

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

GALVESTER DANIELS,

Plaintiff,

v.

CASE NO. 1:07-cv-00100-MP -GRJ

JAMES R MCDONOUGH,

Defendant.

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ORDER

This matter is before the Court on Doc. 20, Report and Recommendation of the Magistrate Judge, recommending that this petition under 28 U.S.C. § 2254 be denied. The time for filing objections has passed, and none have been filed.

For the following reasons, the Court concludes that the Report and Recommendation should be adopted. First, the Court agrees with the Magistrate Judge's conclusion that petitioner's counsel properly declined to object to the out-of-court identification of the Petitioner by the victim. The trial court was correct in finding that there was nothing suggestive or otherwise improper about the out-of-court identification of Petitioner.

The Court also agrees that not calling a second alibi witness was a reasonable strategic choice by counsel, in that the testimony was likely to be inconsistent with another alibi witness and that the second alibi witness' testimony was not "clear and so solid." These negative aspects of the testimony, combined with the advantage of having the first and last closing arguments if counsel declined to call a witness, make this decision reasonable under the circumstances.

Finally, the Court agrees with the Magistrate Judge that the comments by the prosecutor

were invited by or were responsive to the summation of the defense and did not render the trial fundamentally unfair. Therefore, counsel properly declined to object to them.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. The Report and Recommendation of the Magistrate Judge is adopted and incorporated herein.
2. The petition under 28 U.S.C. § 2254, Doc. 1, is denied, and the Clerk is directed to close this file.
3. For the reasons stated above, the Court finds that Petitioner fails to make a substantial showing of the denial of a constitutional right and the issues are not adequate enough to deserve encouragement to proceed further. Accordingly, no certificate of appealability is appropriate in this case.

DONE AND ORDERED this 22nd day of April, 2011

s/Maurice M. Paul

Maurice M. Paul, Senior District Judge