IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

FERLANDO ESCO	§	**PETITIONER**
	§	
v.	§	**Civil No. 1:13cv516-HSO-RHW**
	§	
CHRISTOPHER B. EPPS	§	**RESPONDENT**

MEMORANDUM OPINION AND ORDER OVERRULING PETITIONER'S OBJECTIONS [26], ADOPTING REPORT AND RECOMMENDATION [20], DENYING PETITIONER'S MOTION TO AMEND [15], AND DISMISSING AMENDED PETITION [3]

BEFORE THE COURT are Petitioner Ferlando Esco's ("Esco" or "Petitioner") Objections [26] to the Report and Recommendation of United States Magistrate Judge Robert H. Walker [20]. Having considered the Report and Recommendation and conducted a de novo review of the portions to which Petitioner objects, the Court finds that Petitioner's Objections [26] should be overruled, and the Report and Recommendation [20] should be adopted as the finding of the Court, along with the additional findings made herein. The Motion for Leave to File a Second Amended Petition for Writ of Habeas Corpus [15] (the "Motion to Amend") will be denied as futile, and Petitioner's request for habeas relief pursuant to 28 U.S. C. § 2254, will be denied and the Amended Petition [3] dismissed. R. & R. [20], at 18. This civil action will be dismissed with prejudice.

I. BACKGROUND

A. Factual Background

Petitioner was indicted for (1) aggravated assault, (2) armed robbery, (3)

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conspiracy to commit armed robbery, (4) conspiracy to commit aggravated assault, (5) possession of a firearm by a convicted felon, and (6) felony evasion on September 7, 2005, based on his role in the robbery and shooting of Curtis James outside a McDonald's restaurant in Madison, Mississippi, on June 14, 2005.[1] R. & R. [20], at 1–3. Petitioner drove two coconspirators, Isaiah Sanders and Michael Johnson, to the McDonald's, pointed out James, and drove the get-away car, leading police on a high-speed chase after the plan went sour. *Id.* Police later recovered both guns used in the crime and a hat thrown from the car. *Id.* Petitioner's two coconspirators, Sanders and Johnson, pled guilty. *Id.* Petitioner, however, was tried by a jury and claimed that he was not present at the McDonald's and had no role in planning or executing the robbery, but was framed by police because of his prior criminal history. *See* Def.'s Opening Statement, R. [9-3], at 40–47.[2]

At Petitioner's trial, among the evidence prosecutors introduced was a summary of incoming/outgoing calls from Petitioner's cell phone that had been prepared by police from examining the phone's call log, showing a call made to the victim to lure him to the McDonald's and a call to coconspirator Michael Johnson just before the victim was shot. *Esco*, 9 So. 3d at 1161–62; *see also* State's closing

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[1] A detailed account of the botched robbery, subsequent apprehension of Petitioner and his coconspirators, and Petitioner's trial can be found in the Order affirming the judgment of the Circuit Court of Madison County, Mississippi, on direct appeal, *Esco v. State*, 9 So. 3d 1156, 1158–62 (Miss. Ct. App. 2008). A copy of this published Order appears in the record at ECF No. 8-1.

[2] The Court uses ECF pagination in references to the State court record.

argument, R. [9-6], at 95–96. Officers had seized the phone from Sanders' shirt pocket when Sanders was arrested. R. & R. [20], at 18. Petitioner testified that he had given his phone to Sanders so that Sanders could charge the phone's battery. *Esco*, 9 So. 3d at 1161.

The jury returned unanimous guilty verdicts on all six counts of the indictment. R. & R. [20], at 2–3; R. [9-6], at 140–41. The trial judge found Petitioner was a habitual offender under Mississippi Code Annotated § 99-19-83 and sentenced him to serve five concurrent life sentences and one consecutive life sentence. R. [9-7], at 2–5.

B. Procedural History

Petitioner's initial Petition for Writ of Habeas Corpus was filed on March 4, 2013; however, it was not signed by Petitioner or his attorney. Order [2]. Petitioner's counsel filed an Amended Petition [3] on March 15, 2013, before any answer was filed. The Amended Petition, therefore, constitutes the operative pleading in this case, and sets forth the following grounds for habeas relief:

> 1. The Supreme Court of Mississippi erred in denying Esco post-conviction relief because discovery of new evidence in the recanted testimony of coconspirator Michael Johnson and the testimony of McDonald's employee Kristy Johnson that Esco was not inside the McDonald's entitled Esco to a new trial.
> 2. By not revealing that Kristy Johnson did not identify Esco in a lineup, prosecutors unconstitutionally failed to disclose exculpatory and favorable evidence.
> 3. Esco was denied his Sixth Amendment right to effective assistance of counsel because Esco's trial counsel:
>
> (a) failed to interview Kristy Johnson,
>
> (b) "failed to object at trial and raise on appeal that Esco's indictment was defective. Though Esco was charged with armed

> robbery the indictment failed to state that he put anyone in fear. Additionally, counsel failed to object at trial or raised on appeal that the trial court impermissibly amended the indictment in its instructions to the jury,"
> (c) "failed to object at trial and raise on appeal the lack of evidence that Esco was an habitual criminal,"
> (d) "failed to raise the issue that Esco was denied a speedy trial,"
> (e) "failed to request a change of venue when the trial court observed that jury panel feared Esco," and,
> (f) "failed to stipulate that Esco was a convicted felon for purposes of the State proving that he was a convicted felon in possession of a firearm."
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> 4. The trial court erred in allowing evidence of an armed robbery conviction when Petitioner was sixteen years old without determining whether the evidence was more prejudicial than probative.

Amended Petition [3], at 4–6. The Mississippi Office of the Attorney General ("Respondent") filed an Answer [8] on May 22, 2013.

Petitioner's Motion [15] to file a Second Amended Petition was filed on October 17, 2014, and was based upon new case law that Petitioner argues provides an additional ground for relief. The United States Supreme Court decided *Riley v. California* on June 25, 2014, holding that officers must generally secure a warrant before searching data on cell phones. 134 S. Ct. 2473. On September 24, 2014, the Mississippi Supreme Court denied Petitioner's application for post-conviction collateral relief based on *Riley* as an intervening decision, and found Petitioner's application time-barred without meeting any exception to the time-bar. Order [31-1], *Esco v. Mississippi*, No. 2014-M-923 (Miss. Sept. 24, 2014). Petitioner's counsel then filed the pending Motion to Amend [15], asserting that Petitioner is entitled to federal habeas relief because the trial court erred "in allowing the prosecution to introduce a document the police prepares [sic] purporting to be a list of the

incoming and outgoing phone calls present on State's Exhibit 26, Esco's cell phone records." Mot. Amend, Ex. 1, Second Am. Pet. [15-1], at 2. Respondent filed an Opposition [17] to Petitioner's Motion to Amend, and Petitioner filed a Reply [18].

The Magistrate Judge entered his Report and Recommendation [20] on April 6, 2015, recommending that the Motion to Amend [15] be denied and that the Amended Petition [3] be dismissed. Petitioner obtained new counsel, who filed Objections [26] to the Report and Recommendation on May 20, 2015.[3] Respondent filed a Rebuttal [28] to Petitioner's Objections [26], and Petitioner's counsel filed a Reply [29]. Respondent also filed a Rejoinder [31] on June 12, 2015.

Petitioner objected to the Magistrate's finding that the Motion to Amend [15] should be denied on grounds that *Riley* is not retroactive on collateral review. Objections [26], at 18–20. Petitioner did not object to the Magistrate's findings that he was not entitled to habeas relief on Grounds 1, 2, or 4. As to Ground 3, Petitioner Objected only to the Magistrate's conclusions regarding grounds 3(b), 3(c), and 3(f).

II. DISCUSSION

A. Standard of Review

Because Petitioner filed Objections to the Magistrate's Report and Recommendation [20], this Court is required to "make a *de novo* determination of

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[3] Petitioner also submitted *pro se* Objections [27] on May 18, 2015; however, Petitioner's *pro se* objections are redundant of those filed by his attorney. As such, for the sake of clarity, the Court hereinafter refers to Petitioner's Objections [26] filed through counsel.

those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The district court need not "reiterate the findings and conclusions of the magistrate judge." *Koetting v. Thompson*, 995 F.2d 37, 40 (5th Cir. 1993). Nor must it consider "[f]rivolous, conclusive or general objections." *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). With respect to those portions of the Report and Recommendation to which Petitioner did not file objections, the Court reviews those findings under a clearly erroneous or contrary to law standard. *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

In so reviewing Petitioner's Objections [26], the Court is mindful that Congress, through the Antiterrorism and Effective Death Penalty Act ("AEDPA"), has restricted Federal court review of habeas petitions filed on behalf of persons in State custody. *White v. Thaler*, 610 F.3d 890, 898 (5th Cir. 2010). Specifically, 28 U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) 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; or
>
> (2) 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) (emphasis added).

A decision is "contrary to clearly established federal law" under § 2254(d)(1) if "the state court (1) arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; or (2) confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and reaches an opposite result." *Simmons v. Epps*, 654 F.3d 526, 534 (5th Cir. 2011) (citations omitted). A decision involves "an unreasonable application of clearly established Federal law" under § 2254(d)(1) if "the state court (1) identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts; or (2) either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* (citations omitted). A State court's application of law to facts is unreasonable under § 2254(d)(2) only if it is "objectively unreasonable," not merely "incorrect or erroneous." *Id.* The State court's factual determinations are presumed correct pursuant to § 2254(e)(1), and may only be rebutted by clear and convincing evidence. *Id.*

Congress also generally prohibited Federal courts from granting habeas relief to persons in State custody unless the petitioner first presented that issue to the State court. 28 U.S.C. § 2254(b). "To satisfy the exhaustion requirement, the petitioner must first present his claims to the highest state court in a procedurally proper manner so that it is given a fair opportunity to consider and pass upon challenges to a conviction, before those issues come to federal court for habeas corpus review." *Shelton v. King*, 548 F. Supp. 2d 288, 301 (S.D. Miss. 2008).

B. The Magistrate's Conclusion that the Motion to Amend [15] Should be Denied

A petition for a writ of habeas corpus may be amended as provided by the Federal Rules of Civil Procedure applicable to civil actions. 28 U.S.C. § 2242. According to Federal Rule of Civil Procedure 15, "the court should freely give leave [to amend] when justice so requires." FED. R. CIV. P. 15. If an amendment would be futile, however, a court may, within its discretion, deny an opportunity to amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Flores v. Scott*, 58 F.3d 637, 1995 WL 371237, at *2 (5th Cir. June 9, 1995) (quoting the *Foman* standard and affirming a district court's decision not to construe a habeas petitioner's objections raising new habeas claims as a motion to amend where "allowing the amendment would have been futile"). If amending the Amended Petition [3] to allow a new claim based the Supreme Court's recent decision in *Riley v. California* would be futile, the Court is within its discretion to deny the Motion to Amend [15]. The Court has reviewed the record and finds that such an amendment would be futile.

While *Riley* represents a clarification of the Supreme Court's Fourth Amendment jurisprudence in the context of modern technology,[4] it did not necessarily create a new rule of law. In *Riley*, the Supreme Court decided how the search incident to arrest doctrine should apply to the modern cell phone, given its

[4] *See Riley*, 134 S. Ct. at 2484 (noting that "[a] smart phone of the sort taken from Riley was unheard of ten years ago" and was "nearly inconceivable just a few decades ago" when the Supreme Court decided such bedrock Fourth Amendment cases as *Chimel v. California*, 395 U.S. 752 (1969), and *United States v. Robinson*, 414 U.S. 218 (1973)).

massive data capacity, and held that officers must generally secure a warrant before searching data on cell phones. *Riley*, 134 S. Ct. at 2484–85. The Court did not hold, however, that all searches of cell phones automatically violate the Fourth Amendment. *Id.* at 2493 ("Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest."). The Court specifically left room for "other case-specific exceptions" that "may still justify a warrantless search of a particular phone" including the exigent circumstances exception. *Id.* at 2494.

The Court also did not hold that *Riley* should be applied retroactively on collateral review. *See id.* "[A] new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (quoting 28 U.S.C. § 2244(b)(2)(A)); *see also Teague v. Lane*, 489 U.S. 288, 310 (1989). To the extent the Supreme Court announced a new rule of constitutional law in *Riley*, that rule was not made retroactive to Petitioner's case, which was already on collateral review. *Bell v. Wells*, No. 1:14-CV-793, 2015 WL 4755805, at *3 (M.D.N.C. Aug. 11, 2015) ("[T]he Supreme Court has not held that *Riley* is retroactive."); *Swagerty v. Price*, No. 2:12-CV-00030-JKS, 2014 WL 4163788, at *6 (E.D. Cal. Aug. 20, 2014) ("*Riley* does not provide retroactive relief.").

Granting Petitioner's Motion to Amend [15] would be futile because, to the extent *Riley* announced a new rule of law, it was not made retroactive to cases on

collateral review, such as Petitioner's.[5] The Motion to Amend [15] should be denied.

C. The Magistrate's Conclusion that Petitioner is not Entitled to Habeas Relief and that the Amended Petition [3] Should be Dismissed

Petitioner did not object to the Magistrate's findings that habeas relief was not warranted on Grounds 1, 2, 3(a), 3(d), 3(e), and 4 of the Amended Petition [3]. The Court has reviewed the Magistrate's findings on these grounds and finds that they are neither clearly erroneous nor contrary to law. *See Wilson*, 864 F.2d at 1221. The Court thus adopts the findings of the Magistrate as to those Grounds.

Though Petitioner's Objections as to Grounds 3(b), 3(c), and 3(f) are only properly before the Court as Sixth Amendment ineffective assistance of counsel claims as alleged in the Amended Petition [3], the Objections [26] assert each of these sub-claims as if they were independent grounds for habeas relief. However, these claims were not advanced as independent grounds for habeas relief in the Amended Petition. It is well-settled that issues raised for the first time in objections to a magistrate judge's report and recommendation are not properly before the district court and need not be addressed. *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992).

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[5] Moreover, Petitioner has not attempted to explain how he would retain a reasonable expectation of privacy within the meaning of the Fourth Amendment when, as here, it is undisputed that police came into possession of Petitioner's cell phone after he had voluntarily relinquished it to a third party, Sanders, from whom it was recovered by police. *Esco*, 9 So. 3d at 1161; *cf. United States v. Guerrero*, 768 F.3d 351, 359 (5th Cir. 2014) ("The *Riley* defendant indisputably had an expectation of privacy in the contents of his personal cell phone; the issue was whether the search-incident-to-arrest exception overcame that privacy interest . . .").

A petitioner asserting an ineffective assistance of counsel claim bears the burden of proving both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient only if he makes errors so serious that, when reviewed under an objective standard of reasonable professional assistance and afforded the presumption of competency, he was not functioning as "counsel" guaranteed by the Sixth Amendment. *Id.* at 687-89. Prejudice exists only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The Court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992).

1. Petitioner's Objection to the Magistrate's Finding as to Ground 3(b): Failure to Challenge the Indictment for not Containing all the Elements of Armed Robbery and Failure to Object to Jury Instruction

In the Report and Recommendation, the Magistrate found Petitioner's claim that his trial counsel was ineffective for failing to challenge the armed robbery indictment and jury instruction was "subject to dismissal as unexhausted in State court." R. & R. [20], at 9. The Magistrate did not proceed to consider this claim on the merits. *Id.* In his Objections [26], Petitioner claims that the indictment was constitutionally defective for failing to specifically charge him with "putting [the victim] in fear of immediate injury to his person," and that his claim for relief on this ground was properly exhausted in State court. Objections [26], at 12.

Upon review of the record, the Court finds that Petitioner asserted an independent claim that the indictment was defective in failing to charge all the elements of armed robbery in ground two of his *pro se* Motion for Post-Conviction Collateral Relief. [8-2], at 6. This claim was not presented to the State court as an ineffective assistance claim, as it appears in the Amended Petition [3] before this Court.

In a Motion filed in the State court to Amend his Motion for Post-Conviction Relief [8-3], Petitioner asserted that the trial court erred and his counsel was ineffective because the jury instruction on armed robbery incorporated language not found in the indictment by adding back the "missing" element of placing the victim in fear. [8-3], at 2–6. This claim *was* asserted as an ineffective assistance claim when Petitioner alleged that trial counsel's failure to object to the jury instruction "caused petitioner to be convicted upon an element not charged in the original indictment." *Id.* at 6.

Assuming out of an abundance of caution that the claim as presented in the Motion to Amend filed in State court [8-3] was sufficient to satisfy the exhaustion requirement of 28 U.S.C. § 2254(b), and assuming this issue is properly before the Court, the Court finds it to be meritless. The charge in the indictment reads as follows:

> late of the county aforesaid, on or about the 14th day of June, 2005, in the county aforesaid and within the jurisdiction of this court, did willfully, unlawfully, knowingly and feloniously, take or attempt to take U.S. Currency, the personal property of William Curtis James, Jr., from the presence and against the will of William Curtis James, Jr., by exhibition

> of a deadly weapon, a gun, in Madison County, Mississippi, in violation of Mississippi Code Annotated § 97-3-79 (1972), as amended.

R. [9-1], at 11. The essential elements of armed robbery are "(1) a felonious taking or attempt to take, (2) from the person or from the presence, (3) the personal property of another, (4) against his will, (5) by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon." *Gladney v. State*, 963 So. 2d 1217, 1221 (Miss. Ct. App. 2007). None of these elements is missing from the indictment.

Although the indictment does not specifically mention a part of the fifth element "by putting such person in fear of immediate injury to his person," as Petitioner claims it should, fear of immediate injury is implied by the portion of the fifth element that *is* included in the indictment, "by exhibition of a deadly weapon, a gun." In *Harper v. State*, the Mississippi Supreme Court clarified that "the fear contemplated by the statute does not require the victim to be frightened or terrified. It is quite sufficient if he expects or anticipates that personal injury may result . . . if he does not abide by the instructions of the assailant, who is threatening the use of a deadly weapon." 434 So. 2d 1367, 1368 (Miss. 1983). When the indictment describes how the taking of property was accomplished "by exhibition of a deadly weapon, a gun" the element of fear is implied. *See id.* This is sufficient in the Court's view. Because the indictment was not defective, counsel's failure to object to it or the jury instruction did not constitute ineffective assistance of counsel.

The State Supreme Court's determination that Petitioner "failed to make a substantial showing of the denial of a state or federal right" as to this claim and that his ineffective assistance claim on this issue failed to meet the *Strickland* standard was not contrary to clearly established federal law. Order [8-4], *Esco v. Mississippi*, No. 2010-M-191 (Miss. May 5, 2010); *see also* 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this ground of the Amended Petition [3].

2. Petitioner's Objection to the Magistrate's Finding as to Ground 3(c): Failure to Challenge the Lack of Evidence that Petitioner Served One Year or More for Prior Felonies

The Report and Recommendation concluded that Petitioner's ineffective assistance claim concerning counsel's failure to challenge the lack of evidence that Petitioner served one year or more for prior felonies was "subject to dismissal as unexhausted in State court," and did not address this claim on the merits. R. & R. [20], at 9. This conclusion was consistent with Petitioner's counsel's representation in the Amended Petition that "[t]his issue was not presented in any other court, State or federal." Am. Pet. [3], at 5. In the course of resolving Petitioner's Objections, however, the parties have determined that this claim was, in fact, exhausted. *See* Motion for Post-Conviction Collateral Relief, R. [8-2], at 14; Rejoinder [31], at 5.

In his Objections [26], Petitioner claims that "there was a complete absence of any proof that Esco had served a year or more on any of the convictions that were introduced as proof of Esco's alleged habitual status . . . ." Objections [26], at 8. Respondent, however, has directed the Court to the testimony of Petitioner and

statements of his trial counsel at a hearing to resolve motions in limine, conducted before trial, which reflects that "the trial court was presented with ample evidence, including certified orders and pen-packs, to support Esco's status as a habitual offender pursuant to MISS. CODE ANN. § 99-19-83." Rejoinder [31], at 5–8; R. [9-2], at 14–31. At trial, Petitioner himself testified concerning each of the convictions. *See* R. [9-6], at 17, 28. The trial court again heard argument concerning the time Petitioner served on each prior felony after trial concluded, while the parties were resolving objections to jury instructions. R. [9-6], at 80–86. Finally, after the jury returned the guilty verdicts, Petitioner's trial counsel again renewed his motion that Petitioner's first conviction and the time he served on that conviction should not be used to sentence Petitioner as a habitual offender. R. [9-6], at 147. In short, Petitioner's contention that "the State put forth no evidence to support M.C.A. §99-19-83's requirement that Esco had served at least one year on two separate convictions" is belied by the record. Reply [29], at 2.

Petitioner's trial counsel argued that Petitioner had not served a year or more on prior violent felonies on three separate occasions before the trial judge. The trial court, in the course of resolving trial counsel's motion to that effect, was presented with ample evidence of Petitioner's time served. The State court's finding that Petitioner's "claims of ineffective assistance of counsel fail to meet the [*Strickland*] standard[]" is entitled to AEDPA deference and was not an unreasonable application of clearly established Federal law. Order [8-4], *Esco v. Mississippi*, No. 2010-M-191 (Miss. May 5, 2010); *see also* 28 U.S.C. § 2254(d).

Petitioner is not entitled to habeas relief on this ground of the Amended Petition [3].

3. Petitioner's Objection to the Magistrate's Finding as to Ground 3(f): Failure to Stipulate to Felon Status

The parties agree that Petitioner's claim that his attorney was ineffective for failing to stipulate to felon status was properly exhausted in State court. Rejoinder [31], at 3–4. The Magistrate found that, under the *Strickland* standard, Petitioner's trial counsel's performance in this regard was not constitutionally deficient but a matter of strategy, and any deficiency did not result in actual prejudice. R. & R. [20], at 15–16; *Strickland*, 446 U.S. at 687. Petitioner takes issue with this finding, claiming that the choice not to stipulate to felon status cannot be said to be strategic because "there could be no possible advantage to Esco in not stipulating." Reply [29], at 6. The Court strongly presumes that counsel's decision not to stipulate to felon status was the product of a reasoned trial strategy. *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992).

Upon a de novo review of the record, the Court finds that Petitioner's trial counsel had several possible sound strategic reasons for not stipulating to felon status. First, Petitioner's trial counsel attempted to rebut the statements of Petitioner's coconspirators, Sanders and Johnson, by telling the jury that police encouraged each to "put Ferlando in this deal," saying that "law enforcement [knew] Ferlando because he's been in trouble before." *See* Def.'s Opening Statement, R. [9-3], at 44–45. The Defense's theory that law enforcement framed Petitioner was

apparently predicated, at least in part, on the fact that Petitioner had a prior criminal history. *See id.* Second, the record shows that, rather than stipulate to felon status, Defense counsel opposed the use of the strong-arm robbery conviction when Petitioner was sixteen years old. R. [9-2], at 34–35. This decision was within the realm of trial strategy since, had the Defense been successful in excluding this felony conviction for all purposes, Petitioner would not have a prior conviction for a *violent* felony counted against him, and he would presumably have received a more lenient sentence. *See* State's Brief, R. [9-10] at 52–53 (discussing how, had this strategy succeeded, Petitioner might have received a sentence of 20 years as opposed to a mandatory life sentence). Under the facts of this case, the decision not to stipulate to felon status fell within the realm of reasoned trial strategy.

As to the prejudice element specifically, the Magistrate found that "[t]he evidence of Petitioner's guilt in this case was such that it cannot be said that the 1991 robbery conviction played a role in the jury's decision or rendered the trial outcome either unreliable or fundamentally unfair." R. & R. [20], at 16. The Court has reviewed the record de novo and reaches the same conclusion. *See also Esco v. State*, 9 So. 3d 1156, 1158–62 (Miss. Ct. App. 2008) (detailing the wealth of evidence presented against Petitioner at trial). Petitioner's Objections [26] have not provided evidence or argument to persuade the Court otherwise.

The State court's finding that Petitioner's "claims of ineffective assistance of counsel fail to meet the [*Strickland*] standard[]" is entitled to AEDPA deference and was not an unreasonable application of clearly established Federal law. Order [8-

4], *Esco v. Mississippi*, No. 2010-M-191 (Miss. May 5, 2010); *see also* 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this ground of the Amended Petition [3].

III. CONCLUSION

For the foregoing reasons,

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion [15] for Leave to File a Second Amended Petition for Writ of Habeas Corpus filed on behalf of Petitioner Ferlando Esco is **DENIED.**

IT IS, FURTHER, ORDERED AND ADJUDGED that, Petitioner's Objections to the Report and Recommendation [20] of Magistrate Judge Robert H. Walker entered on April 6, 2015, are **OVERRULED,** and the Report and Recommendation is adopted as the finding of this Court with the additional findings made herein.

IT IS, FURTHER, ORDERED AND ADJUDGED that, the Amended Petition for Habeas Corpus [3] filed pursuant to 28 U.S.C. § 2254 is **DISMISSED.** A separate judgment will be entered in accordance with this Order as required by Federal Rule of Civil Procedure 58.

SO ORDERED AND ADJUDGED, this the 24th day of September, 2015.

s/ Halil Suleyman Ozerden

HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60708
USDC No. 1:13-CV-516

FERLANDO ESCO,

Petitioner-Appellant

v.

CHRISTOPHER B. EPPS,

Respondent-Appellee

Appeal from the United States District Court for the
Southern District of Mississippi, Gulfport

ORDER:

Ferlando Esco, Mississippi prisoner # 78107, was convicted of armed robbery, aggravated assault, conspiracy to commit armed robbery, conspiracy to commit aggravated assault, evasion, and possession of a firearm by a convicted felon, and sentenced to life imprisonment. He now seeks a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2254 application.

Esco does not contest the district court's denial of many of his claims as procedurally defaulted. Nor does Esco challenge the district court's rejection on the merits of his claims that: (1) the Mississippi Supreme Court erroneously denied his state postconviction relief motion given that recanted testimony demonstrated his actual innocence; (2) he received ineffective assistance of counsel based on counsel's failure to argue that his speedy trial rights were

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violated; and (3) the trial court erred by admitting evidence of Esco's 1991 armed robbery conviction without first determining whether the probative value was substantially outweighed by the danger of prejudice. Accordingly, these issues are deemed abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). Esco also raises two issues in his COA brief which were not raised below: (1) the State failed to demonstrate that he was a habitual offender; and (2) the indictment was insufficient for failing to charge every element of armed robbery. Issues raised for the first time in a COA application need not be considered. *Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

As for Esco's remaining claims, he contends that trial counsel were ineffective by failing to stipulate to his prior felony convictions and that the district court abused its discretion by denying his motion to file a second amended § 2254 application. Where the district court rejects constitutional claims on their merits, a COA should issue only if Esco "demonstrat[es] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see also Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). For a claim denied by the district court on procedural grounds, Esco must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484. Esco has not made the requisite showing. *See id.* at 483-84. Accordingly, Esco's COA motion is DENIED.

GREGG J. COSTA
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60708

FERLANDO ESCO,

Petitioner - Appellant

v.

CHRISTOPHER B. EPPS,

Respondent - Appellee

Appeal from the United States District Court for the
Southern District of Mississippi, Gulfport

Before OWEN, ELROD, and COSTA, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for a certificate of appealability (COA). The panel has considered appellant's opposed motion for panel reconsideration of single judge's order denying COA. IT IS ORDERED that the motion is DENIED.

APPENDIX- 2A

APPLICATION FOR CERTIFICATE OF APPEALABILITY

Ferlando Esco, a prisoner in state custody pursuant to a state conviction filed an action pursuant to 28 U.S.C. §2254 to vacate, set aside or correct his convictions for 1) aggravated assault in violation of M.C.A. § 97-3-7(2), 2) armed robbery (M.C.A. § 97-1-1), 3) conspiracy to commit aggravated assault (M.C.A. § 97-1-1), 4) conspiracy to commit armed robbery (M.C.A. § 97-3-79); 5) possession of a firearm by a convicted felon (M.C.A. § 97-37-5) and 6) felony evasion (M.C.A. § 97-9-72) in the Circuit Court of Madison County, Mississippi. *Dock. No. 1.* Esco was sentenced as an habitual to life without parole. He is presently serving that sentence and is in the custody of the Mississippi Department of Corrections.

Before the State filed its answer, Esco filed an amended petition. *Dock. No. 3.* After the State answered, Esco filed a motion to file a second amended petition. *Dock. No. 15.*

Without a hearing, the Magistrate Judge recommended that Esco's motion be denied. *Dock. No. 20.* After reviewing Esco's objections to the Report and Recommendation (*Dock. No. 26*), the district court overruled the objections denied Esco's motion and a certificate of appealability. Dock. Nos. 32, 33. Esco timely appealed to this Court (*Doc. 35*) and requests a certificate of appealability on one or more of the following issues:

1. The District Court's denial of the Motion to Amend the habeas petition to add a claim under *Riley v. California* was error.

Esco filed for permission to amend his petition to add a claim pursuant to *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), that it was error to search his cell phone without a warrant. The district court found that any such amendment would be futile and denied it. But the Mississippi Supreme Court has held that "that judicially enunciated rules of law are applied retroactively." *Kolberg v. State,* 704 So. 2d 1307, 1316 (Miss. 1997) (quoting *Ales v. Ales,* 650 So. 2d 482, 484 (Miss. 1995)); *see also Morgan v. State,* 703 So. 2d 832, 839 (Miss. 1997). To the extent that he would be entitled to have his claim heard in state court, the denial of this right rises to a violation of equal protection and due process. *Hicks v. Oklahoma,* 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980).

2. The state never proved that Esco had served a year or more on the prior felonies used to enhance his sentence.

The district court addresses the merits of this argument and finds that there is sufficient evidence in the record to prove that Esco served more than one year of time on two separate cases. Unfortunately the documents on which the state relied were not made part of the record for the district court to review. The record, as is exists now, does not provide proof that Esco

was an habitual offender pursuant to M.C.A. § 99-19-83. The failure of the State to include the exhibits meant that the district court was without the benefit of the pertinent parts of the state court record in reviewing this issue. For this reason alone, the case should be remanded to the district court. *Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1219 (11th Cir. 2000).

3. The indictment failed to contain all of the elements of armed robbery.

The essential elements of armed robbery are "(1) a felonious taking or attempt to take, (2) from the person or from the presence, (3) the personal property of another, (4) against his will, (5) by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon." *Gladney v. State,* 963 So.2d 1217, 1221 (Miss.App.2007). Esco's indictment did not include element number 5. The district court addresses the merits of the claim and determines that by including the allegation that Esco used a gun, the indictment implicitly charged Esco with have put the victim in fear of immediate injury to his person. But Mississippi law is very clear that an indictment must include every element of the offense. *Peterson v. State*, 671 So. 2d 647, 653 (Miss. 1996); *Love v. State,* 211 Miss. 606, 611, 52 So.2d 470, 472 (1951). The case cited by the District Court, *Harper v. State*, 434 So.2d 1367, 1368

(Miss. 1983), deals with the sufficiency of the evidence and not the sufficiency of the indictment.

4. Trial counsel was ineffective for failing to stipulate that Esco was a convicted felon.

The District Court finds that this issue is without merit because Esco's attorneys could have had a strategic reason in allowing the jury to hear the details of Esco's priors, namely, that Esco was arrested as a result of law enforcement's desire to frame him because he had been in trouble before. However, this defense could exist without the jury's being apprised of the details of Esco's priors. If trial counsel had stipulated that Esco was a felon, the jury would have known that Esco had been in trouble with the law before without having to hear the specifics of that trouble. Esco gained nothing by not stipulating and, thus, his trial counsel were ineffective just as were counsel in *Herrington v. State*, 102 So. 3d 1241 (Miss. App. 2012).

CONCLUSION

Esco will develop further facts and law in his supporting brief. In that brief, Esco has shown that reasonable jurists might differ on his claims. If this Court determines that the issues raised herein are debatable among jurists of reason and that this Court could resolve them in his favor, then the

certificate of appealability should issue. Alternatively, should this Court merely determine that the issues raised in Esco's claims are adequate to deserve encouragement to proceed further, the certificate should issue. *See, Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 3394-95 n. 4, 77 L.Ed.2d 1090 (1983).

Respectfully submitted,
FERLANDO ESCO

By: */s/ Jane E. Tucker*
JANE E. TUCKER

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this date, I filed the foregoing using the Court's ECF system which automatically notified:

JERROLYN M. OWENS
Special Assistant Attorney General
PO Box 220
Jackson, MS 39205-0220.

This the 21st of December, 2015.

/s/ Jane E. Tucker
ATTORNEY FOR ESCO

Jane E. Tucker
Attorney at Law
235 Melbourne Rd
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(601) 291-2047

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60708

FERLANDO ESCO,

Petitioner - Appellant

v.

CHRISTOPHER B. EPPS,

Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Mississippi

Before OWEN, ELROD, and COSTA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the appellant's motion to recall this court's mandate is DENIED. No mandate issued in this matter that just involved the denial of a certificate of appealability. In any event, any request for additional relief in this case--in which the court denied rehearing more than eight months ago--is untimely.

APPENDIX-3

CASE NO. 15-60708

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FERLANDO ESCO
Petitioner - Appellant

v.

CHRISTOPHER EPPS
Respondent – Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NO. 1:13-cv-516-HSO-RHW

APPLICATION FOR CERTIFICATE OF APPEALABILITY

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ATTORNEY FOR APPELLANT

APPENDIX-4

No. 15-60708

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FERLANDO ESCO **PETITIONER-APPELLANT**

VERSUS

CHRISTOPHER EPPS **RESPONDENT-APPELLEE**

MOTION TO RECALL MANDATE AND TO RECONSIDER APPLICATION FOR CERTIFICATE OF APPEALABILITY

COMES NOW, Ferlando Esco, the Petitioner-Appellant, pursuant to 5th Circuit Local Rule 41.2, and makes this his Motion To Recall Mandate And To Reconsider Application For Certificate Of Appealability (COA), and for cause would show the following:

1.

That this Court has authority to exercise discretion to determine, and grant, a motion to recall mandate. See ***5th Circuit Local Rule 41.2.*** Under the rule this Court should recall mandate to prevent "injustice." ***Id.***

2.

That "injustice" is defined:

abuse, bias, bigotry, breach, crime, damage, denial of justice, discrimination, disparity, error of the court, evil, ***fault of the court***, illegality, imposition, improbity, inequality, inquitable action, inequity, infraction, infringement, infringement on one's rights, iniquity, iniuria, iniustitia, malfeasance, maltreatment, miscarriage, miscarriage of justice, misfeasance, mistake of the court, mistreatment, offense, ***omission of a court***, oppression, outrage, partiality, partisanship, persecution, prejudice, transgression, tyranny, unevenness, unfair action, unfairness, unjust treatment, unlawfulness, unrighteousness, violation, violation of right, wrong, wrong verdict, wrongdoing.

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3.

That a manifest injustice is also defined as:

an outcome in a case that is ***plainly and obviously unjust.***

See ***Merriam-Webster Dictionary of Law*** (1996).

4.

That this Court's decision to deny COA in this case was clearly erroneous because of an omisson of this Court, which was the fault of this Court, and which was plainly and obviously unjust.

5.

That this Court denied the certificate of appealability (COA) in this case because this Court made the finding that the Petitioner-Appellant ***briefed two issues in his COA application which was not before the lower court***, that is, the issue that (1) the State failed to demonstrate that he was an habitual offender; and (2) the indictment was insufficient for failing to charge every element of armed robbery. See attached ***January 23, 2017, Order*** (at page 2, first paragraph, lines 5-10)(citation omitted). This was manifestly incorrect and/or clearly erroneous where the record before the lower court demonstrates that the lower court analyzed, and decided, these very two issues that this Court said was not before the lower court. See attached ***Memorandum Opinion of District Court*** (at pages 11-15). Here, the Court obviously omitted these very two issues, and this omission was the fault of the Court. This is plainly and obviously unjust where it is prejudicial by flushing out two claims that was properly before this Court, having been before and decided by the lower court. These two issues omitted by this Court were relevant and critical to a proper and just consideration of the Petitioner-Apellant's request for COA.

6.

That in the case of ***Chester v. Thaler***, No. 08-700233 (decided 6-12-2013), the Federal Court ruled that the Court declined to recall the mandate because there was no perceived injustice nor incorrectness in its decision. See attached ***Chester v. Thaler***. Under this standard, where the Petitioner-Appellant demonstrates an injustice, and incorrectness, in this Court's decision to deny COA, this Court ***should not*** decline to recall the mandate and reconsider the Court's clearly erroneous denial of COA.

7.

That in the case of ***USA v. Montgomery***, No. 09-50809 (decided 9-30-2013), the Federal Court found that Montgomery filed a motion to recall mandate, which was denied on the ground that no mandate was issued. Subsequently, this Court found that Montgomery moved for reconsideration, correctly pointing out that the mandate was issued. This Court then granted Montgomery's motion for reconsideration. See attached ***USA v. Montgomery***. Under this standard, once the Petitioner-Appellant demonstrated (as shown above) that this Court was manifestly incorrect in saying that the two issues briefed were not before the court below, when in fact the record shows that the issue were before, and decided by, the court below, the Petitioner-Appellant's motion to reconsider should be granted.

WHEREFORE, PREMISES CONSIDERED, this Court should grant this motion, recall the mandate, and reconsider the COA application regarding these two issues addressed above. This Court should grant any other relief deemed to be required by justice, fairness and/or equity.

RESPECTFULLY SUBMITTED, this the ____ day of _____, 2017.

Ferlando Esco

FERLANDO ESCO
PRO SE

CERTIFICATE OF SERVICE

Let this certify that the undersigned has on this day caused a true copy of the foregoing to be mailed to Attorney General, P.O. Box 220, Jackson, MS., 39205, this the 11th day of Sept, 2017.

Ferlando Esco

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EMCF
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MERIDIAN, MS 39307