

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

MICHAEL E. RICK

CIVIL ACTION

VERSUS

NO. 16-15650

DARREL VANNOY, WARDEN

SECTION "S" (2)

ORDER

The court, having considered the complaint, the record, the applicable law, the Report and Recommendation of the United States Magistrate Judge, and the petitioner's objection to the United States Magistrate Judge's Report and Recommendation, hereby approves the Report and Recommendation of the United States Magistrate Judge and adopts it as its opinion in this matter.

The petitioner argues that he received ineffective assistance of counsel because his trial counsel failed to call his wife as a witness, and that she would have testified favorably to his case. The United States Court of Appeals for the Fifth Circuit has stated that on federal *habeas corpus* review, "[c]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." Graves v. Cockrell, 351 F.3d 143, 156 (5th Cir. 2003), reh'g granted in part on other grounds, 351 F.3d 156 (5th Cir. 2003) (quotations omitted). To prevail, a petitioner must name the witness, demonstrate that the witness was available to testify and would have, and set out the content of the witness's proposed testimony showing that it would have been favorable to the defense. Day v. Quarterman, 566 F.3d 527, 538 (5th Cir. 2009). Petitioner named

the witness, his wife, and speculates that her testimony would have been favorable to him. However, he does not prove that she was available to testify, and would have testified as he speculates rather than offering testimony that would have been harmful to the defense. Petitioner's argument is speculative and deficient. Therefore, he has not demonstrated that he received ineffective assistance of counsel because his wife was not called as a witness.

Therefore,

IT IS ORDERED that the petition of Michael E. Rick for issuance of a writ of *habeas corpus* under 28 U.S.C. § 2254 be **DENIED** and **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana, this 16th day of August, 2017.


UNITED STATES DISTRICT JUDGE