254, the power to grant federal habeas relief to a state prisoner with respect to claims adjudicated on the merits in state court has been substantially limited. A federal court may not disturb a state conviction unless the state court's adjudication "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)(2). And, a habeas petitioner seeking relief under that provision faces a substantial burden insofar as "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1).

Alternatively, habeas relief may be granted if the state court's resolution of the constitutional issues before it "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." 28 U.S.C. § 2254(d)(1). The Supreme Court explained the distinction between decisions that are "contrary to" clearly established federal law, and those that involve an "unreasonable application" of that law as follows:

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). The Court also noted that an "incorrect" application of federal law is not necessarily an "unreasonable" one.

[T]he most important point is that an unreasonable application of federal law is different from an incorrect application of federal law . . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 410-11 (emphasis in original). So, to prevail, the habeas petitioner must demonstrate that "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011).

Finally, it probably bears noting that a state court need not rely upon, nor need it even cite, Supreme Court precedent in order to avoid resolving a petitioner's claims in a way that is "contrary to" or involves an "unreasonable application of" clearly established federal law. See Early v. Packer, 537 U.S. 3, 8 (2002) ("Avoiding these pitfalls does not require citation of our cases - indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.") (emphasis in original). In fact, even when a state court has summarily rejected a petitioner's federal claim without any discussion at all, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Harrington, 562 U.S. at 99 (emphasis supplied). Under those circumstances - that is, when "a state court's decision is unaccompanied by an explanation," - the habeas petitioner still bears the burden of "showing there was no reasonable basis for the state court to deny relief." Id. at 98.

As the Supreme Court has noted, AEDPA's amendments to § 2254(d) present a substantial hurdle for those seeking federal habeas relief.

If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further.

Harrington, 562 U.S. at 102 (citation omitted).

Only as to federal claims that were presented to the state court but neither adjudicated on the merits nor dismissed by operation of a regularly-applied state procedural rule, may this court apply the more petitioner-friendly de novo standard of review. See, e.g., Clements v. Clarke, 592 F.3d 45 52 (1st Cir. 2010) ("In contrast, a state court decision that does not address the federal claim on the merits falls beyond the ambit of AEDPA. When presented with such unadjudicated claims, the habeas court reviews them de novo.") (citation omitted).

With those principles in mind, the court turns to Ayer's petition and the State's motion for summary judgment.

### **Background**

On August 20, 1999, Ayer shot and killed Mark Rowland, a social worker who had been working with the New Hampshire Division for Children, Youth and Families. In resolving the

claims Ayer presented on direct appeal of his state conviction, the New Hampshire Supreme Court summarized Ayer's criminal conduct, arrest, interrogation, and conviction as follows:

Beginning in 1998, the New Hampshire Division for Children, Youth and Families (DCYF) became involved with the defendant's family, and in July 1999, Family Counselor Mark Rowland of the Nashua Children's Home was assigned to the defendant's case. On August 20, 1999, Rowland was scheduled to meet with the defendant's family. When Rowland arrived that day, the defendant was leaving in his truck. He informed Rowland that he did not want to meet and that he hoped Rowland would leave. The defendant then left the property but remained in the immediate area. Rowland did not leave. When the defendant returned a few minutes later, Rowland told the defendant that he would not leave. The defendant then shot Rowland in the head and fled in his truck. Rowland later died from the gunshot wound.

Within minutes of the shooting, Officer Martin Matthews of the Nashua Police Department received a radio dispatch about the shooting and rushed to the scene. Immediately after he arrived, emergency medical personnel arrived and began treating Rowland. As soon as the scene was secured, Matthews was ordered to begin investigating this urgent situation. He scanned the area for potential witnesses to the shooting and for anyone who might know where the shooter was. His attention was drawn to a woman, later identified as Joan Ayer, the defendant's wife, who was standing near the scene, crying hysterically. As Matthews approached Mrs. Ayer, but before he asked any questions, she blurted out, "He had said that morning that he was going to shoot him," and, "he'd been sitting across the street in his truck all morning waiting for him." Matthews asked to whom Mrs. Ayer was referring and she responded that it was her husband. When asked who her husband was, Mrs. Ayer identified the defendant. She then described the defendant's truck and informed Matthews that the defendant had access to firearms.

Matthews conveyed Mrs. Ayer's description of the defendant's vehicle to his dispatcher, who then issued

an alert to other officers. Shortly thereafter, Officers Matthew Eskridge and Scott Anderson saw the defendant's truck. The officers stopped the truck and arrested the defendant without incident. While arresting the defendant, the officers noticed firearms and ammunition in his truck. One of the firearms was later determined to be the murder weapon. The defendant was transported to the Nashua Police Department for booking. Approximately forty minutes elapsed from the time the original dispatch was sent until the defendant was booked at the police station.

At the police station, the defendant waived his Miranda rights, see Miranda v. Arizona, 384 U.S. 436 (1966), and gave a formal statement to police. He stated that he felt he had been harassed by DCYF and other agencies for some time and that when Rowland arrived at his home and would not leave, he "snapped." He also stated that he had been contemplating making a "demonstration" for some time and that a "demonstration" was necessary to make DCYF and others heed his complaints and concerns.

In 2003, the defendant was convicted of first-degree murder. That conviction was reversed on appeal. Upon retrial, the defendant was again convicted of first-degree murder. This appeal followed.

State v. Ayer, 154 N.H. 500, 502-04 (2006) ("Ayer II").<sup>2</sup>

As construed by the magistrate judge, Ayer's habeas petition advances nine claims:

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<sup>2</sup> Ayer's first conviction was overturned on appeal after the New Hampshire Supreme Court concluded that his constitutionally protected right to self-representation had been violated. See State v. Ayer, 150 N.H. 14 (2003) ("Ayer I"). Having succeeded on that claim once before, Ayer advanced it again (unsuccessfully) in his direct appeal of his second conviction. See Ayer II, 154 N.H. at 515-18. And, perhaps not surprisingly, he raises that issue once again in this proceeding.

1. Ayer was denied his Fifth, Sixth, and Fourteenth Amendment rights to represent himself at trial when the trial court "forced" him to have court-appointed counsel;
2. Ayer's Sixth and Fourteenth Amendment right to confront the witnesses and evidence against him was violated when the trial court admitted testimony of a witness who had died between Ayer's first and second trials, and whose testimony was recorded at the first trial;
3. Ayer's Fifth, Sixth, and Fourteenth Amendment rights to Due Process and a fair trial were violated when the trial court denied Ayer the ability to present certain defenses to the jury for consideration;
4. Ayer's Fifth, Sixth, and Fourteenth Amendment rights to due process and a fair trial were violated when the trial court refused to instruct the jury regarding the lesser offense of provocation manslaughter;
5. Ayer's Fifth and Fourteenth Amendment rights to due process and not to incriminate himself were violated when his statements were admitted at trial even though he had not voluntarily waived the rights afforded to him by Miranda v. Arizona, 396 U.S. 868 (1969);
6. Ayer's Fifth and Fourteenth Amendment rights to due process and not to incriminate himself were violated when his statements were admitted at trial even though he had invoked his right to counsel prior to questioning, but was not afforded counsel at that time;
7. Ayer's Fifth and Fourteenth Amendment due process rights were violated when the trial court admitted in evidence firearms, weapons, and ammunition found in Ayer's truck even though the items were not used in the commission of the crime, were highly prejudicial, and were not introduced for a legitimate purpose;

8. Ayer's Sixth and Fourteenth Amendment right to confront the witnesses against him was violated when the trial court erroneously admitted certain statements made by Ayer's wife through another witness, as excited utterances, where Ayer's wife did not testify; and
9. Ayer was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel when his appointed trial counsel suggested Ayer's guilt to the jury by focusing on a mental state defense rather than a defense asserting that Ayer did not engage in the conduct alleged to be criminal.

Report and Recommendation (document no. 57), at 1-3 (construing the factual allegations and legal claims set forth in documents no. 1, 50, 52, and 56). None of those claims has merit and each may be resolved rather briefly.

A. Ayer's Right to Represent Himself (Claim One).

Before a criminal defendant may be allowed to represent himself at trial, he first must "knowingly and intelligently" waive his important and constitutionally protected right to counsel. And, he may only do so after having been made aware of the "dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." Faretta v. California, 422 U.S. 806, 835 (1975) (citation and internal punctuation omitted). His waiver of the right to counsel and his invocation of the right to self-representation must be clear, unambiguous, and unequivocal.

See generally United States v. Betancourt-Arretuche, 933 F.2d 89, 92-93 (1st Cir. 1991); Tuitt v. Fair, 822 F.2d 166, 174-77 (1st Cir. 1987).

The New Hampshire Supreme Court considered and rejected Ayer's claim that the trial court improperly denied him the right of self-representation. Specifically, the court concluded that, "[b]ased upon our review of the record, we agree that the defendant did not clearly and unequivocally assert the right to self-representation." Ayer II, 154 N.H. at 516.<sup>3</sup>

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<sup>3</sup> The record suggests that Ayer was purposefully evasive in refusing to specifically waive his right to counsel (or invoke his right to proceed pro se), despite numerous pointed questions on that topic from the trial court (which plainly understood that this was a critical issue).

Approximately seven times I requested from Mr. Ayer a decision as to whether he wished to proceed pro se or have counsel appointed for him. Mr. Ayer made it very clear that he was not invoking his right to proceed pro se. He repeatedly declined to make a decision and stated that he was not about to "give up one right for another." Mr. Ayer declined to make a decision as to whether he would accept the appointment of counsel or proceed pro se. Accordingly, I appointed [two attorneys] as his trial counsel.

Ayer II, 154 N.H. at 517 (quoting a post-hearing order issued by the trial court). It would appear that Ayer deliberately withheld any unequivocal and unambiguous waiver of his right to counsel (and corresponding invocation of his right to proceed pro se) so that he might, if convicted, once again raise this very issue on appeal. Such gamesmanship is, however, doomed to fail – if there is no unequivocal, voluntary, and intelligent waiver of a defendant's right to counsel, then he must be represented and cannot undertake his own defense.

Ayer has not shown that the court's conclusion was based upon either an "unreasonable determination of the facts," or that it was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). He is, therefore, not entitled to habeas corpus relief on that claim.

B. Testimony of Norman Bleau (Claim Two).

Next, Ayer claims that his constitutionally protected right to confront witnesses was violated when the trial court admitted into evidence a transcript of testimony from Norman Bleau - a witness who testified at Ayer's first trial, but who had passed away before Ayer's re-trial. That claim is, however, procedurally defaulted.

The procedural default doctrine provides that a federal court will not consider a claim for habeas relief that was rejected by a state court for failure to comply with that court's procedural requirements, Coleman v. Thompson, 501 U.S. 722, 732 (1991), provided those procedural requirements amount to "a firmly established and regularly followed state practice," Ford v. Georgia, 498 U.S. 411, 423-24 (1991) (internal quotation marks omitted). See generally Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012) ("A state court's invocation of a procedural rule to deny

a prisoner's claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed." ).

As the court of appeals has observed, a claim for habeas relief is procedurally defaulted in either of two situations.

First, a claim is procedurally defaulted if the state court has denied relief on that claim on independent and adequate state procedural grounds. Second, a claim is procedurally defaulted if it was not presented to the state courts and it is clear that those courts would have held the claim procedurally barred.

Pike v. Guarino, 492 F.3d 61, 73 (1st Cir. 2007) (citations omitted). The doctrine applies whether the procedural default occurred at trial, on direct appeal, or in the context of a collateral proceeding, and is "grounded in concerns of comity and federalism." Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (citation omitted). Because a petitioner who has failed to meet a state's procedural requirements for presenting his federal claims has deprived the state court of an opportunity to address those claims in the first instance, a federal court will consider them only if the petitioner demonstrates cause for his state-court default and prejudice resulting therefrom. Id. Alternatively, the Supreme Court has carved out a very narrow exception for those petitioners who can demonstrate that they are

"actually innocent" of their crimes of conviction - a rare exception neither relevant to this case, nor invoked by Ayer. See generally Dretke v. Haley, 541 U.S. 386 (2004).

Here, the New Hampshire Supreme Court concluded that Ayer had not preserved the issue concerning Mr. Bleau's testimony for appellate review and, therefore, it declined to address it. Ayer II, 154 N.H. at 520 ("Because an argument that is not raised in a party's notice of appeal is not preserved for appellate review, we do not address the issue of Mr. Bleau's testimony.") (citation omitted). The issue is, therefore, procedurally defaulted. See, e.g., Trevino v. Thaler, 133 S. Ct. 1911, 1917 (2013) ("[A] conviction that rests upon a defendant's state law 'procedural default' (for example, the defendant's failure to raise a claim of error at the time or in the place that state law requires), normally rests upon 'an independent and adequate state ground.' And where a conviction rests upon such a ground, a federal habeas court normally cannot consider the defendant's federal constitutional claim.") (citations omitted).

Ayer has demonstrated neither cause for his state-court procedural default nor any prejudice resulting from the introduction of Mr. Bleau's testimony. See generally Murray v. Carrier, 477 U.S. 478, 488 (1986). Mr. Bleau did not witness the

actual shooting and, at best, his testimony was cumulative and served simply to place Ayer near the scene of the crime at the time of the shooting. See generally Transcript of Jury Trial, Day 2, July 20, 2000, at 15-30. Even independent of Mr. Bleau's testimony, the evidence of Ayer's guilt was overwhelming, including the fact that he had made prior threats against DCYF that he shared with two family members (and, on the morning of the shooting, he told his wife he was "going to do what I said I was gonna do"); he shot at Mr. Rowland and then fled the scene; a ballistic examination of the bullet removed from Mr. Rowland's skull matched Ayer's 9mm Makarov pistol, which was recovered from Ayer's truck; and, of course, Ayer's own confession to police that when Mr. Rowland arrived at his home he "snapped," that he had previously been contemplating some sort of "demonstration" to make the State address his complaints and concerns, and that he "had to kill somebody so somebody would listen." See Ayer II, 154 N.H. at 503; State Habeas Decision (document no. 52-1) at 11.

Because Ayer's claim relating to the testimony of Mr. Bleau is procedurally defaulted, and because Ayer has shown neither cause for that default nor prejudice, he is not entitled to federal habeas corpus relief on that claim.

C. Defenses and Instructions on Lesser Charges (Claims Three and Four).

Ayer next asserts that his federal due process rights were violated when the trial court refused to allow him to present certain defenses ("defense of another" and the "right to revolution") and declined to instruct the jury on certain lesser offenses (reckless manslaughter and provocation manslaughter). First, the state supreme court concluded that Ayer's claims regarding reckless manslaughter and the "right to revolution" under the New Hampshire Constitution "were not raised before the trial court." Ayer II, 154 N.H. at 515. Accordingly, the court declined to address them and they are procedurally defaulted.

The state supreme court addressed and rejected Ayer's remaining claims on the merits, concluding that under the state's criminal laws and based upon the evidence presented at trial, Ayer was not entitled to assert such defenses, nor was he entitled to the requested jury instructions. See Ayer II, 154 N.H. at 513-15 (concluding, for example, that there was no evidence that Mr. Rowland intended to kidnap Ayer's son and, because Mr. Rowland was engaged in a lawful act when he refused to leave Ayer's property, Ayer was precluded from arguing sufficient provocation to support a finding of manslaughter). See generally Powell v. Tompkins, 2015 WL 1681274, at \*5 (1st Cir. April 15, 2015) ("It is, of course, the duty of the state

high court to construe the meaning of state statutes, including criminal offenses and rules of procedure. . . . The [state supreme court's] exposition represents the very meaning of the statute intended by the state legislature, and we are duty bound, in no uncertain terms, to follow that state precedent.") (citations omitted).

The State asserts that this court is precluded from reviewing Ayer's claims, since they were resolved on "independent and adequate state law grounds." Respondent's memorandum (document no. 75-1) at 15. That argument (which is typically presented in the context of procedural default) is unclear and likely incorrect, for reasons the court need not develop here. See generally Olszewski v. Spencer, 466 F.3d 47, 62 (1st Cir. 2006) ("Independent and adequate state grounds exist where the state court declined to hear the federal claims because the defendant failed to meet a state procedural requirement.") (emphasis supplied). It suffices to note that Ayer does not assert that the trial court violated his rights under state law, nor does he claim the state supreme court got that aspect of its decision wrong. Rather, he says the allegedly erroneous trial court rulings (i.e., its refusal to give the requested jury instructions or to allow him to assert certain defenses) resulted

in the violation of his constitutionally protected right to a fundamentally fair trial.

Nevertheless, it is plain that Ayer has not borne his burden under § 2254. He has not shown that the New Hampshire Supreme Court's resolution of those claims was based upon an unreasonable determination of the facts in light of the record evidence, nor has he demonstrated that it was contrary to, or involved an unreasonable application of, clearly established federal law (a burden he bore even though the state supreme court resolved his claims without reference to federal law or Supreme Court precedent, see generally Early, 537 U.S. at 8; Harrington, 562 U.S. at 99). To the contrary, the state court's opinion is well-reasoned, factually supported, and entirely consistent with both state law and (more importantly for these purposes) the federal constitution.

Finally, the court notes that even if it were persuaded that those claims are subject to the more petitioner-friendly de novo review, the outcome would be no different.<sup>4</sup> Ayer has not shown

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<sup>4</sup> As noted above, the magistrate judge concluded that Ayer properly exhausted his federal due process claims relating to the jury instructions and defenses - that is, he fully and fairly presented them to the state's highest court. An argument could be made, however, that the state court did not resolve Ayer's federal constitutional claims but, instead, addressed only the state law aspects of those claims. See Ayer II, 154 N.H. at

that the challenged trial-court rulings resulted in a fundamentally unfair trial or otherwise violated his federally protected due process rights. Simply stated, under these circumstances, Ayer had no federal constitutional right to present defenses (or to obtain jury instructions) that were unsupported by the factual record and, therefore, unavailable under state law. As the Supreme Court has observed in a related context:

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Patterson v. New York, 432 U.S. 197, 201-02 (1977) (citations and internal punctuation omitted) (emphasis supplied).

Because Ayer has not shown that the challenged trial court rulings were so offensive to firmly rooted principles of fairness and justice that he was deprived of his constitutionally

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513-15. If that is, in fact, the case, Ayer's federal due process claims would properly be subject to de novo review.

protected right to due process and a fair trial, he is not entitled to habeas relief on those claims.

D. Right Against Self-Incrimination (Claims Five and Six).

Ayer also claims that certain statements he made (and that were used against him at trial) were obtained in violation of his Miranda rights. He asserts that, contrary to the testimony of two police officers and the factual findings of the trial court (which were sustained by the state supreme court), he did invoke his right to counsel during the booking process and prior to his interrogation. Thus, he argues his statements to the police were obtained in violation of his Fifth Amendment rights. He goes on to say that, but for those unconstitutionally obtained statements, the warrant authorizing the search of his truck would not have issued. He also claims that those statements should not have been admitted at trial.

In addressing that claim on direct appeal, the New Hampshire Supreme Court first concluded that, “[u]pon review of the record [which includes a video tape of the booking process], we agree [with the trial court] that the defendant did not use any words that invoked the right to counsel during booking.” Ayer II, 154 N.H. at 518. It also concluded that the trial court supportably credited the testimony of two police officers, rejected Ayer’s

contrary testimony, and found that Ayer never invoked his right to counsel during an unrecorded interview with police. Id. 518-19. Accordingly, the court held that Ayer's right to counsel was not violated.

Again, Ayer has failed to carry his burden under 28 U.S.C. § 2254(d). The state court's factual findings are amply supported by the record, and there is not even the slightest suggestion that its legal conclusions were contrary to, or involved an unreasonable application of, clearly established federal law. As to that claim, then, Ayer is not entitled to federal habeas corpus relief.

E. Introduction of Firearms and Ammunition (Claim Seven).

Next, Ayer claims that his Fifth and Fourteenth Amendment due process rights were violated when the trial court admitted into evidence ammunition and various firearms that were recovered during a search of his truck. He says those weapons (except, of course, the 9mm Makarov) were not used in the commission of the crime and, therefore, had no relevance. He also asserts, without elaboration, that their introduction was "highly prejudicial."

The state supreme court thoroughly and thoughtfully addressed Ayer's claims under the applicable rules of evidence

and held that the trial court permissibly allowed the introduction of those weapons. See, e.g., Ayer II, 154 N.H. at 512 ("Evidence of numerous weapons in the defendant's truck could tend to show that he had planned and prepared to stage some type of violent act. Accordingly, the record supports the trial court's ruling that the presence of weapons in the defendant's truck was relevant for a purpose other than showing the defendant's character or disposition."). See also, Id. at 513 ("In sum, because the record supports the admission of the evidence of the weapons and ammunition in the defendant's truck under Rule 404(b) we conclude that the trial court did not unsustainably exercise its discretion.").

But, as to the constitutional dimensions of Ayer's evidentiary claims, the state supreme court concluded that Ayer failed to properly preserve them for appeal and, therefore, waived them.

[T]he defendant contends that admitting the evidence of weapons and ammunition violated his due process rights under the New Hampshire and Federal Constitutions. The defendant, however, does not explain how his rights were violated. He argues only in conclusory terms that "the evidence should have been excluded as a matter of due process." Because, in the realm of appellate review, a mere laundry list of complaints regarding adverse rulings by the trial court, without developed legal argument, is insufficient to warrant judicial review, we decline to address the defendant's constitutional argument.

Ayer II, 154 N.H. at 513 (citation omitted). That claim is, then, procedurally defaulted. And, Ayer has not demonstrated cause for the procedural default, nor has he shown prejudice. To the contrary, both the trial court and the state supreme court thoroughly explained why evidence of the presence of firearms in Ayer's truck was properly admitted at his trial: it was relevant and its probative value was not substantially outweighed by any risk of unfair prejudice to Ayer. See, e.g., Id. at 511-13.

F. Excited Utterances (Claim Eight).

In his eighth claim, Ayer asserts that the trial court erroneously admitted his wife's excited utterances to the police immediately after he shot Mr. Rowland. That error, says Ayer, violated his due process right to a fair trial, as well as his Sixth Amendment right to confront the witnesses against him.

But, except in rare cases, state evidentiary rulings - even erroneous ones - do not constitute a basis for habeas corpus relief on grounds that the petitioner's due process rights were violated. As the court of appeals has noted:

An erroneous evidentiary ruling that results in a fundamentally unfair trial may constitute a due process violation and thus provide a basis for habeas relief. However, to give rise to habeas relief, the state court's application of state law must be so arbitrary or capricious as to constitute an independent due process violation. To be a constitutional violation, a

state evidentiary error must so infuse the trial with inflammatory prejudice that it renders a fair trial impossible.

Lyons v. Brady, 666 F.3d 51, 55-56 (1st Cir. 2012) (citations and internal punctuation omitted) (emphasis supplied). Here, as discussed below, the record does not support the view that the excited utterances were admitted in error. And, even if one were to assume that evidence should have been excluded, there is certainly no support for the claim that its introduction infused Ayer's trial with "inflammatory prejudice" so great that it rendered his trial "fundamentally unfair."

As to Ayer's assertion that the introduction of his wife's excited utterances violated his Sixth Amendment rights, the New Hampshire Supreme Court addressed, and rejected, that claim on Ayer's direct appeal. In so doing, the court properly identified, and faithfully (and not unreasonably) applied, clearly established federal law, as embodied in Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 547 U.S. 813 (2006). See Ayer II, 154 N.H. at 504-11. The court's lengthy discussion and reasoning need not be recounted. It is sufficient to note that the court ultimately concluded that "Mrs. Ayer's statements were not testimonial under Crawford and Davis and [] their admission did not, therefore, violate the defendant's rights under the Federal Constitution." Id. at 511.

Ayer has not shown, nor is there anything in the record to suggest, that the state supreme court's resolution of that issue was contrary to, or involved an unreasonable application of, clearly established federal law. Nor has Ayer demonstrated that the state court's decision was based upon an unreasonable determination of facts in light of the record evidence. Consequently, as to that claim, Ayer is not entitled to habeas corpus relief.

G. Ineffective Assistance of Counsel (Claim Nine).

Finally, Ayer asserts that his trial counsel rendered constitutionally deficient representation by focusing on his mental state (thereby implying to the jury that he actually shot Mr. Rowland), rather than asserting that Ayer did not engage in the charged criminal conduct. Ayer presented that claim to the state habeas court, which thoroughly addressed all of Ayer's various factual and legal claims. See State Habeas Decision (document no. 52-1). Again, it is not necessary to recount the state court's exhaustive discussion of the issue. It is enough to note that it invoked and faithfully applied the appropriate legal standard, as embodied in Strickland v. Washington, 466 U.S. 668 (1984), and concluded that Ayer had satisfied neither prong of the relevant test. That is, he failed to show that counsel's performance fell below an objective standard of reasonableness.

Moreover, the court concluded that even if one were to assume that counsel's representation had been constitutionally deficient, Ayer failed to show any resulting prejudice. Consequently, the court denied Ayer's petition for habeas relief.

Again, Ayer has failed to carry his burden under 28 U.S.C. § 2254(d). He has neither shown that the habeas court based its decision on an unreasonable determination of facts in light of the evidence presented, nor has he demonstrated that the court's decision was contrary to, or involved an unreasonable application of, clearly established federal law.

#### **Conclusion**

As noted above, Ayer's motion to amend his petition for habeas corpus relief (document no. 87) is denied. His motion to strike (document no. 89) is also denied.

And, for the foregoing reasons, as well as those set forth in respondent's comprehensive memorandum of law, respondent's motion for summary judgment (document no. 75) is granted. The petition for a writ of habeas corpus is denied and the Clerk of Court shall close the case.

Because Ayer has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), the court declines to issue a certificate of appealability. Petitioner may, however, seek such a certificate from the court of appeals under Federal Rule of Appellate Procedure 22(b). See Rule 11, Federal Rules Governing Section 2254 Cases (2010); 28 U.S.C. § 2253(c).

**SO ORDERED.**

  
Steven J. McAuliffe  
United States District Judge

April 22, 2015

cc: Daniel E. Ayer, Sr., pro se  
Elizabeth C. Woodcock, Esq.  
Susan P. McGinnis, Esq.