UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1611

Elmos D. Hopkins

Petitioner - Appellant

v.

Warden Robert Dooley; Marty Jackley, Attorney General of the State of South Dakota

Respondents - Appellees

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:17-cv-04082-LLP)

JUDGMENT

Before GRUENDER, KELLY and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

July 24, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix "C"

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ELMOS D. HOPKINS,	*	CIV 17-4082
Petitioner,	*	
vs.	*	JUDGMENT
WARDEN ROBERT DOOLEY; and MARTY JACKLEY, The Attorney General of the State of South Dakota,	*	
Respondents.	*	

In accordance with the Order filed on this date with the clerk,

IT IS ORDERED, ADJUDGED, and DECREED that Petitioner's application for a writ of habeas corpus is dismissed with prejudice.

Dated this 17th day of January, 2018.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
MATTHEW W. THELEN, CLERK

By: _____ Deputy

Appendix "B"

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ELMOS D. HOPKINS,	*	CIV 17-4082
Petitioner,	*	
vs.	*	ORDER
WARDEN ROBERT DOOLEY; and MARTY JACKLEY, The Attorney General of the State of South Dakota,	*	
Respondents.	*	

Petitioner Elmos D. Hopkins, an inmate at the Mike Durfee State Prison in Springfield, South Dakota, has applied for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Magistrate Judge issued a Report and Recommendation recommending that the Respondents' Motion to Dismiss be granted and Mr. Hopkins' Petition for Habeas Corpus be dismissed with prejudice. Petitioner filed no objections to the Report and Recommendation.

After conducting an independent review of the record, the Court agrees with the Magistrate Judge. Accordingly,

IT IS ORDERED:

1. That the Report and Recommendation, Doc. 13, is ADOPTED.

2. That Respondents' Motion to Dismiss, Doc. 10, is GRANTED.

3. That Petitioner's application for Writ of Habeas Corpus, Doc. 1, is dismissed with prejudice.

4. That Petitioner's Motion for Stay and Abeyance, Doc. 3, is denied.

5. That Petitioner's Motion *Informa Pauperis Status*, Doc. 8, is denied as moot.

6. That a Certificate of Appealability shall not issue.

Dated this 17th day of January, 2018.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
MATTHEW W. THELEN, CLERK

By: _____
Deputy

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

ELMOS D. HOPKINS, Petitioner, vs. WARDEN ROBERT DOOLEY, MARTY JACKLEY, THE ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA; Respondents.	4:17-CV-04082-LLP REPORT AND RECOMMENDATION

INTRODUCTION

This matter is before the court on petitioner Elmos D. Hopkins' *pro se* petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. See Docket No. 1. This matter was referred to this magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) & (B) and the October 16, 2014, standing order of the Honorable Karen E. Schreier, United States District Judge. Now pending is respondents' motion to dismiss, which was filed July 26, 2017. See Docket No. 10. Mr. Hopkins thereafter filed a "notice to proceed." See Docket No. 12. The following is this court's recommended disposition of respondents' motion.

FACTS

A. Direct Criminal Proceedings

Mr. Hopkins was arrested and charged following a burglary of the residence of John and Cindy Miles the day after Christmas, December 26, 2011. He proceeded to jury trial.

1. The Jury Trial

At trial, John Miles testified he and his wife had left their Lincoln County, South Dakota, home to travel into the city of Sioux Falls on December 26, 2011, to have breakfast with friends.[1] They returned to their home at approximately 10 a.m. As they traveled the gravel road leading to their house, they noticed an African-American male sitting in a white car parked along the roadside. It struck Mr. Miles as an odd place to be parked. As the Mileses pulled into their garage, they noticed a cabinet door ajar. They then noticed the door leading from the garage into the house was open. They realized something was amiss and John began backing their vehicle out of the garage.

As the vehicle traveled down the driveway, the Mileses observed exiting their home a Caucasian male with a gun in either hand and an African-American male with a sack over his back. Mr. Miles testified when the two men saw the Mileses, they spun around and reentered the house. The Mileses continued backing out of their driveway and drove over to a gravel road on the east side of their house. Mr. Miles drove past three or four houses before stopping and turning his car back around. He then drove past the front of his house again. Spying the white car parked by the road, he decided to drive closer to obtain the license plate off the car because he believed it must be involved with the burglars.

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[1] This court does not recount trial testimony in the order in which it appeared at trial. Rather, the trial testimony is recounted herein in the order in which it makes narrative sense to the reader. Although out of order, each witness' testimony is recounted accurately.

As Mr. Miles drove past the front of his house, he saw a gun come pointing out of the bushes at them, so he hit the brakes. The two men previously spotted saw the Mileses and turned around, running to the northeast. Mr. Miles continued following the white car that had been parked, which was heading back toward Sioux Falls. Cynthia Miles called 9-1-1 on her phone. The Mileses followed the white car, updating police as to the location of the car as they followed.

At one point near the intersection of 69th Street and Cliff Avenue in Sioux Falls, the white car pulled into a complex and the two cars ended up facing each other. The driver of the white car got out and gestured to the Mileses as if to say, "what do you want? What are you doing?" Fearing that the driver might have a gun, the Mileses backed up. The driver of the white car took off again and the Mileses resumed pursuing him.

After the white car ran through a stop sign and a stop light, Mr. Miles quit chasing it, not wanting to have the white car hit someone else and hurt them. Police stopped the car, a white Chevrolet Malibu, in Sioux Falls just a few minutes after the Mileses gave up the chase. The Mileses were called to the scene of the stop where they identified both the car and the driver.

Afterward, the police and the Mileses traveled back to the Mileses' house. After approximately 4 hours of waiting, Mr. Miles was able to enter his house. He found all the bedroom dresser cabinets opened, other cabinets and doors open, his guns were missing, much of his wife's jewelry was missing, and a

pillowcase was gone off one of the pillows on their bed. Mr. Miles identified a screwdriver and a hammer recovered from the crime scene as belonging to him. He stated when he and his wife left for Sioux Falls that morning, these tools were in his cabinet in the garage. Mr. Miles identified the guns, the pillowcase, and the jewelry recovered from outside as belonging to he and his wife.

In court, Mr. Miles was not able to identify Mr. Hopkins. On cross-examination, defense counsel reiterated that Mr. Miles was unable to identify Mr. Hopkins. Mr. Miles testified he never gave Mr. Hopkins permission to enter his house.

Cindy Miles also testified similarly to her husband. She added detail about the meeting with the driver of the white vehicle at the apartment complex at 69th Street and Cliff Avenue. She said the white car pulled into the complex and her husband followed. However, the complex parking lot was very small and the Mileses' car was blocking the white car's exit. At this point the African-American male driver got out of the white car and came towards the Mileses to within just a couple of feet from their car. He made a gesture which Cindy Miles interpreted to mean "what?" When the driver got back in his car, Cindy told her husband he might have a gun and suggested they back up, which they did. Cindy was able to positively identify the driver who had been parked in the white car by the side of the gravel road as the same driver of the car who they encountered at the apartment complex.

Cindy was not able to identify the Caucasian man and the African-American man who she saw coming out of her house. She testified they had on jeans with hooded sweatshirts, with the hoods on their heads obscuring their faces. She only saw them for a split second under stressful circumstances.

On cross-examination, defense counsel reiterated that Cindy could not identify Mr. Hopkins. She could not give a description of the age of either of the two burglars either.

During a break in testimony in the trial, defense co-counsel Cynthia Berreau informed the court that Marie Williams, a witness subpoenaed by the defense, had contacted counsel and indicated she would not honor her subpoena, stating it was too stressful for her to testify. Ms. Berreau stated Ms. Williams might be integral to the defense of Mr. Hopkins and asked the court how it would handle the matter. The court indicated it would wait until the time for Ms. Williams' testimony the next day and see if she honored her subpoena.

The next morning before the jury was brought in, Ms. Berreau asked the court to make inquiry of the bailiff whether he had overheard any conversation among the jurors that would indicate they had used Google or any electronic device to find out information about the case or about Mr. Hopkins. The court inquired whether Ms. Berreau had any evidence that the jury had violated the court's instruction not to conduct their own research. Ms. Berreau flatly said "no." Her request was based on her own investigation—she herself had

Googled Mr. Hopkins and found the first five stories that popped up indicated Mr. Hopkins had previously been arrested for armed robbery. The court refused to make inquiry of the bailiff or the jury where there was no evidence whatsoever of any jury misconduct. The court did state it would alert the bailiff privately to be attentive about the issue. Testimony then resumed.

Agent Jason Piercy of the South Dakota Division of Criminal Investigation (DCI) testified he identified the driver of the Chevrolet Malibu as Brandon Mahone. Agent Piercy interviewed Brandon in the backseat of a patrol car at the scene. Brandon gave Agent Piercy his mother's cell phone number, who he identified as Rita Moore, Mr. Hopkins' live-in girlfriend. Ms. Moore was also Tre Lee Hamer's aunt.

Police responded to the Miles residence and apprehended the African-American male who had been fleeing on foot. He was identified as Tre Lee Hamer. Agent Piercy interviewed Tre in the backseat of a patrol vehicle in the driveway of the Mileses' house. Tre told Agent Piercy he had been burglarizing the Mileses' home with two other individuals, Mr. Hopkins and Brandon, who was the driver of the white vehicle.

Other police officers related to Agent Piercy what the Mileses had observed. The police also told Agent Piercy they had discovered a pillowcase with a tire iron laying on top of it in the cattails near the Mileses' house and two firearms in the yard of a neighbor as well. The Mileses identified the firearms and the pillowcase as their property.

Agent Piercy then called Rita Moore. Based upon the information he had obtained from the Mileses, Brandon, Tre, and Ms. Moore, Agent Piercy felt he had probable cause to arrest Elmos Hopkins. He then proceeded to locate Mr. Hopkins at his apartment. Two police officers accompanied Agent Piercy, one of which handcuffed Mr. Hopkins when he exited his apartment.

Agent Piercy asked for permission to search Mr. Hopkins' white Oldsmobile Cadillac which was parked out front. Mr. Hopkins gave consent to search. The search revealed that there was no tire iron in the trunk of the car.

The police officers transported Mr. Hopkins to the jail and Agent Piercy met with him in an interview room there. The meeting was videotaped and a redacted DVD of this meeting was introduced into evidence at trial.[2] At the inception of the interview, which began at 3:26 p.m., Agent Piercy read Mr. Hopkins his Miranda rights. Mr. Hopkins indicated he understood those rights and would waive the rights and talk to Agent Piercy. A video recording of the interview was played for the jury. The following is a paraphrased summary of what Mr. Hopkins told Agent Piercy in his interview:[3]

> We were out riding around and we decided we wanted to "do something." I was with two boys. Can't remember their names. [Agent Piercy jogged Mr. Hopkins' memory.] Brandon was Rita's

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[2] There were long stretches of time when Mr. Hopkins was alone in the interview room and nothing was happening. These segments were redacted. There was also redacted from the video some preliminary discussion about Mr. Hopkins' criminal record.

[3] This court obtained a copy of the video recording from state court and watched it.

> son. Brandon was just driving the car. Tre was the other boy. Me and Brandon went over to Tre's to pick him up. Stopped at a gas station to get gas. All three of us were talking about needing money. Let's just say the burglary was my idea. We were just driving around and we saw this house. Never saw the house before. Randomly picked the house out. "It's the only way to do it." We knocked to see if anyone was home. We didn't have a plan. Brandon knew what we were doing. The tire tool found at the crime scene was mine. It came out of the back of my Oldsmobile. We knocked on the door. Tried to get in. Finally I broke a window and crawled through. I grabbed two guns, long guns. I also put some jewelry in a pillowcase. I found the guns in a closet in the master bedroom. The guns and jewelry came from the same room. I wasn't in there 5 minutes. Tre wasn't in the bedroom with me. Tre came running in and said the homeowners came home. Tre tried to run through a plate glass window—patio door. We walked out the front door. The homeowners saw me, looked at me. I just smiled at them--I had two guns in my hands, pointing down. I'll just probably plead guilty. I made it home in 20 minutes. I was walking by the highway, hitchhiking. Five police came by me. An old man in a red pickup truck picked me up. I'm wearing the same clothes and cowboy boots in the interview that I wore during the burglary. My boots have smooth soles except for the heel. Tre didn't take anything. I handed Tre the pillowcase because I had the guns in my hands. It was just a random thing—it just happened. I'll cop off for a year.

During the interview with Agent Piercy, Mr. Hopkins told him he used an L-shaped tire tool with a socket at one end to access the Mileses' house. At the time Mr. Hopkins made this admission, Agent Piercy had not revealed to Mr. Hopkins that a tire iron was discovered at the Mileses' house. The details Mr. Hopkins related to Agent Piercy about the burglary—who was involved, what transportation was used, how entry into the home was accomplished, what items were taken and where in the Mileses' home those items were found—matched the information from Brandon, Tre, the Mileses and the officers on scene. For example, Mr. Hopkins related walking out the front door

of the Mileses' house and meeting the homeowners face-to-face with guns in both hands. He identified Brandon as the driver of the car and Tre as entering the house with Mr. Hopkins.

During cross-examination, one of Mr. Hopkins' trial counsel, Paul Henry, elicited testimony from Agent Piercy that shoe prints had been found at the scene of the burglary, that Mr. Hopkins was wearing black cowboy boots when Agent Piercy interviewed him, and that none of the shoe prints recovered from the crime scene matched any shoes owned by Mr. Hopkins. Agent Piercy also testified there was no DNA evidence, fingerprints, or any other forensic evidence to prove Mr. Hopkins was at the Mileses' home.

Agent Piercy also agreed that during the interview that Mr. Hopkins tried to deflect any culpability as to Brandon, saying at one point that he did not even know his name and also saying that Brandon "didn't do much" in connection with the crime. Agent Piercy also admitted when he pressed Mr. Hopkins to say whose idea it was to commit the burglary, Mr. Hopkins responded, "let's just say I did it." When Agent Piercy pressed him, saying he did not want to put words in Mr. Hopkins' mouth, Mr. Hopkins just repeated the same line.

Deputy Dave Schrank of the Lincoln County Sheriff's Office testified about various photos taken of the crime scene and the physical items recovered therefrom. Among the physical items recovered were a hammer left on the bed in the master bedroom, a screwdriver left on the step, the tire iron, a Zabala

20-gauge shotgun, and a .22 caliber Glenfield rifle. Although these items were tested for latent fingerprints, police were not able to identify any fingerprints on any of these items. No fingerprints were obtained from doorways or other surfaces in the house either.

Deputy Schrank also testified that he could not say that any of the pry marks found on doors, doorknobs, or doorframes were--or were not--caused by either the tire iron or the screwdriver. He also stated no DNA evidence was found that could be tested.

Deputy Schrank testified he photographed shoe prints found at the scene as well as took a gel lift and an electrostatic lift to recover shoe impressions. The impressions matched a pair of shoes that had been turned into evidence. Because the shoe was a common shoe pattern, Deputy Schrank could not conclusively say the shoes in evidence made the shoe prints found at the crime scene. Deputy Schrank also found a shoe print that he was not able to lift or document that was consistent with a print left by a cowboy boot.

On cross-examination, Mr. Henry elicited testimony that Deputy Schrank never saw Mr. Hopkins' footwear that he was wearing upon his arrest, and that even if he had seen the shoes, Deputy Schrank would not be able to conclusively match the shoes to the nondescript shoe print found at the Mileses' house. The only thing Deputy Schrank could say with certainty was that the print was made by a shoe with a sole with no pattern on it. Deputy Schrank agreed that he did not know if Mr. Hopkins' footwear had a pattern on

it. Deputy Schrank agreed that he found no fingerprints, no DNA, no trace evidence, and no definitive footprints that tied Mr. Hopkins to the crime scene.

Brandon Mahone testified that he drove Mr. Hopkins and Tre Lee Hamer to a house that Mr. Hopkins identified as his boss' house. Mr. Hopkins directed Brandon where to park and to wait for him. He and Tre then got out of Brandon's car and went to the house. Brandon was sitting by the side of the road when he observed the homeowners drive by him, pick up their mail out of the mailbox, and drive into the garage of the same home Mr. Hopkins and Tre had approached. Brandon then saw the Mileses' vehicle go into reverse rather violently and back out of the driveway very quickly. He surmised something was not right and he decided to leave the area. The Mileses followed him and ultimately he was arrested. He stated the first clue he had that something was amiss was when he saw the Mileses' car back violently out of the garage.

Brandon was arrested and taken to the police station and interviewed. He testified that he never spoke to Mr. Hopkins, his mother Rita, or his auntie Marie Williams by phone at any point that morning after he parted company with Tre and Mr. Hopkins. Brandon testified that from the time the Mileses arrived home until he was booked into the jail, he never told anyone about what happened except the police. Brandon's testimony was very clear and cogent. He recalled details and articulated events clearly. At no time did he state anything out of sequence, at no time did anyone have to prompt or remind him of anything, at no point did he appear confused.

On cross-examination, Brandon admitted lying to police when they initially questioned him after his arrest on December 26. Initially he told police he was in the country looking for a good place to take his son dirt bike riding. He also lied and said he did not know Tre or Mr. Hopkins. Also on cross, Brandon admitted he had previously been convicted of false impersonation to a law enforcement officer, a crime of dishonesty. Brandon admitted he had a history of lying. Brandon also testified he did not see Mr. Hopkins go into or come out of the Mileses' house.

Tre testified that around 9 a.m. on December 26, 2011, Mr. Hopkins and Brandon picked him up at his grandmother's house—Brandon was driving his car. The three of them drove around for a while, stopped at Burger King, then stopped at a gas station. They arrived at the Mileses' house later that morning. He and Mr. Hopkins got out of the car and went to the front door. They knocked, but no one came to the door.

Then Mr. Hopkins went to the back of the house, returned to the front, and went to the car and grabbed a crowbar which he used to break a window in the house.[4] Mr. Hopkins climbed into the house through the broken window, came back out the garage, and unlocked the garage door. Tre then entered the house with Mr. Hopkins. Tre described the crowbar Mr. Hopkins

[4] There was never any testimony as to when Mr. Hopkins' tire iron or "tire tool" from his Oldsmobile was transferred to Brandon's Chevrolet Malibu. The fact that it was transferred at some time prior to the three setting out on their movements on the morning of December 26 may suggest the crime was anticipated by at least one of the three men involved.

used as an L-shaped black tool that you use to change a tire on a car. This matched the description of the tool that Mr. Hopkins gave to Agent Piercy in his confession.

Tre testified he and Mr. Hopkins were not in the house even 10 minutes when the homeowners returned. Tre said he was freaking out. Mr. Hopkins told Tre they were just going to walk out of the house. He threw Tre a pillowcase with jewelry in it. Mr. Hopkins exited the house into the garage carrying two guns and Tre followed him. Tre then ran out the back door of the garage. He tried to get to Brandon's car, but Brandon left, so Tre and Mr. Hopkins both ran to a field with tall grass. Tre threw the pillowcase back to Mr. Hopkins and ran off to an apartment complex. He was arrested when he left the apartment complex.

Tre was interviewed first by a police officer and then by a detective. He told them who he had been involved in the burglary with and what had happened. Tre was interviewed a third time later on also. Each time law enforcement interviewed Tre he always told them he was involved in the burglary with Mr. Hopkins and Brandon.

After Tre was taken to jail, he telephoned his girlfriend and talked to her. Tre told her only that he was arrested and what penalty he was facing. He did not tell her any details of what had happened. Tre made the phone call after he had been booked into the jail.

At the close of the state's case, a question was raised about whether Tre and Brandon could be released from their subpoenas. Defense counsel indicated they had been subpoenaed by the defense as well as the prosecution. Defense counsel wanted to confer with Mr. Hopkins before deciding whether to recall either witness in the defense's case. The defense never recalled either witness to testify during the defense's case.

The defense called Deputy E.J. Colshan as its first witness. He testified that when he was called by dispatch to investigate this burglary, he was informed to look for a white male in his 40s or 50s wearing a dark colored coat. Deputy Steve Erickson testified that the person who found the two long guns and drew Erickson's attention to them was a white male of undetermined age. On cross-examination by the state Deputy Erickson said the man was a neighbor of the Mileses.

The defense called Rita Moore. Ms. Moore testified she was Brandon's mom. She testified she met Mr. Hopkins through a program her sister was running and had known him approximately 18 months. Ms. Moore testified she and her son Brandon lived with Mr. Hopkins for a time and that he was her boyfriend in December, 2011.

Ms. Moore testified that Mr. Hopkins was not home the morning of December 26, 2011, at least initially. He did return home shortly before noon, about the same time a news story was broadcast about her nephew Tre. Mr. Hopkins then left the apartment again.

Prior to Mr. Hopkins' return home, Ms. Moore received a phone call from Tre's girlfriend. The girlfriend told Ms. Moore the guys were in trouble and she was going to come over to Ms. Moore's home.

Ms. Moore and Mr. Hopkins had a discussion on December 26 about her son, Brandon. Ms. Moore expressed concern for Brandon. When defense counsel asked if Mr. Hopkins called Ms. Moore on the telephone after he left the apartment, she testified he had not.

During cross-examination by the state, Ms. Moore admitted she had continued to have contact with Mr. Hopkins up until July, 2012. During that contact, the two of them had discussed her testimony at trial. Ms. Moore testified flatly that Mr. Hopkins told her what to say at trial. Also on cross-examination, Ms. Moore testified that Mr. Hopkins had admitted to her that he was at the crime scene with her son, Brandon.

After Ms. Moore's testimony, the jury was excused. Defense counsel informed the court that, as expected, Marie Williams had failed to come to court pursuant to her subpoena. Defense counsel asked permission to speak privately with Mr. Hopkins to determine whether he wanted to press the issue and force Ms. Williams to comply with the subpoena. Defense counsel also informed the court they would be discussing with Mr. Hopkins the subject of whether he should testify. After a break, defense counsel informed the court they would not be calling Ms. Williams as a witness, but that Mr. Hopkins would be testifying on his own behalf.

At this point, the court again advised Mr. Hopkins that he had a right not to testify. The court said if he exercised his right to remain silent, the jury would be instructed that not testifying is not an admission of guilt in any fashion. After asking Mr. Hopkins if he intended to testify (he said "yes,"), the court instructed him he would be waiving his right not to answer questions. If he testified, the prosecutor would be allowed to ask questions about his testimony and his involvement in the crime. Mr. Hopkins said he understood. The court stated Mr. Hopkins would become just like any other witness in the case. The court further stated Mr. Hopkins could be charged with perjury if he testified falsely. Mr. Hopkins said, "I understand that."

The court inquired whether Mr. Hopkins' decision to testify was against his counsel's advice. Ms. Berreau said that it was against advice. The court then further told Mr. Hopkins if he testified against counsel's advice, he would not then later be able to claim it was a mistake to testify, that he got bad legal advice. Mr. Hopkins replied, "She's a good lawyer." The court asked if he understood everything the court had said. Mr. Hopkins replied, "Yep."

Defense counsel then called Mr. Hopkins as a witness. Mr. Hopkins testified in narrative fashion instead of a question-and-answer format.[5] Mr. Hopkins testified he got up in the morning and went over to Lewis Drug to

[5] At the subsequent habeas evidentiary hearing, defense trial counsel explained they had an ethical duty not to suborn perjury. Because Mr. Hopkins had admitted his guilt to counsel numerous times, counsel expected Mr. Hopkins might lie when he testified. Therefore, the only ethical way for counsel to present Mr. Hopkins' testimony was in narrative fashion rather than question-and-answer format.

buy some milk. When he got back to the apartment, Tre's girlfriend called saying "they" were chasing Tre through the woods and asking if Ms. Moore and Mr. Hopkins would go look for him. Mr. Hopkins took Ms. Moore with him because he was from Florida and didn't know his way around. They searched for Tre, did not find him, and returned to their apartment. Tre's girlfriend called back and said the police had arrested Tre.

Police then called and said they had a warrant for Mr. Hopkins' arrest, that Tre had told police Mr. Hopkins was with him. Mr. Hopkins then took off in his car. He drove to Marie Williams' work place, where he used the phone there to call back to the apartment to talk to Ms. Moore at approximately 10 or 10:30 a.m. Mr. Hopkins testified he asked Ms. Moore what she wanted him to do. She told Mr. Hopkins she did not want Brandon to go to prison. Mr. Hopkins testified he told Ms. Moore he would take the blame for Brandon and turn himself in.

Mr. Hopkins testified that he had previously been living with a woman for over a year who drank a lot. He explained to the jury that he was on parole and did not want to get busted on parole, so he moved out and left her. Why, he asked the jury, would he possibly go just two weeks later, meet two guys that he didn't even know, and go do a burglary with them when he was trying to successfully serve out his five-year parole?

He testified all he has done was try to help Ms. Moore and Brandon. Brandon had no place to go and he let him move in with him and Ms. Moore.

Mr. Hopkins testified he could not understand why they were all lying about him now. He also testified that, after he was arrested and placed in jail, Ms. Moore stole all his money and gambled it at a casino. He also testified she used his credit cards and burnt them up.

Mr. Hopkins told the jury he "had a rough past, you know, I really do." But he explained that anything he had ever done, he pled guilty to because he did it. But this, he testified, he did not do. "I'm not guilty of this," he stated.

On cross-examination, the state held up the tire tool found at the crime scene and asked Mr. Hopkins if he recognized it. Mr. Hopkins said he did. The state asked if the tire tool had come from the back of Mr. Hopkins' car. "Yes, it did," Mr. Hopkins answered. As to his allegedly false confession, the state asked Mr. Hopkins—if his purpose was to help Brandon and Tre—why he had implicated them in the burglary in his confession. Mr. Hopkins denied implicating the two boys. Mr. Hopkins stated he fabricated the confession. After Mr. Hopkins testified, the defense rested. The state did not put on any rebuttal evidence.

In closing arguments, the state emphasized Mr. Hopkins' confession to Agent Piercy, which included a wealth of details that only one who participated in the burglary could know. The state also highlighted Rita Moore's testimony that Mr. Hopkins had attempted to instruct her on what to say in her testimony at trial and that he admitted to her he committed the burglary.

In the defense closing argument, counsel pointed out the victims were eye witnesses to the burglary of their home and they were unable to identify Mr. Hopkins as the man who committed the crime. As to Brandon, Rita and Tre, who did implicate Mr. Hopkins, counsel pointed out Mr. Hopkins was an outsider and the three of them were all blood relatives, giving them a motive to lie to pin the blame on Mr. Hopkins. Counsel argued that there was no forensic evidence tying Mr. Hopkins to the crime scene—no hair fibers, no blood, no fingerprints, and no DNA. Given that there was a broken window, counsel found the absence of any blood or fibers noteworthy. Counsel also compared Mr. Hopkins and Tre and asked the jury to consider which of them looked more physically able to kick in a door.[6]

After deliberating 49 minutes, the jury returned a guilty verdict against Mr. Hopkins for second-degree burglary and two counts of grand theft.

2. Plea to Part II Information and Sentencing

On November 6, 2012, Mr. Hopkins was arraigned on the part II information alleging him to be a habitual offender. The state circuit court informed Mr. Hopkins he had a right to a separate jury trial on the habitual offender information. At such a trial, the jury would have to determine whether Mr. Hopkins' prior convictions were valid and qualify as felony convictions. The court informed Mr. Hopkins he was presumed innocent of the

[6] The court is not aware of Tre Lee Hamer's appearance, but Mr. Hopkins in the interview video stated he weighed 125 pounds. He appeared extremely thin and lanky. He was 65 years old at the time of the interview. Tre was in his late teens or early 20s.

habitual offender allegation and the state would have the sole burden of proving his guilt beyond a reasonable doubt.

The court explained Mr. Hopkins would be entitled to court-appointed counsel on the habitual offender charge. He would have a right to confront and cross-examine his accusers at trial. He would have the right to remain silent. He would have the right to subpoena witnesses. He would have the right to testify on his own behalf if he wished.

In order to prove Mr. Hopkins' prior felonies, the court told Mr. Hopkins the state could offer certified copies of the judgments from the courts in which he had been convicted. The state would also have to show Mr. Hopkins was the same person named in those judgments.

The court explained to Mr. Hopkins that if the jury found him guilty on the habitual offender information, the legal effect would be to raise the maximum penalty on each of his current convictions by two classifications. The court explained second-degree burglary starts out as a Class III offense, but with a conviction on a habitual offender information, it would be increased to a Class I offense with a maximum penalty of 50 years' imprisonment and a $50,000 fine. Likewise, grand theft had an initial classification as a Class IV felony, but with a habitual offender conviction, it would be increased to a Class II felony with a maximum penalty of 25 years' imprisonment. The court also explained to Mr. Hopkins that each of his sentences could be ordered to be served consecutively, so that he would be facing a maximum total of 100 years'

imprisonment (50 + 25 + 25 = 100). When the court asked Mr. Hopkins if he understood all this, he responded, "yes, sir."

The court then asked Mr. Hopkins whether he wanted to plead guilty to the part II habitual offender information or whether he wanted to plead not guilty and have a trial. Mr. Hopkins indicated he wished to plead guilty. The court informed him if he pleaded guilty, he would give up his right to a jury trial on the information, give up the right to confront and cross-examine his accusers, and he would give up his right to remain silent because the judge would ask him questions.

The court asked Mr. Hopkins as to each of five separate felonies alleged in the habitual offender information whether he admitted the prior conviction. Mr. Hopkins admitted all five prior felonies and entered a guilty plea to the habitual offender information. The court inquired whether Mr. Hopkins had legal representation on each of the felony convictions alleged in the information. Mr. Hopkins stated he had. Mr. Hopkins testified in response to the court's questions that no one had forced, threatened, or made any promises to him to get him to admit to the habitual offender information.

Mr. Hopkins waived his right to a 48-hour interlude between his plea and sentencing. The court advised Mr. Hopkins it was not usually in the defendant's favor to waive the 48-hour interval. Mr. Hopkins indicated he wanted to go ahead immediately with sentencing despite this advisement. The state court sentenced Mr. Hopkins in the same hearing to 55 years'

imprisonment as follows: 50 years' imprisonment on the burglary conviction; 5 years' imprisonment on one grand theft conviction, to be served consecutive to the burglary sentence; 5 years' imprisonment on the second grand theft conviction, to be served concurrently with the first grand theft sentence.

3. Direct Appeal

Mr. Hopkins appealed his convictions to the South Dakota Supreme Court. A different lawyer, Jeffrey Larson, was appointed to represent Mr. Hopkins on appeal. Appellate counsel filed a brief raising the issue whether the trial court had erred in admitting inadmissible hearsay testimony at trial. Counsel argued that the trial court had erred in allowing Agent Piercy to testify to what other people had told him about the investigation, including information linking Mr. Hopkins to the crime. That problem was compounded when, upon defense counsel properly objecting to the testimony, the trial court never clearly sustained or overruled the objection. The South Dakota Supreme Court affirmed summarily on September 3, 2013. State v. Hopkins, 837 N.W.2d 414 (Table).

B. State Habeas Proceedings

1. First State Habeas Petition

Mr. Hopkins filed his first state habeas petition *pro se* on November 15, 2013.[7] He initially raised the following issues:

[7] While his first state habeas petition was pending, Mr. Hopkins filed two motions to reduce his sentence, one on January 15, 2014, and the other

Ineffective assistance of counsel in the following ways:

1. trial counsel failed to submit an alibi defense

2. trial/appellate counsel failed to investigate conversations with other inmates who were privy to conversations between the persons who actually committed the crimes, who admitted their involvement, and laughed about lying on the witness stand at trial when they implicated Mr. Hopkins.

3. trial counsel failed to impeach the state's witnesses who actually committed the crime by failing to ask them about immunity agreements

4. trial counsel failed to move to suppress Mr. Hopkins' confession

5. trial counsel failed to move to suppress fruit of illegal search of Mr. Hopkins' apartment

6. trial counsel failed to challenge or investigate the foundation and truth of hearsay statements admitted into evidence

7. trial counsel failed to elicit testimony from the victim at trial that it was the state's two witnesses who committed the crime and not Mr. Hopkins

8. trial counsel failed to subpoena Mr. Hopkins' phone records which would have shown he was not at the scene of the crime when the crime was committed

9. trial counsel failed to obtain surveillance video footage from Lewis Drug that would have shown Mr. Hopkins was at the drug store at the time the crime was being committed

10. trial counsel failed to object to prosecutor's evidence that the burglary tool (a tire iron) came from Mr. Hopkins' car

11. trial counsel failed to show Mr. Hopkins did not possess any of the stolen goods and was not present at the burglary; Mr. Hopkins asserted he was factually and actually innocent

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October 8, 2014. The state circuit court denied both of those motions on January 28, 2014, and December 8, 2014, respectively.

12. trial counsel failed to tell the court about improper jury activity on Google after the first night of trial

13. trial counsel allowed the jury to see Mr. Hopkins in jail clothing and shackles prior to trial

14. the medication trial counsel was taking during the trial made him highly intoxicated and forgetful

15. trial counsel failed to convey to Mr. Hopkins a pre-trial plea offer by the prosecutor which would have limited his penitentiary sentence to 20 years

16. appellate counsel met with Mr. Hopkins only briefly

17. appellate counsel failed to present all the issues Mr. Hopkins wanted presented in his direct appeal

18. appellate counsel refused to give Mr. Hopkins copies of his trial transcripts before filing the appeal

In addition to the above ineffective assistance of counsel claims, Mr. Hopkins also raised two free-standing constitutional issues:

19. The admission of hearsay statements violated Mr. Hopkins' due process rights.

20. Mr. Hopkins' sentence violates the Eighth Amendment prohibition on cruel and unusual punishment.

The state habeas court appointed counsel to represent Mr. Hopkins. An evidentiary hearing was held on January 14, 2016.[8] Mr. Hopkins was personally present at the hearing along with his habeas counsel.

Prior to the hearing, Mr. Hopkins voluntarily dismissed the following claims previously asserted as set forth above: 2, 5, 14, 16, 17, 18. The state habeas court denied Mr. Hopkins' petition for relief in written findings of fact

[8] The transcript of the state habeas evidentiary hearing is attached.

and conclusions of law dated May 12, 2016, addressing only the following claims enumerated above: 1, 3-4, 6-13, 15, and 19-20. Thus, no decision was rendered on the following claims enumerated above: 2, 5, 14, and 16-18, which are the claims Mr. Hopkins voluntarily dismissed. The findings of fact and legal conclusions of the state habeas court are discussed in more detail below in the DISCUSSION section of this opinion.

Following the state circuit court's decision, Mr. Hopkins moved for a certificate of appealability, which the circuit court denied on June 16, 2016. He then sought a certificate of appealability from the South Dakota Supreme Court, which also denied his request 11 months later on May 12, 2017.

2. Second State Habeas Petition

On June 28, 2017, Mr. Hopkins filed a second state habeas petition. In it, he asserted "newly discovered evidence," that he had not undergone a competency evaluation prior to his trial. He argued the court should have *sua sponte* ordered such an evaluation. He also asserted trial, appellate, and habeas counsel were all ineffective for failing to identify this issue and raise it.

The state habeas court at the circuit court level denied Mr. Hopkins' second petition as a second or successive petition that did not meet the statutory requirements for filing such petitions. Specifically, the court held Mr. Hopkins did not show he had newly discovered evidence that would establish by clear and convincing evidence that no reasonable jury would have found him guilty. Alternatively, the court held Mr. Hopkins failed to allege a

new rule of constitutional law, previously unavailable, and made retroactive to cases on collateral review by the United States Supreme Court. The state habeas court denied leave to Mr. Hopkins to file his second petition on June 28, 2017.

Mr. Hopkins sought a certificate of probable cause from the South Dakota Supreme Court. That court denied Mr. Hopkins' request on August 7, 2017.

C. Mr. Hopkins' Federal § 2254 Habeas Petition

In his petition in this court, Mr. Hopkins raises the following claims for relief:

1. Due process violation in admitting inadmissible hearsay testimony.
2. Ineffective assistance of trial counsel:
    a. failure to present alibi defense
    b. failure to investigate
    c. failure to subpoena alibi witnesses
    d. failure to investigate jail inmate who told of conversations with the real persons who admitted committing the crime
    e. failure to impeach state's witnesses who committed crime
    f. failure to suppress confession
    g. failure to object to hearsay
    h. failure to establish victims did not identify Hopkins
    i. failure to subpoena Hopkins' phone records
    j. failure to obtain Lewis Drug surveillance video

k. failure to suppress fruits of illegal search

l. failure to pursue juror activity on Google

m. failure to object to jury seeing Hopkins in jail clothing with shackles on

n. trial counsel's medication interfered with his ability to represent Hopkins competently

o. failure to convey plea offer from prosecutor to Hopkins

p. failure to challenge sentencing

q. failure to explain consequences of going to trial

r. failure to explain the meaning of habitual offender charge

s. Mr. Hopkins attached a copy of his first state habeas petition and incorporated all those allegations by reference

3. Ineffective assistance of appellate and habeas counsel:

a. appellate counsel met only briefly once with Hopkins

b. appellate counsel refused to present on appeal all issues Hopkins wanted to present

c. appellate counsel did not give Hopkins copies of trial transcripts

d. appellate counsel refused to file an Anders[9] brief

e. appellate counsel failed to investigate

f. appellate counsel failed to raise issues of illegal search and seizure of Hopkins' home and car

[9] Anders v. California, 386 U.S. 738 (1967). An Anders brief may be filed on appeal where a convicted defendant wishes to appeal and counsel can find no non-frivolous issues to raise on appeal. An Anders brief thus preserves the defendant's right to an appeal while not compromising the lawyer's duty of candor to the court not to raise frivolous issues.

g. appellate counsel failed to raise Eighth Amendment issue as to sentence

h. Mr. Hopkins attached a copy of his first state habeas petition and incorporated all those allegations by reference

4. The trial court and trial counsel both failed to address Mr. Hopkins' mental incompetency to stand trial

D. Respondents' Motion to Dismiss

Respondents filed a motion to dismiss Mr. Hopkins' federal habeas petition without holding an evidentiary hearing. See Docket No. 10. They argue (incorporating by reference their answer), that Mr. Hopkins has failed to exhaust his claims and has procedurally defaulted on those claims. Respondents also argue that Mr. Hopkins is unable to state a claim upon which relief can be granted.

DISCUSSION

A. Rule 12(b)(6) Standard

Respondents' motion to dismiss is based on FED. R. CIV. P. 12(b)(6), which allows dismissal if the petitioner has failed to state a claim upon which relief can be granted. Petitioners must plead "enough facts to state a claim to relief that is *plausible* on its face." Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (emphasis added).

Under Federal Rule of Civil Procedure 8(a)(2), a petitioner must plead only "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. at 554-55 (quoting FED. R. CIV. P. 8(a)(2)). A complaint does not need "detailed factual allegations" to survive a motion to dismiss, but

a petitioner must provide the grounds for his entitlement to relief and cannot merely recite the elements of his cause of action. Id. at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). There is also a "plausibility standard" which "requires a complaint with enough factual matter (taken as true)" to support the conclusion that the petitioner has a valid claim. Id. at 556. The petitioner's complaint must contain sufficiently specific factual allegations in order to cross the line between "possibility" and "plausibility" of entitlement to relief. Id.

There are two "working principles" that apply to Rule 12(b)(6) motions. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). First, courts are not required to accept as true legal conclusions "couched as factual allegation[s]" contained in a complaint. Id. (citing Papasan, 478 U.S. at 286). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (quoting Twombly, 550 U.S. at 555). Rule 8 "does not unlock the doors of discovery for a petitioner armed with nothing more than conclusions." Iqbal, 556 U.S. at 678-79.

Second, the plausibility standard is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679 (quoting decision below Iqbal v. Hasty, 490 F.3d 143, 157-158 (2d Cir. 2007)). Where the petitioner's allegations are merely conclusory, the court may not infer more than the mere possibility of misconduct, and the complaint has

alleged "but has not 'show[n]' "that he is entitled to relief as required by Rule 8(a)(2). Iqbal, 556 U.S. at 679 (emphasis added).

The Court explained that a reviewing court should begin by identifying statements in the complaint that are conclusory and therefore not entitled to the presumption of truth. Id. at 679-680. Legal conclusions must be supported by factual allegations demonstrating the grounds for a petitioner's entitlement to relief. Id. at 679; Twombly, 550 U.S. at 555; FED. R. CIV. P. 8(a)(2). A court should assume the truth only of "well-pleaded factual allegations," and then may proceed to determine whether the allegations "plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

Rule 12(b)(6) requires the court to evaluate the sufficiency of a *plaintiff's pleading* of a claim. See FED. R. CIV. P. 12(b)(6); Iqbal, 556 U.S. at 679. Thus, the primary document the court examines is the plaintiff's initial pleading. Rule 56, the rule for summary judgment, allows the court to consider affidavits, documents, deposition transcripts and other items extraneous to the complaint in determining whether to grant the motion. See FED. R. CIV. P. 56. In this district, a summary judgment motion also requires the movant to file a statement of undisputed material facts. See DSD L.R. 56.1A. Respondents did not file a statement of undisputed material facts in support of their motion to dismiss, so it cannot be construed to be a summary judgment motion.

Courts evaluating a Rule 12(b)(6) motion are not strictly limited to evaluating only the complaint, however. Dittmer Properties, L.P. v. F.D.I.C.,

708 F.3d 1011, 1021 (8th Cir. 2013). They may consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned." Id. (citing Miller v. Redwood Toxicology Lab., Inc., 688 F.3d 928, 931 n.3 (8th Cir. 2012) (quoting 5B Charles A. Wright & Arthur R. Miller, Fed. Practice & Procedure § 1357 (3d ed. 2004))). In a habeas action, the settled record of the underlying proceedings is appropriate for the court to take judicial notice of when evaluating a motion to dismiss. See Hood v. United States, 152 F.2d 431 (8th Cir. 1946) (federal district court may take judicial notice of proceedings from another federal district court); Matter of Phillips, 593 F.2d 356 (8th Cir. 1979) (proper for federal court to take judicial notice of state court pleadings); Green v. White, 616 F.2d 1054 (8th Cir. 1980) (court of appeals may take judicial notice of district court filings). This court has taken judicial notice of Mr. Hopkins' criminal circuit court file, his direct appeal file, and both of his state habeas files. These are the principles guiding the court's evaluation of respondents' motion.

B. Principles Applicable to § 2254 Petitions

A state prisoner who believes he is incarcerated in violation of the Constitution or laws of the United States may file a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The federal courts are constrained, however by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), to exercise only a "limited and deferential review of underlying state court decisions." Osborne v.

Purkett, 411 F.3d 911, 914 (8th Cir. 2005). A federal court may not grant a writ of habeas corpus unless the state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in Supreme Court cases or if it confronts a set of facts that are materially indistinguishable from a decision of the Court and nevertheless arrives at a result different from the Court's precedent." Williams v. Taylor, 529 U.S. 362, 405-06, (2000). A federal habeas court may not issue the writ merely because it concludes the state court applied the clearly established federal law erroneously or incorrectly. Id. at 411. "Rather, that application must also be *unreasonable*." Id. (emphasis added).

The state court's factual findings are presumed to be correct, and a federal habeas court may not disregard the presumption unless specific statutory exceptions are met. Thatsaphone v. Weber, 137 F.3d 1041, 1045 (8th Cir. 1998); 28 U.S.C. § 2254(e). A federal habeas court "may not simply disagree with the state court's factual determinations. Instead it must conclude that the state court's findings lacked even fair support in the record." Marshall v. Lonberger, 459 U.S. 422, 432 (1983).

C. Exhaustion and Procedural Default

Mr. Hopkins presents, by this court's count, 29 discreet issues in support of his federal habeas petition, numbered above as issue 1, issue 2 with subparts a-s, issue 3 with subparts a-h, and issue 4. Of these 29 issues, there are 14 issues that were either never presented at all before the state courts, or were initially presented and then dismissed by Mr. Hopkins before his state court habeas evidentiary hearing, resulting in no decision being made on those issues by the state courts. The 14 issues not exhausted in state court are as follows, again using the court's numbering from the above FACTS section of this opinion: 2(d), (k), (n), (p), (q), and (r); all of 3 and all of 4. This court respectfully recommends dismissing these claims with prejudice because, as explained below, these claims are not exhausted and they cannot now be exhausted.

1. Exhaustion

Federal habeas review of state court convictions is limited.

> (b)(1) 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 unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the state; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> * * *
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

See 28 U.S.C. § 2254(b) and (c). The above codifies what was previously a judicial doctrine of exhaustion.

A federal court may not consider a claim for relief in a habeas corpus petition if the petitioner has not exhausted his state remedies. See 28 U.S.C. § 2254(b). "[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). If a ground for relief in the petitioner's claim makes factual or legal arguments that were not present in the petitioner's state claim, then the ground is not exhausted. Kenley v. Armontrout, 937 F.2d 1298, 1302 (8th Cir. 1991). The exhaustion doctrine protects the state courts' role in enforcing federal law and prevents the disruption of state judicial proceedings. Rose v. Lundy, 455 U.S. 509, 518 (1982). The Supreme Court has stated:

> Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Rose, 455 U.S. at 518 (citation omitted). The exhaustion rule requires state prisoners to seek complete relief on all claims in state court prior to filing a writ of habeas corpus in federal court. Federal courts should, therefore, dismiss a petition for a writ of habeas corpus that contains claims that the petitioner did

not exhaust at the state level. See 28 U.S.C. § 2254; Rose, 455 U.S. at 522. The exhaustion requirement is waived "only in rare cases where exceptional circumstances of peculiar urgency are shown to exist." Mellott v. Purkett, 63 F.3d 781, 784 (8th Cir. 1995).

A federal court must determine whether the petitioner fairly presented an issue to the state courts in a federal constitutional context. Satter v. Leapley, 977 F.2d 1259, 1262 (8th Cir. 1992). "To satisfy exhaustion requirements, a habeas petitioner who has, on direct appeal, raised a claim that is decided on its merits need not raise it again in a state post-conviction proceeding." Id. "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan, 526 U.S. at 845. "A claim is considered exhausted when the petitioner has afforded the highest state court a fair opportunity to rule on the factual and theoretical substance of his claim." Ashker v. Leapley, 5 F.3d 1178, 1179 (8th Cir. 1993).

a. Step One--Did Hopkins fairly present the federal constitutional dimensions of his federal habeas corpus claim to the state courts?

Fairly presenting a federal claim requires more than simply going through the state courts:

> The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies.

> Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.

Picard v. Connor, 404 U.S. 270, 276 (1971).

It is also not enough for the petitioner to assert facts necessary to support a federal claim or to assert a similar state-law claim. Ashker, 5 F.3d at 1179. The petitioner must present both the factual and legal premises of the federal claims to the state court. Smittie v. Lockhart, 843 F.2d 295, 297 (8th Cir. 1988) (citation omitted). "The petitioner must 'refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue.' " Ashker, 5 F.3d at 1179. This does not, however, require petitioner to cite "book and verse on the federal constitution." Picard, 404 U.S. at 278 (citing Daugharty v. Gladden, 257 F.2d 750, 758 (9th Cir. 1958)). The petitioner must simply make apparent the constitutional substance of the claim. Satter, 977 F.2d at 1262.

Here, 14 of Mr. Hopkins's claims are clearly not exhausted at the state level. Issues 2(d), (k), and (n) and 3(a)-(d) were initially presented in Mr. Hopkins' first state habeas petition, but he dismissed them before the evidentiary hearing on that petition. Issues 2(p), (q), and (r) as well as 3(e)-(h) were never presented in state court in any pleading. Issue 4 was presented in a second state habeas petition, but the state courts enforced a procedural bar to that petition and refused to receive it.

b. Step Two—Are there currently available, non-futile state remedies?

Because Mr. Hopkins has not exhausted his state remedies as to these 14 claims, the court must analyze whether there are any non-futile state remedies still available to Mr. Hopkins. In other words, would it do any good to send Mr. Hopkins back to state court to allow him to exhaust? The answer is "no."

In South Dakota, a prisoner may not bring a second or successive habeas petition unless his claim fits into one of two categories. See SDCL 21-27-5.1. First, a subsequent habeas petition may be filed if the petitioners can show he has newly discovered evidence that would be sufficient to establish by clear and convincing evidence that no reasonable jury would have found him guilty, he can bring a subsequent petition. Id. Here, the claims Mr. Hopkins initially presented and then dismissed are not newly discovered. He obviously knew of them when he filed his first state habeas petition because he alleged them in that petition.

Likewise, the allegations that trial counsel was ineffective for failing to challenge Mr. Hopkins' sentence, for failing to explain the consequences of going to trial, and for failing to explain the meaning of the habitual offender charge are not newly discovered. Mr. Hopkins clearly knew of these issues at a minimum after his direct appeal was concluded. The same is true for Mr. Hopkins' claim that the circuit court or trial counsel should have ordered a competency examination before trial—Mr. Hopkins clearly was aware at the

time of his trial and thereafter that he had not been subjected to such an exam. Therefore, the allegation about the competency exam is not newly discovered.

Since none of Mr. Hopkins' unexhausted claims constitute newly discovered evidence, they do not fit within the first exception to South Dakota's prohibition on filing a second or subsequent habeas petition. Id. Indeed, this is what the state circuit court held when considering Mr. Hopkins' second state habeas petition which asserted the issue about the competency exam.

The second exception under South Dakota law which would allow a prisoner to file a second or successive habeas petition is when a petition relies upon a new rule of constitutional law, not previously available, and which is made retroactive to cases on collateral review. Id. Again, Mr. Hopkins' 14 unexhausted claims do not rest upon any new rules of constitutional law. All of these claims are based on well-established law that existed at the time of his trial.

Because none of Mr. Hopkins' claims fit within the exceptions under South Dakota law that would allow a prisoner to file a second or subsequent habeas petition, it would be futile to send Mr. Hopkins back to state court to exhaust these 14 claims. The state courts would, as the state courts did with the second petition Mr. Hopkins filed, simply refuse to entertain such a successive petition.

2. Procedural Default

Closely related to the doctrine of state court exhaustion is the doctrine of procedural default.[10] Both doctrines are animated by the same principals of comity—that is, in our dual system of government, federal courts should defer action on habeas matters before them when to act on those petitions would undermine the state courts' authority, which have equal obligations to uphold the constitution. See Coleman v. Thompson, 501 U.S. 722, 731 (1991) (quoting Rose, 455 U.S. at 518, overruled in part on other grounds by Martinez v. Ryan, 566 U.S. 1 (2012),[11] superseded in part on other grounds by statute as recognized in Duncan v. Atchison, 2014 WL 4062737 (N.D. Ill. Aug. 13, 2014). If a petitioner has failed to exhaust administrative remedies, and the petitioner has no further state remedies available to him, analysis of the procedural default doctrine is the next step.

Procedural default is sometimes called the "adequate and independent state grounds" doctrine. A federal habeas petitioner who has defaulted his

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[10] Pre-AEDPA law held that procedural default must be raised by the state or it was waived. See Gray v. Netherland, 518 U.S. 152, 166 (1996). After passage of AEDPA in 1996, the defense is not waived unless the State expressly waives the requirement. See Banks v. Dretke, 540 U.S. 668, 705 (2004) (citing 28 U.S.C. § 2254(b)(3)). Here, respondents have not expressly waived the defense, but instead have asserted it. See Docket No. 11 at pp. 10-13.

[11] The Martinez decision modified that part of the Coleman decision involving whether ineffective assistance of habeas counsel can constitute "cause" excusing a procedural default. See Martinez v. Ryan, 566 U.S. ___, 132 S. Ct. 1309, 1315 (2012) (holding that, where state law required that ineffective assistance of counsel claims may not be raised until habeas proceedings, ineffectiveness of habeas counsel may supply "cause" sufficient to excuse a procedural default).

federal claims in state court by failing to meet the state's procedural rules for presenting those claims, has committed "procedural default." Coleman, 501 U.S. at 731-32, 735 n.1. If federal courts allowed such claims to be heard in federal court, they would be allowing habeas petitioners to perform an "end run" around state procedural rules. Id. However, where no further non-futile remedy exists in state court, it is not feasible to require the petitioner to return to state court as would be the case in a dismissal for failure to exhaust state remedies.

Mr. Hopkins has defaulted in state court on his 14 federal claims identified above by failing to meet the state's procedural rules for presenting those claims. "Adequate and independent state grounds" exist for the state court's decision if the decision of the state court rests on state law ground that is independent of the federal question and adequate to support the judgment. Coleman, 501 U.S. at 729. "This rule applies whether the state law ground is substantive or procedural." Id. at 729. "[A] state procedural ground is not adequate unless the procedural rule is strictly or regularly followed." Johnson v. Mississippi, 486 U.S. 578, 587 (1988). Mr. Hopkins makes no allegation that SDCL § 21-27-5.1, the rule prohibiting second or successive state habeas petitions, is arbitrarily or irregularly enforced.

"The federal court looks to the last, reasoned state court opinion dealing with the claim to determine whether a specific contention is procedurally defaulted. If the last state court to be presented with a particular federal claim

reaches the merits, it removes any bar that might otherwise have been available." Clemons v. Leubbers, 381 F.3d 744, 750 (8th Cir. 2004) (citations omitted).

Because the last reasoned state court opinions dealing with Mr. Hopkins's habeas claims did not address their merits, but rejected them on procedural grounds, this Court is precluded from reviewing them. Coleman, 501 U.S. at 750; Weigers v.Weber, 37 Fed. Appx. 218, 219-20 (8th Cir. 2002) (unpublished) (prisoner's failure to timely appeal denial of state habeas resulted in failure to give South Dakota one full opportunity to resolve any constitutional issue by invoking one complete round of South Dakota's established appellate process and thus his claims were procedurally defaulted).

"In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750. See also Ruiz v. Norris, 71 F.3d 1404, 1409 (8th Cir. 1995) ("A district court need not consider the merits of a procedurally defaulted claim.") (citations omitted). The court next considers whether Mr. Hopkins has shown (1) a fundamental miscarriage of justice or (2) cause and prejudice, either of which would excuse his default.

a. Fundamental Miscarriage of Justice

To fit within the fundamental miscarriage of justice exception, the petitioner must make a showing of actual innocence. Schlup v. Delo, 513 U.S. 298, 321, (1995). A successful claim of actual innocence requires the petitioner to support his allegations with new, reliable evidence. Weeks v. Bowersox, 119 F.3d 1342, 1351 (8th Cir. 1997).

"Actual innocence" is not an independent constitutional claim upon which habeas relief can be granted; instead, it is "a gateway through which a habeas petitioner must pass to have his otherwise [procedurally] barred constitutional claim considered on the merits." Schlup v. Delo, 513 U.S. 298, 315 (1995). Actual innocence means factual innocence, it does not mean mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623 (1998). Actual innocence claims are rarely successful as they require the petitioner to carry an exacting burden. Schlup, 513 U.S. at 324.

In order to show actual innocence, Mr. Hopkins must (1) produce "new reliable evidence" not presented previously; and (2) he must "show that, in light of all the evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt of the crime for which he . . . was convicted." Schlup, 513 U.S. at 324; United States v. Apker, 174 F.3d 934, 938-39 (8th Cir. 1999).

Evidence is "new" only if it was not available at the time of the trial and if it could not have been discovered earlier through the exercise of due diligence.

Johnson v. Norris, 170 F.3d 816, 818 (8th Cir. 1999). A petitioner can make the new evidence showing only where he demonstrates that the factual basis for the evidence did not exist at the time of the plea and could not have been presented earlier. Id. The evidence must not only be "new" but it must also be "reliable." Schlup, 513 U.S. at 324.

Here, Mr. Hopkins fails to produce any new and reliable evidence, let alone new and reliable evidence that indicates his innocence. Mr. Hopkins alleges his lawyer failed to investigate jail inmates who would have told of conversations with the "real persons" who admitted committing the crime. First, Mr. Hopkins only makes an allegation of lack of investigation. He never asserts that this supposed inmate was willing to testify and what the inmate would have said had he been called as a witness. Second, the state's theory of the case was never that Mr. Hopkins perpetrated the burglary and theft by himself—the state itself presented evidence that three men acted together to commit the crime. Therefore, an admission by two others that they committed the crime would not have shown that Mr. Hopkins was innocent—such evidence was consistent with the state's case. Finally, this evidence, if it exists, is not new—it existed at the time Mr. Hopkins went to trial.

Similarly, Mr. Hopkins alleges his trial counsel was ineffective for failing to suppress the fruits of an illegal search, failing to challenge his sentence, failure to explain the consequences of going to trial, and failure to explain the habitual offender charge. He alleges appellate counsel was ineffective for

failing to meet more often with Mr. Hopkins, for failing to raise all the issues Mr. Hopkins wanted raised on appeal, for failing to give Mr. Hopkins copies of the trial transcript, for failing to investigate, and for failure to file an Anders brief. He also argues he should have been subjected to a competency examination before trial.[12] None of this is "newly discovered evidence." If the allegations are true, Mr. Hopkins knew about these issues at the very latest at the conclusion of his direct appeal. He could have raised them in his first state habeas petition. They are not newly discovered evidence. Mr. Hopkins has not shown actual innocence to excuse his procedural default.

b. Cause and Prejudice

A state procedural default may also be excused if the petitioner can demonstrate "cause" for the default *and* actual prejudice as a result of the violation of federal law. Maynard v. Lockhart, 981 F.2d 981, 984 (8th Cir. 1992) (citations omitted, emphasis added). If no "cause" is found, the court need not consider whether actual prejudice occurred. Id. at 985; Wyldes v. Hundley, 69 F.3d 247, 253 (8th Cir. 1995) (citations omitted). "The requirement of cause . . . is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief . . ." Cornman v. Armontrout, 959 F.2d 727, 729 (8th Cir. 1992). The habeas petitioner must show that "some objective factor

[12] Mr. Hopkins alleges he demonstrated evidence of incompetency prior to trial. However, he never alleges he was under a disability post-trial nor does he present any evidence to the court to show that was the case. Mr. Hopkins' pleadings are cogent and intelligible.

external to [petitioner] impeded [his] efforts." Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)) (emphasis added).

A petitioner may show cause by demonstrating that the factual or legal basis for a claim was not reasonably available to the petitioner at the time or that there was interference by officials which prevented the petitioner from exhausting his state remedies. Murray, 477 U.S. at 488. A petitioner's lay status, *pro se* status, and lack of education are not sufficient cause to excuse a procedural lapse in failing to pursue state court remedies. See Stewart v. Nix, 31 F.3d 741, 743 (8th Cir. 1994); Smittie, 843 F.2d at 298. Illiteracy or low intelligence are also not enough to demonstrate cause. See Criswell v. United States, 108 F.3d 1381, *1 (8th Cir. 1997) (unpub'd.); Cornman, 959 F.2d at 729. Finally, neither is ignorance of the law. Maxie v. Webster, 978 F.2d 1264, *1 (8th Cir. 1992) (unpub'd.).

Mr. Hopkins alleges as cause that he is over 70 years old and has "limited intelligence." See Docket No. 12 at p.1. He asserts that another inmate writes for him in this matter. Id. However, he represented himself when drafting both his first and second state court habeas petitions—he makes no allegation that these pleadings were drafted by someone else. These pleadings reveal Mr. Hopkins to be fully capable of articulating his claims clearly and understandably. In any event, as discussed above, being of "limited intelligence" does not constitute cause to excuse Mr. Hopkins's procedural default. Smittie, 843 F.2d at 298. The Eighth Circuit has long held that "*pro*

se status and lack of familiarity with the intricacies of the law cannot alone constitute cause." McKinnon v. Lockhart, 921 F.2d 830, 832, fn. 5 (8th Cir. 1990); Williams v. Lockhart, 873 F.2d 1129, 1130 (8th Cir. 1989).

Mr. Hopkins has shown no "cause" for the fact that he failed to follow the state's procedural rules by including all of his claims—including the 14 at issue here--when he filed his first state habeas petition. The fact that he did initially include many of these 14 claims in his first petition and then voluntarily dismissed them before the state habeas evidentiary hearing demonstrates that nothing prevented him from asserting them when and where state law dictated he should.

Nor can Mr. Hopkins' habeas counsel provide the necessary "cause" to excuse his procedural default. If a prisoner cannot raise a claim of ineffective assistance of counsel in his direct appeal, and he was not given counsel in state habeas proceedings--or his state habeas counsel was himself or herself ineffective--then procedural default does not bar a federal habeas court from hearing the prisoner's ineffective assistance claims. Martinez, 566 U.S. at 14. The Martinez Court recognized a narrow exception to the unqualified statement in Coleman, to the effect that the ineffectiveness of state habeas counsel does not provide cause to excuse a procedural default. The Martinez Court held that inadequate assistance of counsel at the state habeas proceedings may establish cause. Id. The Martinez Court distinguished Coleman on the basis that the error of the state habeas lawyer in that case was *on appeal* from the

trial state habeas court's decision. Id. at 15-16. This is different than making an error *before the state trial habeas court itself*, rather than before an appellate state habeas court. Id. Martinez announced a 'narrow exception' to the Coleman rule:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas claim of ineffective assistance at trial if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Dansby v. Hobbs, 766 F.3d 809, 828 (8th Cir. 2014) (citing Martinez, 566 U.S. at 14). See Davila v. Davis, 582 U.S. ___, 137 S. Ct. 2058 (2017) (reaffirming that counsel error on appeals is not cause excusing a procedural default).

In Trevino v. Thayer, 569 U.S. 413, 133 S. Ct. 1911 (2013), the Supreme Court expanded Martinez to apply to situations where "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." Dansby, 766 F.3d at 829 (citing Trevino, 133 S. Ct. at 1921). It appears that South Dakota is such a state. See State v. Craig, 850 N.W.2d 828, 838 (S.D. 2014) ("ineffective assistance of counsel claims are generally not considered on direct appeal, because it is only through habeas corpus that a sufficient record can be made to allow the appropriate review.") (other citations omitted).

Martinez is inapplicable here. Although Mr. Hopkins alleges in ground 3 of his federal petition that both appellate counsel and habeas counsel were ineffective, all of the facts with which he supports that allegation are errors on appeal, not errors at the state habeas level. And the Supreme Court has recently reaffirmed its Coleman rule that errors on appeal do not supply cause to excuse procedural default, even if it is alleged that habeas counsel was ineffective in failing to raise appellate counsel's errors in the state habeas proceeding. See Davila v. Davis,582 U.S. ___, 137 S. Ct. 2058 (2017).

The doctrine of procedural default is not intended to "create a procedural hurdle on the path to" federal habeas relief. Mellott, 63 F.3d at 784. However, strong comity concerns underlie the reason for the rule's adoption. Id. Mr. Hopkins has not alleged any grounds which would support a finding by this court that "cause" exists which would excuse his failure to comply with the state's rules. Accordingly, the court recommends that the 14 enumerated claims in Mr. Hopkins's federal habeas petition be dismissed. A dismissal on grounds of procedural default is a dismissal *with* prejudice. Compare Armstrong v. Iowa, 418 F.3d 924, 926-27 (8th Cir. 2005) (dismissal with prejudice is appropriate where the ground for dismissal is procedural default), with Carmichael, 163 F.3d at 1045-46 (dismissal for failure to exhaust state remedies where state remedies remain available to petitioner should be a dismissal without prejudice).

D. Ineffective Assistance of Counsel—the Exhausted Claims

Of Mr. Hopkins' 29 claims, as discussed above, 14 were procedurally defaulted and this court will not address those claims on the merits. Of the remaining 15 claims, two of those claims are simply a resubmission of Mr. Hopkins' first state court habeas petition. The court also does not address those two "claims" on the merits because they are not independent claims, they are merely duplicates of either the 14 defaulted claims or in the other claims not defaulted. That leaves 13 claims that the court will address on the merits. Twelve of these are allegations of ineffective assistance of trial counsel. To clarify, the 12 counsel claims are:

2(a). failure to present an alibi defense.

2(b), (i), and (j). failure to investigate by obtaining Mr. Hopkins' phone records and Lewis Drug surveillance video footage.

2(c). failure to subpoena alibi witnesses.

2(e). failure to impeach state's witnesses who committed the crime.

2(f). failure to suppress Mr. Hopkins' confession.

2(g). failure to object to hearsay testimony introduced by state.

2(h). failure to establish that the victims never identified Mr. Hopkins.

2(l). failure to pursue issue of juror/jury's activity on Google.

2(m). failure to object to jury seeing Mr. Hopkins in jail clothes and shackles.

2(o). failure to convey plea offer from the state to Mr. Hopkins.

1. The Strickland Standard in § 2254 Proceedings

The Supreme Court "has recognized that 'the right to counsel is the right to effective assistance of counsel.' " Strickland v. Washington, 466 U.S. 668, 698 (1984) (citing McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970)). Strickland is the benchmark case for determining if counsel's assistance was so defective as to violate a criminal defendant's Sixth Amendment rights and require reversal of a conviction. Id. at 687. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. The defendant must also show that counsel's unreasonable errors or deficiencies prejudiced the defense and affected the judgment. Id. at 691. The defendant must show "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695. In sum, a defendant must satisfy the following two-prong test. Id. at 687.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

"There is a presumption that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment." Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002). It is the petitioner's burden to overcome this presumption, and a "petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." Id. Counsel's conduct must be judged by the standards for legal representation which existed at the time of the representation, not by standards promulgated after the representation. Bobby v. Van Hook, 558 U.S. 4, 8 (2009).

When a petitioner makes an ineffective assistance of counsel claim in a § 2254 petition, Strickland's deferential review of counsel's conduct is paired with the extremely deferential lens through which federal courts view the state court's determination of a habeas claim as dictated by AEDPA. The result is that the federal court's "highly deferential" review becomes "doubly" so. Harrington v. Richter, 562 U.S. at 105 (quoting Knowles v. Mirzayance, 556 U.S. 111, 123 (2009)). "Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d)." Id. The inquiry when a Strickland claim is raised in a § 2254 petition is "whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id.

A claim of ineffective assistance of trial counsel requires Mr. Hopkins to show that his lawyers' representation of him fell below an objective standard of reasonableness and thereby prejudiced his case. Skillicorn v. Luebbers, 475 F.3d 965, 973 (8th Cir. 2007) (citing Strickland, 466 U.S. at 687). In a petition under 28 U.S.C. § 2254, however, Mr. Hopkins must do more: he must show that the state court "applied Strickland to the facts of his case in an objectively unreasonable manner." Skillicorn, 475 F.3d at 973 (quoting Bell v. Cone, 535 U.S. 685, 699 (2002)). The court now turns to Mr. Hopkins' individual claims.

2. Claims of Ineffective Assistance

a. Failure to Investigate and Present Alibi Defense

Mr. Hopkins asserts his counsel were ineffective for failing to present an alibi defense at trial, including failing to subpoena alibi witnesses and failing to obtain phone and video surveillance records to support his alibi. These are issues 2(a)-(c), (i) and (j), above.

The testimony elicited about these issues at the state habeas evidentiary hearing in this matter shows counsel's performance was not deficient regarding investigating and presenting an alibi defense. The two alibi witnesses Mr. Hopkins wanted counsel to call to testify at trial were Rita Moore[13] and her sister, Marie Williams. See Habeas Hearing Transcript (HHT) at pp. 10-12, 51-52. Rita Moore *was* called as a witness, at Mr. Hopkins' insistence, and she

[13] Rita spelled her name for the court reporter at trial and spelled it Moore. The transcript of the habeas evidentiary hearing, where Ms. Moore did not testify, identifies her as "Rita Mower." The court adheres to the spelling of Rita's last name as evidenced in the trial transcript.

was a disastrous witness for the defense. Both of Mr. Hopkins' trial lawyers discouraged him from calling Rita as a witness. HHT at 118-19. They told Mr. Hopkins what Rita told him in private is not what she told the attorneys or the police, meaning she was just telling Mr. Hopkins what he wanted to hear. Id. Prior to trial, the circuit court appointed counsel to represent Rita. HHT at 120. At trial Rita testified that Mr. Hopkins had tried to instruct her what to say at trial (she declined to follow his instructions). Also, Rita testified Mr. Hopkins had admitted to her that he participated in the burglary.

Marie Williams did not want to testify for the defense. HHT at 124. Defense counsel served her with a subpoena, but she contacted defense counsel through an intermediary and let counsel know she was not going to honor the subpoena. HHT 124-25. Defense counsel made the decision after Rita testified that the defense would decline to have the judge send law enforcement out to bring Ms. Williams to the trial. HHT 125. Counsel testified at the state habeas hearing that, as a matter of trial strategy, she thought it best not to force Ms. Williams to testify as she was unlikely to be a favorable witness for the defense, a strategic choice she informed Mr. Hopkins about at the time the decision was made. Id. Mr. Hopkins testified at the state habeas hearing that he ultimately *agreed with* counsel's decision not to pursue Ms. Williams as a witness. HHT at 76.

As to the phone and video surveillance records, defense counsel did make multiple attempts to obtain those. HHT at 103-09. There were no

interior video surveillance records at the Lewis Drug store Mr. Hopkins claimed to have been at the morning of the burglary. Id. Exterior video surveillance recordings had been deleted or recorded over before counsel's request for them was made. Id.

The phone records Mr. Hopkins wanted were from Rita's landline telephone at the apartment. Id. Landline telephones, unlike digital cell phones, do not create a record of local calls made. Id. Counsel's request for these phone records yielded only a record of long-distance phone calls made on Rita's phone, which did not show any local calls Mr. Hopkins or others allegedly made on the day of the burglary because all such alleged calls were local. Id.

Trial counsel for Mr. Hopkins testified at the habeas hearing that they thought his alibi defense was weak. HHT 153, 179. Mr. Hopkins had confessed to the police, in detail, his involvement in the crime prior to counsel ever being appointed to represent him. HHT at 109-10. In Mr. Hopkins' first meeting with counsel, he admitted his guilt. Id. He also admitted his guilt to his counsel on numerous other occasions, describing the events of the crime in great detail. HHT at 178. Both codefendants gave statements to the police. HHT at 183. The details in the codefendants' statements matched the details in the statements Mr. Hopkins gave to police and to his own counsel. Id. Mr. Hopkins never asserted his innocence to his defense counsel; rather, he asserted it would be difficult for the state to *prove* he committed the crime.

HHT at 188. Additionally, the times of events Mr. Hopkins asserted in his alibi defense did not match the rest of the evidence; the statements of other witnesses failed to support his alibi. HHT at 153.

The state habeas court's findings of fact were that both defense counsel were experienced criminal defense attorneys. The court also found that Mr. Hopkins had admitted to both defense lawyers on multiple occasions that he had committed the burglary, describing the crime in detail. The court found defense counsel viewed Mr. Hopkins' alibi defense to be "not a particularly strong defense" given Mr. Hopkins' own admissions and the likely testimony of Brandon and Tre. By subpoenaing Rita and Ms. Williams and seeking out the phone and video surveillance records, the court concluded that defense counsel made an adequate investigation of the facts and circumstances surrounding the allegations against Mr. Hopkins, and in particular, his alibi defense. The court found counsel's decision not to force Ms. Williams to testify was sound trial strategy.

The state habeas court accurately stated the law deriving from Strickland regarding ineffective assistance of counsel claims. The court concluded that defense counsel's performance was not deficient and that Mr. Hopkins had failed to demonstrate prejudice.

In reviewing the state habeas court's decision, this court must evaluate whether the state court's adjudication of Mr. Hopkins' claim "resulted in a decision that was contrary to, or involved an unreasonable application of,

clearly established Federal law" by applying a rule set forth in a Supreme Court opinion, reaching a contrary result on materially indistinguishable facts. 28 U.S.C. § 2254(d)(1); Williams, 529 U.S. at 405-06. The state habeas court herein applied the law of Strickland accurately and reasonably.

In reviewing the state habeas court's decision, this court must also evaluate its factual findings, which are presumed to be correct, to determine if the findings lack fair support in the record. Marshall, 459 U.S. at 432; Thatsaphone, 137 F.3d at 1045; 28 U.S.C. § 2254(e). Here, the state habeas court's factual findings are amply supported in the record. The record of the evidence from the habeas hearing revealed despite Mr. Hopkins' admissions to counsel and to law enforcement that he had committed the burglary, counsel followed all leads available to attempt to establish an alibi defense for Mr. Hopkins. Thus, the state court's findings on this issue are fully supported by the record. The court recommends denying habeas relief on Mr. Hopkins' ineffective assistance claim centering on his alibi defense. Mr. Hopkins has failed to overcome the doubly presumptive standard for Strickland as applied to a state court conviction: he has not shown counsel acted unreasonably nor has he shown the state habeas court unreasonably applied the law or found facts unsupported in the record.

b. Failure to Impeach the True Criminals

In claim 2(e), Mr. Hopkins claims counsel was ineffective in failing to impeach the state's witnesses who committed the crime, meaning Brandon and

Tre. Mr. Hopkins claims Brandon was on disability for a short-term and long-term memory problem and defense counsel should have cross-examined him regarding his poor memory. Mr. Hopkins argues that Brandon's memory was so bad that the only way he could have recalled details of the burglary by the time his trial occurred was if someone planted that testimony in Brandon's mind.

As to Tre, Mr. Hopkins asserts Tre was subjected to a polygraph examination regarding his confession and he failed the exam. Mr. Hopkins has not introduced any evidence to show that this was true. He alleges counsel should have cross-examined Tre about his allegedly failed polygraph.

Mr. Hopkins has introduced no evidence whatsoever that Brandon's memory is bad, let alone so bad as to render him incompetent as a witness. Moreover, Brandon testified at the trial in great detail, describing watching the homeowners arrive home, pick up their mail, pull into their garage, and then reverse the car rather violently back down the driveway. He never faltered in his testimony, got confused, or had to be prompted. To then cross-examine Brandon on the grounds that he was unable to recall events because of a faulty memory would have instead robbed defense counsel of credibility.

In any event, counsel's cross-examination of Brandon was very effective in that counsel elicited from Brandon an admission that he initially lied to the police about the burglary, stating he was out in the country looking for places his son could ride his dirt bike and asserting he did not know Mr. Hopkins or

Tre. Defense counsel also established through cross-examination of Brandon that he had previously been convicted of a crime of dishonesty—false impersonation. Defense counsel even got Brandon to admit he had a history of lying. Finally, on cross-examination, counsel elicited testimony from Brandon that he did not see Mr. Hopkins enter or exit the Mileses' house.

At the habeas evidentiary hearing, defense counsel admitted she knew Brandon received disability payments, but she was not sure what the nature of his disability was.

Tre likewise testified at Mr. Hopkins' trial with great recall, detail, and clarity. The details of the story as testified to by Brandon and Tre matched the details of the confession Mr. Hopkins gave to Agent Piercy on December 26, 2011. Additionally, both Brandon and Tre testified that they did not relay the details of the burglary to Mr. Hopkins or to anyone else prior to the time that Mr. Hopkins himself told Agent Piercy the details of the crime in his own confession.

In Johnson v. United States, 278 F.3d 839, 843 (8th Cir. 2002), the court held that defense counsel's failure to vigorously cross-examine a witness about a robbery did not rise to the level of a Strickland violation because the discrepancies in the witness's testimony were small and the result of the jury verdict would not have been different if defense counsel had vigorously cross-examined the witness.

In Hall, the Eighth Circuit held that the none of the following actions by defense counsel constituted a Strickland violation: counsel's failure to introduce evidence showing that a critical witness was motivated to lie; counsel's failure to impeach a witness with a prior inconsistent statement; and counsel's failure to cross-examine witness with information gained from her medical records. Id. at 693-98. The court determined that counsel's actions conformed with sound trial strategy and that the impact of such evidence would have been minimal and non-prejudicial to the petitioner. Id.

In contrast, in Steinkuehler v. Meschner, 176 F.3d 441, 444-45 (8th Cir. 1999), the Eighth Circuit held that trial counsel's performance was deficient when he failed to cross-examine a sheriff as to evidence that he pressured another witness (a jailer supervisor) to "forget" petitioner's intoxicated state. The court also held that counsel's performance was deficient when he failed to cross-examine the sheriff about allegations that he himself often "forgot" facts favorable to criminal defendants. Id. Because petitioner's defense to the murder was his intoxication, the testimony of law personnel who saw petitioner directly after the shooting was critical to his defense. Id. at 445. Only two witnesses testified as to petitioner's condition, the sheriff and the jailer supervisor, and their testimony was in direct conflict. Id. The court concluded that counsel's deficient performance in failing to attack the credibility of the sheriff prejudiced the petitioner and denied him a fair trial. Id. Petitioner faced a first-degree murder conviction unless he could convince the jury that

he was intoxicated at the time of the shooting. Id. Cross-examining the sheriff would likely have produced evidence that would have led the jurors to have a reasonable doubt as to petitioner's guilt. Id. Thus, the court concluded that "a reasonable probability exists that the result of petitioner's first-degree murder conviction would have been different if trial counsel would have [cross-examined the sheriff]." Id. at 446.

In Guzman-Ortiz v. United States, 849 F.3d 708, 714 (8th Cir. 2017), the court stated attacking a witness' credibility and motives to lie are reasonable cross-examination strategies. The court noted it had found ineffective assistance for lack of cross-examination where (1) inadmissible and devastating evidence was allowed in and (2) failing to cross-examine a witness who made grossly inconsistent prior statements. Id. (citing United States v. Orr, 636 F.3d 944, 952 (8th Cir. 2011)). Counsel's choosing to focus on some issues to the exclusion of others carries with it a strong presumption that counsel did so for tactical, strategic reasons rather than through deficient performance. Id. (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003)).

Here, counsel did cross-examine both Brandon and Tre and did so competently. Even *if* Brandon is receiving disability for a memory issue, counsel's failure to cross-examine Brandon on that subject did not result in prejudice. The most damning evidence in this case was Mr. Hopkins' own confession and the fact that the details he related to Agent Piercy matched the details Brandon and Tre gave to police when they confessed.

Mr. Hopkins' explanation that he confessed falsely to protect Brandon was shown to be a lie when the state pointed out (1) Mr. Hopkins *implicated* Brandon rather than exonerating him in his confession and (2) Mr. Hopkins knew all the minute details of the burglary under circumstances where no one else could have told him those details, he had to have observed them first hand himself by being at the burglary.

If the jury had learned Brandon had a memory problem, it almost certainly would have overlooked that impediment and convicted Mr. Hopkins in any event because Brandon's testimony was congruent with all the rest of the evidence except Mr. Hopkins' narrative trial testimony. After all, defense counsel got Brandon to admit he was a liar, and the jury overlooked that fact in crediting his testimony—most probably for the same reason: Brandon's testimony was congruent with all the other evidence.

The state habeas court's findings and conclusions that Mr. Hopkins failed to factually and legally establish a Strickland violation with regard to the cross-examinations of Brandon and Tre is fully supported in the record. The court applied the correct legal standard and the court's findings are supported by the evidence. This court recommends denying habeas relief to Mr. Hopkins on the grounds that counsel was ineffective for failing to properly cross-examine Brandon and Tre.

c. Failure to Suppress Mr. Hopkins' Confession

In claim 2(f) Mr. Hopkins asserts counsel was ineffective for failing to suppress Mr. Hopkins' confession to Agent Piercy. Defense counsel testified at the state habeas hearing he never moved to suppress Mr. Hopkins' confession because he believed there were no grounds for suppression. HHT at 182-83. In counsel's estimation, Agent Piercy advised Mr. Hopkins of his Miranda rights; Mr. Hopkins made a knowing, intelligent and voluntary waiver of those rights; and the statement itself was free of any duress or coercion on the part of Agent Piercy. Id.

The holding of the Miranda case "is that an individual must be advised of the right to be free from compulsory self-incrimination, and the right to the assistance of an attorney, any time a person is taken into custody for questioning." United States v. Griffin, 922 F.2d 1343, 1347 (8th Cir. 1990) (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966)). A Miranda warning is required prior to questioning whenever two conditions are present: (1) the suspect is being interrogated and (2) the suspect is in custody. Unites States v. Flores-Sandoval, 474 F.3d 1142, 1146 (8th Cir. 2007); Griffin, 922 F.2d at 1347; United States v. Carter, 884 F.2d 368, 371 (8th Cir. 1989). Here, Mr. Hopkins was both in custody and subject to interrogation, so Agent Piercy was required to advise him of his Miranda rights. Agent Piercy did so. Therefore, lack of Miranda warnings was not a basis for suppressing Mr. Hopkins' confession.

It is the government's burden to prove that a defendant's waiver of his Miranda rights was voluntary, knowing, and intelligent. United States v. Caldwell, 954 F.2d 496, 508 n.2 (8th Cir. 1992) (citations omitted). "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Miranda v. Arizona, 384 U.S. 436, 475 (1966) (citing Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964)). However, the government "need prove waiver only by a preponderance of the evidence." Colorado v. Connelly, 479 U.S. 157,168 (1986) (citing Nix v. Williams, 467 U.S. 431, 444, & n.5 (1984)).

A waiver of one's Miranda rights may be either express or implied. Berghuis v. Thompkins, 560 U.S. 370, 130 S. Ct. 2250, 2261 (2010) (citing North Carolina v. Butler, 441 U.S. 369, 372–76 (1979)). An implied waiver occurs when the suspect embarks on a course of conduct indicating, given the totality of circumstances, waiver. Id. The government must show that the suspect was advised of his Miranda rights, understood those rights, and then chose to make an uncoerced statement. Id. at 2261–62. Simply proving that a Miranda advisement was given and that a statement was subsequently made is not sufficient. Id. at 2261. Although the advisement itself is formalistic, the waiver need not be formalistic and the waiver need not comply with the

procedures set out in FED. R. CRIM. P. 11 for waiver of an accused's rights to trial in open court during a plea proceeding. Id. at 2262.

Whether Mr. Hopkins effectively waived his Miranda rights requires two inquiries:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

United States v. Jones, 23 F.3d 1307, 1313 (8th Cir. 1994) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)). See also Berghuis v. Thompkins, 560 U.S. 370, 130 S. Ct. 2250, 2260 (2010) (quoting Moran, 475 U.S. at 421).

"Only if the 'totality of circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Jones, 23 F.3d at 1313 (quoting Moran, 475 U.S. at 421 (quoting Fare v. Michael C., 442 U.S. 707, 725 (1979))). Examination of the totality of circumstances includes, but is not limited to, such considerations as "the background, experience, and conduct" of the defendant. Id. (quoting United States v. Barahona, 990 F.2d 412, 418 (8th Cir. 1993) (internal quotation marks omitted)).

The voluntariness of Mr. Hopkins' confession itself also requires the court to apply the totality of the circumstances test. The Supreme Court has stated that, under the Due Process Clause of the Fifth and Fourteenth

Amendments, "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned." Miller v. Fenton, 474 U.S. 104, 109 (1985) (citing Brown v. Mississippi, 297 U.S. 278 (1936)). "In considering whether a confession was voluntary, the determinative question is whether the confession was extracted by threats, violence, or promises (express or implied), such that the defendant's will was overborne and his or her capacity for self-determination was critically impaired." United States v. Pierce, 152 F.3d 808, 812 (8th Cir. 1998) (citing Sumpter v. Nix, 863 F.2d 563, 565 (8th Cir. 1988) (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961))). The court must look to the totality of the circumstances, "including the conduct of the law enforcement officials and the defendant's capacity to resist any pressure." Id. See also Withrow v. Williams, 507 U.S. 680, 688–89 (1993) (continuing to adhere to the totality of circumstances test). See Dickerson v. United States, 530 U.S. 428, 434 (2000) ("The due process test takes into consideration 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.' "). The burden of demonstrating that a defendant's statement was voluntary rests with the government, which must prove voluntariness by at least a preponderance of the evidence. Missouri v. Seibert, 542 U.S. 600, 608 n.1 (2004).

The Supreme Court has made clear that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the

meaning of the Due Process Clause of the [Fifth or] Fourteenth Amendment." Colorado v. Connelly, 479 U.S. 157, 167 (1986). That is because a *prima facie* showing of a due process violation must include a showing of some sort of *state action*. Connelly, 479 U.S. at 165–66. Therefore, a defendant's mental status alone can never result in a finding that his statement was involuntary without some form of police overreaching. Id.

However, this does not mean that a defendant's mental status is irrelevant to the question of whether his statement was voluntary. A defendant's mental status is still relevant under the totality of circumstances test to the extent the evidence shows that the police were aware of that mental status and acted in some way to exploit it. See United States v. Makes Room For Them, 49 F.3d 410, 415 (8th Cir. 1995) (holding that totality of circumstances requires consideration of defendant's age, education, and experience insofar as police knew those facts); Townsend v. Sain, 372 U.S. 293, 298–99 (1963) (defendant's statement was involuntary when obtained following the police's administration of a truth serum to defendant), overruled on other grounds Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992);[14] (defendant's statement was involuntary when obtained following the police's administration of a truth serum to defendant); Blackburn v. Alabama, 361 U.S. 199, 207–08 (1960) (defendant's statement was involuntary where police were aware of defendant's history of mental problems, knew that he was probably insane, and proceeded

[14] Keeney was in turn superseded by statute. See Williams v. Taylor, 529 U.S. 420, 432–33 (2000) (discussing the enactment of 28 U.S.C. § 2254).

with interrogation). Where a defendant suffered from some mental infirmity and police were unaware of that infirmity, courts have found the necessary state action to be missing. Connelly, 479 U.S. at 160–61, 164–65 (confession not coerced where defendant exhibited no sign of mental illness to police, but where defendant in fact confessed because "voices" commanded him to confess); see also United States v. Rohrbach, 813 F.2d 142, 144–45 (8th Cir. 1987) (confession was voluntary despite defendant's minimal formal education, history of drug and alcohol abuse, and suicide attempts where there was no corresponding coercive actions on the part of police).

The existing precedent outlines the type of police conduct that courts have found to be coercive. The conduct includes extreme duration and conditions of detention, the manifest attitude of police toward the defendant, pressures which sap or sustain a defendant's powers of resistance or self-control, and exploiting a defendant's mental and physical state. See Colorado v. Spring, 479 U.S. 564, 574 (1987) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J.)); Davis v. North Carolina, 384 U.S. 737, 739–53 (1966) (defendant held for sixteen days of incommunicado interrogation in a closed cell without windows); Blackburn v. Alabama, 361 U.S. 199, 207–08 (1960) (defendant was probably insane at the time of his confession, police knew defendant had a history of mental problems, police questioned defendant for eight to nine hours of sustained interrogation in a tiny room literally filled with police, police isolated defendant from friends,

relatives, or legal counsel); Reck v. Pate, 367 U.S. 433, 436–44 (1961) (defendant held for four days with inadequate food and medical attention until confession obtained); Culombe, 367 U.S. at 625–26 (1961) (defendant held for five days of repeated questioning during which police employed coercive tactics); Payne v. Arkansas, 356 U.S. 560, 561–68 (1958) (defendant held incommunicado for three days with little food and threats that a lynch mob would be admitted into the jail); Ashcraft v. Tennessee, 322 U.S. 143, 153–55 (1944) (defendant questioned by relays of officers for 36 hours without sleep). It is this body of law which the court applies to Mr. Hopkins's assertion that his statement was involuntary.

Based on the legal analysis of Connelly and its progeny, the court considers all the facts and circumstances surrounding Mr. Hopkins' statement in determining whether that statement was voluntary. See Withrow v. Williams, 507 U.S. 680, 688–89 (1993); Arizona v. Fulminante, 499 U.S. 279, 285–86 (1991); Miller v. Fenton, 474 U.S. 104, 109–10 (1985); and United States v. Plumman, 409 F.3d 919, 925 (8th Cir. 2005) (holding that "recap" statement was voluntary when two FBI agents used "rapport building" technique to interview suspect). In this context, the court also considers Mr. Hopkins's personal characteristics to the extent they were known to the agents. Blackburn v. Alabama, 361 U.S. 199, 207–08 (1960); Makes Room For Them, 49 F.3d at 415; Jenner v. Smith, 982 F.2d 329, 333 (8th Cir. 1993).

At the time Mr. Hopkins confessed to Agent Piercy, he was 65 years old. By his own count, he had spent 42 years in prison. His criminal history recounted at his sentencing revealed he had more than 5 prior felonies for various offenses, notably armed robbery among them. Agent Piercy established that Mr. Hopkins was able to read, write and understand English. The agent also offered Mr. Hopkins water, coffee, and a trip to the restroom. Agent Piercy explained who he was and what he was investigating. He asked Mr. Hopkins permission to call him "Lucky." The interview lasted less than an hour. Agent Piercy did not employ any lies, pressure, deceptive tactics or other stratagems. Agent Piercy never cursed, raised his voice, touched Mr. Hopkins, threatened to touch him, or invaded Mr. Hopkins' physical space. Agent Piercy asked mostly open-ended questions, letting Mr. Hopkins tell his story in his own words and in his own way. Mr. Hopkins gave no outward evidence of being under the influence of any drugs or alcohol—his speech was clear and crisp, his narrative was coherent and linear, he was able to sit and walk around the room without any mobility problems. In short, this court's own independent analysis of the facts and the law would lead this court to conclude Mr. Hopkins voluntarily and intelligently waived his Miranda rights and that his statement was voluntary and uncoerced.

However, in a § 2254 proceeding, that is not the proper inquiry. The inquiry is whether the state court applied federal constitutional law unreasonably and whether the state court's findings of fact enjoy support in

the record. The state habeas court applied the correct legal standard to determine if Mr. Hopkins' waiver of his Miranda rights was voluntary and if his statement was voluntary. The state habeas court's factual findings regarding the totality of circumstances were supported in the record.

Because there were no grounds to suppress Mr. Hopkins' confession, defense counsel was not ineffective in failing to move to suppress it. Had such a motion been made, it would have been unsuccessful. This court recommends denying habeas relief based on Mr. Hopkins' claim that counsel was ineffective for failing to suppress his confession because counsel's representation was not deficient and Mr. Hopkins was not prejudiced by counsel's failure to make a frivolous motion.

d. Failure to Object to Hearsay Testimony

In claim 2(g) Mr. Hopkins alleges counsel was ineffective for failing to object to Agent Piercy's hearsay testimony regarding what others had told him. This allegation is simply not true. After reading the trial transcript and appellate counsel's brief on appeal, it is clear Mr. Hopkins' trial counsel *did* object to Agent Piercy's hearsay testimony. The court at times sustained the objections, at times overruled the objections, but, as appellate counsel pointed out in his brief on appeal, sometimes the court did not clearly rule one way or the other. What is clear, however, is that defense counsel did properly lodge objections to the hearsay. Because counsel actually did what Mr. Hopkins asserts they should have done—object--he cannot show deficient

representation. The court recommends denying this ground as a basis for habeas relief.

e. Failure to Establish the Victims Could Not Identify Him

In claim 2(h) Mr. Hopkins asserts trial counsel was ineffective for failing to establish that John and Cindy Miles were unable to identify him as one of the persons who burglarized their house. This is again an assertion not borne out by an examination of the trial transcript. The prosecutor brought out in direct examination of both John and Cindy Miles that they were unable to identify Mr. Hopkins as the man they saw at their house on December 26, 2011. Then defense counsel on cross-examination elicited this same testimony all over again. The Mileses actually testified *twice* that they were unable to identify Mr. Hopkins. Because counsel actually did what Mr. Hopkins asserts they should have done, he cannot show deficient representation. The court recommends denying this ground as a basis for habeas relief.

f. Failure to Pursue Juror Misconduct Via Google

In claim 2(l) Mr. Hopkins asserts counsel had evidence that jurors had actually conducted extra-judicial research about the trial on Google and that trial counsel failed to pursue the issue with the court. This is another bogus issue laid naked by a review of the trial transcript.

What actually occurred was that defense counsel went home after the first night of trial and Googled Mr. Hopkins' name. The first 5 entries that came up revealed he had a prior conviction for armed robbery. Counsel had *no*

evidence that the jury or any individual juror had accessed the internet to obtain information about the case. However, alarmed at what her own search had revealed, defense counsel asked the court to make inquiry of the bailiff if he had heard any of the jurors talking about information obtained off the internet.

Because counsel actually had *no* evidence the jury or any juror had done anything wrong, the court quite sensibly refused to create a problem where none existed by introducing or interjecting the topic among the jurors. The court did assure defense counsel that it would speak privately to the bailiff and ask him to be alert for any conversations among the jurors about internet access. Because counsel actually did what Mr. Hopkins asserts they should have done (bring the matter of potential internet access by the jury to the court's attention), Mr. Hopkins cannot show deficient representation. The court recommends denying this ground as a basis for habeas relief.

g. Failure to Object to Jury Seeing Mr. Hopkins in Jail Clothes and Shackles

In claim 2(m) Mr. Hopkins alleges the jury saw him in jail clothes and shackles and that defense counsel failed to bring the matter to the court's attention. Mr. Hopkins himself testified at the state habeas hearing. At that hearing, he stated he was *not* in jail clothes, but rather was wearing the civilian clothes counsel had obtained for him to wear to trial when he was seen. HHT at 44-45. Those clothes consisted of jeans, jean jacket, cowboy shirt, and cowboy boots. Id. He was in the basement of the courthouse and he claims

the jury was there too and that they saw him. HHT at 93-94. He admitted, however, that whenever he was in the courtroom he did not have any shackles on. Id.

Again, Mr. Hopkins has not introduced any evidence to show that this event really happened. However, assuming it did happen, and assuming he did tell defense counsel about it and they refused to do anything, Mr. Hopkins would still have to show prejudice. He must show "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695. He "must show that . . . counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. The evidence of Mr. Hopkins' guilt was overwhelming at his trial. True, the state had no eye witness identification from the victims and no forensic evidence. But, again, the colossal effect of Mr. Hopkins' own confession, which matched up with Brandon and Tre's testimony, cannot be underestimated. Mr. Hopkins not only admitted committing the burglary, but he volunteered facts and details that no one could have told him about—he had to have witnessed the burglary in order to know about those facts and details. If the jury saw Mr. Hopkins in shackles in passing in the basement of the courthouse, it did not render the result of his trial "unreliable." The court recommends denying habeas relief on this ground of Mr. Hopkins' petition.

h. Failure to Convey 20-year Plea Offer

Finally, Mr. Hopkins asserts in claim 2(o) that the state made a plea offer to Mr. Hopkins in which they agreed to cap his prison time at 20 years' imprisonment and that counsel failed to convey this plea offer to Mr. Hopkins. Of course, defense counsel is duty-bound to convey each and every plea offer to a criminal defendant client, even if the offer is ridiculous, even if the client has said he will not accept any plea offer. Missouri v. Frye, 566 U.S. 134, 145 (2012). So this, if true, is a very serious allegation.

At the state habeas hearing, Mr. Hopkins' testimony belied the above assertion. At the habeas hearing, Mr. Hopkins testified under oath that his lawyer *did* convey a 20-year plea offer to him right before trial, but told Mr. Hopkins she had rejected it on his behalf, knowing that he would not accept it. HHT at 45-46. When asked if Mr. Hopkins would have accepted a 20-year plea offer, he equivocated and said, "probably because I was trying to get 15 [years' imprisonment]." HHT at 46. When asked if Mr. Hopkins had ever told his counsel that he would have accepted a plea offer of 20 years, he stated clearly "no." Id.

Defense counsel flatly denied at the habeas hearing that the state had ever made a plea offer of 20 years. HHT at 140. She stated the best offer the state ever made was 25 to 35 years. Id. Counsel testified she relayed all plea offers the state made to Mr. Hopkins. Id.

When a petitioner asserts a claim of ineffective assistance of counsel because a plea deal was rejected or not conveyed and the petitioner instead went to trial, in order to show prejudice the petitioner must show (1) that he *would have* pleaded guilty but for counsel's deficient conduct and (2) had he accepted the plea deal, there is a reasonable probability he would have received a less stringent sentence. Lafler v. Cooper, 566 U.S. 156, 164 (2012). The second factor can be demonstrated by showing the defendant would have been enabled to enter a plea to a lesser charge or would have received a lesser sentence. Ramirez v. United States, 751 F.3d 604, 608 (8th Cir. 2014). Here, Mr. Hopkins has failed to demonstrate that he would have accepted the 20-year plea offer, had it really been made. Thus, he cannot show prejudice under Strickland, even if his testimony at the state habeas hearing is fully credited.

In addition, he makes no attempt to show he would likely have received a less stringent sentence had he pleaded guilty instead of going to trial, or that he would have been able to plead to a lesser charge (the state never offered to allow Mr. Hopkins to plead to a charge other than what he had been indicted on). A plea agreement between the state and the defendant is not, generally, binding on a circuit court judge in South Dakota. See State v. Shumaker, 792 N.W.2d 174, 175 (S.D. 2010) ("generally circuit courts [in South Dakota] are not bound by plea agreements."). Therefore, even if the state agreed to *recommend* a 20-year sentence for Mr. Hopkins, the court remained free to

impose any sentence up to and including the maximum sentence of 50 years for second-degree burglary and 25 years for grand theft. Id.

The reasons the court stated for imposing the sentence it did on Mr. Hopkins would have still been extant had Mr. Hopkins pleaded guilty instead of going to trial. That is, the court would still have been faced with a defendant at sentencing that had spent 2/3 of his life in prison, with many felony convictions, having committed the current crime while on federal supervision, and evincing a lack of remorse. The two major reasons the circuit court cited in imposing the sentence it did was (1) Mr. Hopkins appeared incapable of rehabilitation after the many times he had been imprisoned and (2) the public needed to be protected from Mr. Hopkins. These two factors would still have been prominent at sentencing whether Mr. Hopkins pleaded guilty or went to trial.

The court recommends denying this claim for habeas relief. Mr. Hopkins has not satisfied his burden under Strickland to show he was prejudiced.

E. Due Process Violation in Admitting Hearsay Testimony

Claim number 1 in the court's numbering above in the FACTS section of this opinion is that Mr. Hopkins' due process rights were violated by admitting hearsay testimony at his trial. Mr. Hopkins dismissed this claim in the middle of his testimony at the state habeas evidentiary hearing. His habeas counsel asked Mr. Hopkins to explain to the habeas court what the basis for this claim

was. Mr. Hopkins testified he was not sure what this claim entailed. HHT at 48. Therefore, he agreed to drop the claim. Id.

If the state habeas proceedings were the only place Mr. Hopkins had raised (and then dismissed) this issue, it would be procedurally defaulted because he withdrew the issue before the habeas court had a chance to rule on it on the merits. However, a § 2254 habeas petitioner can satisfy the state exhaustion requirement by raising the issue *either* on direct appeal or in state post-conviction proceedings. Satter, 977 F.2d at 1262 (stating "a habeas petitioner who has, on direct appeal, raised a claim that is decided on its merits need not raise it again in a state post-conviction proceeding."). Id. Here, Mr. Hopkins' appellate counsel raised the issue in his direct appeal, so state exhaustion requirements are met.

The South Dakota Supreme Court issued a summary affirmance of Mr. Hopkins' conviction and sentence. In its entirety, in substance, the court stated:

> The Court considered all of the briefs filed in the above-entitled matter, together with the appeal record, and concluded pursuant to SDCL 15-26A-87.1(A), that it is manifest on the face of the briefs and the record that the appeal is without merit on the following grounds: 1. that the issues on appeal are clearly controlled by settled South Dakota law or federal law binding upon the states, and 2. that the issues on appeal are ones of judicial discretion and there clearly was not an abuse of discretion (SDCL 15-26A-87.1(A)(1) and (3)), now, therefore, it is
>
> ORDERED that a judgment affirming the judgment of the lower court be entered forthwith.

See State v. Hopkins, No. 26571 (S.D. Sept. 3, 2013).

The South Dakota Supreme Court's summary dismissal of Mr. Hopkins' appeal offers no insight into that court's thought process. In this situation, the Eighth Circuit has instructed that "when a state appellate court affirms a lower court decision without reasoning, we 'look through' the silent opinion and apply AEDPA review to the 'last reasoned decision' of the state courts." Worthington v. Roper, 631 F.3d 487, 497 (8th Cir. 2011) (citing Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991)) (other citations omitted). "This is so regardless of whether the affirmance was reasoned as to some issues or was a summary denial of all claims." Worthington, 631 F.3d at 497. In this case, therefore, this court will "look through" the South Dakota Supreme Court's summary affirmance to the circuit court's decision and apply the AEDPA review to that decision.

The hearsay which forms the basis of Mr. Hopkins' habeas claim all arose during the testimony of the state's first witness, Agent Jason Piercy. The first objection was made as follows:

> Prosecutor: And could you describe to the jury the events of that particular morning and what information you were provided.
>
> Piercy: I received a—it was December 26th, I received a telephone call from Detective Matt Kopeke who is a detective at the Sheriff's Office in Canton and he informed me—
>
> Defense counsel: Objection, hearsay.
>
> The Court: I guess I'm going to allow some limited testimony to explain why he did what he did if you want to narrow it to that.

Jury Transcript, Vol. I ("JT") at p. 107.

A few moments later, the following exchange took place:

Prosecutor: . . . And what did you find when you arrived at that location [the scene of the traffic stop of Brandon]?

Piercy: When I arrived and met with the sergeant with Sioux Falls Police Department and Trooper Isaac Kurtz and they had—the trooper had stopped a white Chevrolet Malibu which was driven by Brandon Mahone.

Defense counsel: Objection, hearsay. Move to strike.

The Court: Part of that answer might be hearsay as far as who the driver of the vehicle was, but who was present, he can testify to that.

Prosecutor: And these are things you were aware of personally at the scene, correct?

Piercy: Correct.

Prosecutor: Okay. The driver of that white vehicle, was he the individual that was reported by the victims in this case?

Defense counsel: Objection, lack of foundation.

The court: We don't have any testimony here as to what the victims reported. So again, Mr. Wollman [prosecutor], if you're going to go that route, you need to lay some foundation.

Prosecutor: Your Honor, as it relates to this, again, it would be the effect on the listener and simply some preliminary.

The court: Just to explain why he did what he did.

Prosecutor: Not offered to prove the truth of the matter asserted.

The court: All right. Proceed.

JT at pp. 107-08.

In a habeas proceeding attacking a state court conviction, this court does *not* examine whether the admission of the hearsay testimony at trial was

properly admitted under state law. Oliver v. Wood, 96 F.3d 1106, 1108 (8th Cir. 1996). Rather, the question in this collateral proceeding is whether Mr. Hopkins' conviction was obtained in violation of the United States Constitution. Id. The admission of hearsay at a criminal trial violates Due Process rights "only if the court's error in admitting the evidence was so obvious that it 'fatally infected the trial and rendered it fundamentally unfair.' " Id. (quoting Troupe v. Groose, 72 F.3d 75, 76 (8th Cir. 1995)).[15]

"Hearsay" is a defined term. A statement is hearsay only if it meets two requirements: (1) the declarant did not make the statement while testifying at the current trial and (2) the party offers the statement in evidence to prove the truth of the matter asserted in the statement. See FED. R. EVID. 801(c). See also SDCL § 19-19-801(c).

In the case of Agent Piercy's testimony, the out-of-court statements made by others and testified to by Agent Piercy were *not* hearsay because they were not offered to prove the truth of the matter asserted in the statement. In other words, Det. Kopeke's statement to Agent Piercy was not offered to prove the truth of the matter asserted—i.e. that there *had been* a burglary at the Mileses' house. Rather, Agent Piercy offered Det. Kopeke's statement merely to explain how it came about that Agent Piercy got involved in the investigation.

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[15] The court notes Mr. Hopkins alleges a Due Process violation, which implicates the Fourteenth Amendment for state actions. Mr. Hopkins does not allege a violation of his Confrontation Clause rights, which would implicate the Sixth Amendment. Therefore, the court analyzes only the Due Process issue.

The statement involving the trooper really was not an out-of-court statement at all. Agent Piercy never testified: "the trooper said . . ." or "the trooper told me . . ." Agent Piercy testified that the "trooper had stopped a white Chevrolet Malibu which was driven by Brandon Mahone." These were facts Agent Piercy had personal knowledge of since he traveled to the scene of the stop, observed the white Malibu and interviewed Brandon himself.

The conclusion that neither statement was really hearsay was the basis of the trial court's admission of both statements. Because neither statement was hearsay, the rule against hearsay did not prohibit the admission of the statements. Finally, because the admission of this evidence complied with the rules of evidence, this court concludes that it was not error to admit the evidence. Because no evidentiary error occurred in the first place, there is no "fatal" error so serious that it infected the trial and rendered it fundamentally unfair.

With regard to the admission of the alleged hearsay in Agent Piercy's testimony, this court concludes that the state circuit court reasonably applied federal law and that there was a reasonable factual basis for the court's ruling. Accordingly, this court recommends this claim for habeas relief asserted by Mr. Hopkins be denied.

F. Motion for Stay and Abeyance

Mr. Hopkins acknowledges he has failed to exhaust some of his claims in state court. He asks the court to stay this federal habeas petition to allow him

time to go back to state court and complete his exhaustion. See Docket No. 3. The court recommends denying this motion because *all* of Mr. Hopkins' claims are procedurally defaulted. He has no nonfutile remedies left available to him in state court. Granting a stay and abeyance would be fruitless because the result would be the same at the end of such an attempt: Mr. Hopkins' claims would have to be dismissed due to procedural default.

CONCLUSION

Based on the foregoing law, facts and analysis, this court respectfully recommends the following actions:

1. that respondents' motion to dismiss [Docket No. 10] be granted;

2. that Elmos Hopkins' motion for stay and abeyance [Docket No. 3] be denied;

3. that Mr. Hopkins' motion for informa pauperis status [Docket No. 8] be denied as moot because the $5.00 filing fee has already been paid by Mr. Hopkins; and

4. that Mr. Hopkins' § 2254 habeas petition [Docket No. 1] be dismissed with prejudice.

NOTICE TO PARTIES

The parties have fourteen (14) days after service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. Failure to file timely objections will result in the waiver of the right to appeal questions of fact.

Objections must be timely and specific in order to require de novo review by the District Court. Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990); Nash v. Black, 781 F.2d 665 (8th Cir. 1986).

DATED November 28, 2017.

BY THE COURT:

Veronica L. Duffy

VERONICA L. DUFFY
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.