

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

ROBERTO CONCEPCION,

Petitioner,

v.

CASE NO. 4:05-cv-00392-MP-AK

JAMES CROSBY,  
JAMES MCDONOUGH,

Respondents.

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**ORDER**

This matter is before the Court on Doc. 21, Report and Recommendation of the Magistrate Judge, recommending that the habeas petition be denied and this case dismissed with prejudice. The petitioner filed objections, doc. 23, which the Court has reviewed. For the reasons given below, the Report and Recommendation is adopted and the case dismissed.

Petitioner stood trial for two sets of events. The first was a home burglary at a home belonging to the Howard family, and the other was an armed robbery at a second home, belonging to the Flores family. At the trial, he was charged in Count I for the Howard burglary, in which he allegedly took a .32 mm handgun. He was also charged in the remaining Counts for the events at the Flores home, where he allegedly used the handgun from the Howard burglary to commit armed robbery. He was convicted of all counts, but the state courts eventually ordered a new trial on all of the counts relating to the Flores home because of faulty in-court language translation. The state courts declined to order a new trial regarding Count I. Thus, the instant petition deals only with Count I, concerning the events at the Howard home.

Petitioner brings four claims. First, he attacks the sufficiency of the evidence on Count I.

The Court agrees with the Magistrate Judge that the Petitioner failed to exhaust this claim in state court and it is now procedurally barred. Although he raised the sufficiency of the evidence in state courts, he never raised it as a federal constitutional issue.

With regard to his second claim, Petitioner claims that his counsel was ineffective with regard to the charged burglary at the Howard home by failing to object to Mr. Flores' in-court identification of Petitioner as the perpetrator of later armed robbery at the Flores home. The Court agrees with the Magistrate Judge and the state courts that the identification of the Petitioner regarding the Flores robbery did not affect whether Petitioner committed the Howard burglary earlier. Thus, even if counsel was deficient for failing to object, it did not prejudice Petitioner on Count I. Furthermore, the Flores testimony may have been the "glue that brought everything together" with regard to the already overturned convictions regarding the Flores robbery, but the Court rejects the argument in Petitioner's objections that the Flores testimony was essential to the conviction concerning the Howard burglary. A footprint matching the Petitioner's shoe was found, and the gun identified by Ms. Howard as hers was found in an air duct in Petitioner's home after the two crimes.

Finally, the Court agrees with the Magistrate Judge that by failing to appeal the issue of jury selection to the state appellate court, which Petitioner admits in his objections at page 4, the Petitioner has failed to exhaust this claim. As with the first claim, he offers no argument

regarding cause and prejudice for the failure to exhaust.

Accordingly, it is hereby

**ORDERED AND ADJUDGED:**

1. The Report and Recommendation of the Magistrate Judge is adopted and incorporated herein.
2. The petition in this case is denied and the case dismissed with prejudice.

**DONE AND ORDERED** this 9th day of December, 2008

*s/Maurice M. Paul*  
Maurice M. Paul, Senior District Judge