

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60808



A True Copy
Certified order issued Aug 02, 2018

Jyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

JAMES M. FERGUSON,

Petitioner-Appellant,

versus

PELICIA HALL, Commissioner, Mississippi Department of Corrections;
Jody Bradley, Warden, Wilkinson County Correctional Facility,

Respondents-Appellees.

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

O R D E R:

James Ferguson, Mississippi prisoner # 60446, moves for a certificate of appealability ("COA") to appeal the denial of his 28 U.S.C. § 2254 application, in which he sought to challenge his conviction of aggravated assault and the life sentence. Ferguson maintains that (1) the evidence is insufficient for aggravated assault with a knife; (2) his trial counsel was ineffective for failing to investigate, for failing to protect his right to a preliminary hearing, for

failing to object to certain evidence, and for failing to make certain arguments or point out evidence that Ferguson believes would have helped his case; (3) the introduction of certain evidence resulted in a constructive amendment of the indictment; and (4) a police detective committed perjury to secure the indictment. Ferguson moves for appointment of counsel.

To obtain a COA, Ferguson must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). If a district court has rejected the claims on their merits, the movant “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*, 529 U.S. at 484; *see also Miller-El*, 537 U.S. at 338.

Ferguson has not made the requisite showing, so the motion for a COA is DENIED. The motion for appointment of counsel is also DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

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

JAMES M. FERGUSON

PETITIONER

v.

Civil No. 1:15cv261-HSO-RHW

MARSHALL FISHER

RESPONDENT

FINAL JUDGMENT

This matter came on to be heard on the Proposed Findings of Fact and Recommendation [20] of Magistrate Judge Robert H. Walker, entered in this civil action on April 27, 2017. The Court, after a full review and consideration of the Magistrate Judge's Proposed Findings of Fact and Recommendation [20], the record as a whole, and relevant legal authority, finds that in accord with its Order entered herewith,

IT IS, ORDERED AND ADJUDGED, that this civil action is DISMISSED WITH PREJUDICE.

SO ORDERED AND ADJUDGED, this the 13th day of November, 2017.

s/ Halil Suleyman Ozerdem

HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

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

JAMES M. FERGUSON

PETITIONER

v.

Civil No. 1:15cv261-HSO-RHW

MARSHALL FISHER

RESPONDENT

MEMORANDUM OPINION AND ORDER GRANTING
PETITIONER'S [23] MOTION TO AMEND OBJECTIONS;
OVERRULING PETITIONER'S [22], [23] OBJECTIONS; ADOPTING
[20] PROPOSED FINDINGS OF FACT AND RECOMMENDATION; AND
DENYING [1] PETITION FOR WRIT OF HABEAS CORPUS

This matter is before the Court on Petitioner James M. Ferguson's Objections [22] to the Proposed Findings of Fact and Recommendation [20] of United States Magistrate Judge Robert H. Walker, and Petitioner's Motion [23] to Amend his Objections [22]. After thoroughly reviewing the Motion [23] to Amend, Proposed Findings of Fact and Recommendation [20], the record, the position of Petitioner advanced in his Objections, and relevant legal authority, the Court will grant Petitioner leave to amend his Objections and will consider the Objections raised in both Petitioner's original Objections [22] and his Motion [23] to Amend. The Court nevertheless concludes Petitioner's Objections [22], [23] should be overruled and that the Magistrate Judge's Proposed Findings of Fact and Recommendation [20] should be adopted as the finding of the Court. Petitioner James M. Ferguson's 28 U.S.C. § 2254 Petition [1] for Writ of Habeas Corpus should be denied, and this case dismissed with prejudice.

I. BACKGROUND

A. State Court Proceedings

On December 19, 2011, a grand jury of the Circuit Court of Harrison County, Mississippi, First Judicial District (the “Circuit Court”), returned an indictment against Petitioner James M. Ferguson (“Petitioner” or “Ferguson”) for aggravated assault in violation of Mississippi Code § 97-3-7(2)(b), as a habitual offender in accordance with § 99-19-81. R. [16-1] at 10-11. Petitioner was accused of “unlawfully, feloniously, wilfully and purposely caus[ing] bodily injury to [an individual], with a deadly weapon, to wit: a knife, by stabbing the said [individual] with said weapon” *Id.* at 10.

On August 9, 2012, Petitioner was found guilty of aggravated assault following a jury trial. *Id.* at 101. The trial court sentenced Petitioner to life in the custody of the Mississippi Department of Corrections pursuant to Mississippi Code § 99-19-83. *Id.* On August 10, 2012, Petitioner’s trial counsel filed a Motion for New Trial and for Acquittal Notwithstanding the Verdict, *id.* at 110-11, which the trial court denied, *id.* at 114.

On January 18, 2013, the Circuit Court granted Petitioner’s Petition for Post-Conviction Relief, permitting Petitioner to file an out-of-time appeal. R. [16-4] at 147-48. Petitioner appealed. R. [16-1] at 121. On appeal to the Mississippi Supreme Court,

Ferguson, through appellate counsel, raise[d] the following issues: (1) that the trial court erred in denying Ferguson’s motions for directed verdict and judgment notwithstanding the verdict; (2) that the trial court

erred in refusing to grant one of his proposed jury instructions; and (3) that the trial court erred by refusing to admit into evidence drug paraphernalia found in [the victim's] apartment.

Ferguson v. State, 137 So. 3d 240, 242-43 (Miss. 2014); *see also* R. [16-5] at 10-14 (appellant's brief). The Mississippi Supreme Court affirmed Petitioner's conviction and sentence, denied his motion for rehearing, and issued its mandate on May 22, 2014. R. [16-4] at 2.¹

On June 30, 2015, Petitioner filed in the Mississippi Supreme Court a *pro se* Application for Leave to Proceed in the Trial Court for Post-Conviction Relief Proceeding. R. [16-6] at 4. Petitioner asserted that his appellate counsel did not address certain issues on appeal, and that Petitioner was denied due process of law because he was purportedly convicted of an offense other than the one charged in the indictment and because he was not given adequate notice that he would be tried for, and the indictment was constructively amended to charge him with, causing the victim "injuries with hair dryer, curling iron, and radio." *Id.* at 7-12. Petitioner argued that no stab wounds were found on the victim to support a charge that he stabbed the victim with a knife. *Id.* at 12-13.

The Mississippi Supreme Court denied Petitioner's Application on July 15, 2015. R. [16-6] at 2. The court found that Petitioner's "indictment-related claim lacks an arguable basis," and that his "ineffective assistance of counsel claim fails to

¹ On May 9, 2014, Petitioner filed a petition for writ of habeas corpus in this Court. *Ferguson v. Miss. Dep't of Corr.*, 1:14cv204-HSO-RHW (S.D. Miss. May 9, 2014). The petition was dismissed without prejudice on June 16, 2015, for failure to exhaust state law remedies. *Ferguson v. Miss. Dep't of Corr.*, No. 1:14cv204-HSO-RHW, 2015 WL 3752346 (S.D. Miss. June 16, 2015).

meet the requisite prongs of deficient performance and prejudice provided by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Id.*

B. Section 2254 Petition

On August 13, 2015, Petitioner filed a 28 U.S.C. § 2254 Petition [1] for Writ of Habeas Corpus in this Court. Petitioner claims that his trial counsel rendered ineffective assistance in failing to object to the introduction of a curling iron, hair dryer, and portable radio into evidence, and in failing to object to the prosecution's references to injuries caused by these items in opening and closing arguments. Petitioner asserts that the indictment was constructively amended by the admission of the hair dryer, curling iron, and radio into evidence at trial. Underlying each of these claims is Petitioner's continued challenge as to the sufficiency of the evidence. Petitioner maintains that there was no evidence that the victim was stabbed with a knife, and that he was not charged with assaulting the victim with a hair dryer, curling iron, or radio.

Respondent Marshall Fisher ("Respondent") filed an Answer to the Petition on December 14, 2015. Ans. [15] at 1. Respondent identifies an additional claim by Petitioner, that he was deprived a fair trial when the judge allowed the admission of these three items into evidence. *Id.* at 6. As the Magistrate Judge ultimately found, the Petition does not seem to raise this claim, but out of an abundance of caution the Court will address it.

C. Magistrate Judge's Proposed Findings of Fact and Recommendation

The Magistrate Judge entered a Proposed Findings of Fact and Recommendation [20] on April 27, 2017. To the extent Petitioner professes his innocence, the Magistrate Judge determined that there was constitutionally-sufficient evidence to convict Petitioner of the offense as charged. *See* Proposed Findings of Fact and Recommendation [20] at 4. With respect to the ineffective assistance of counsel claims, the Magistrate Judge found that counsel's performance could not be deemed constitutionally deficient and that Petitioner could not demonstrate prejudice. *Id.* at 6-8. The Magistrate Judge concluded that Petitioner's constructive amendment to the indictment claim lacked merit. *Id.* at 8-9. According to the Magistrate Judge, “[t]he record demonstrates that [Petitioner] was convicted of the same conduct for which he was indicted.” *Id.* at 9.

The Magistrate Judge recommended that Petitioner's claim regarding the admissibility of the curling iron, hair dryer, and radio be dismissed based upon Petitioner's failure to exhaust state remedies. *Id.* at 9-10. In the alternative, the Magistrate Judge found that the claim lacked merit because these items were admissible in evidence. *Id.* at 9-12. In sum, the Magistrate Judge recommended that the § 2254 Petition be denied and dismissed with prejudice. *Id.* at 12.

D. Petitioner's Objections

Petitioner submitted Objections [22] to the Proposed Findings of Fact and Recommendation [20], rearguing the claims in his Petition. Petitioner contends that the State was allowed to constructively amend the indictment to include the

victim's injuries from the hair dryer, curling iron, and radio, and that his trial counsel was ineffective in failing to object to the introduction of these items into evidence. Obj. [20] at 2-9. Petitioner claims that he is actually innocent of the crime charged, *id.* at 9-10, and attempts to distinguish between lacerations and "stab wounds," maintaining that the medical records prove the victim was not stabbed, *id.* at 10-11.

Petitioner later filed a Motion [23] to Amend his Objections [22], asking the Court to consider additional legal and factual arguments. These include that a detective of the Gulfport Police Department ("GPD") erroneously stated in his investigative reports that the victim's medical records documented that she suffered multiple stab wounds to her face. Mot. [23] at 3. According to Petitioner, after the GPD detective presented this information to a grand jury, the grand jury returned an indictment charging him with stabbing the victim. *Id.* However, Petitioner insists that the medical report did not state that the victim suffered stab wounds, constituting plain error. *Id.* Petitioner attaches exhibits which are also found in the state-court record.

II. DISCUSSION

A. The Court will grant Petitioner's Motion [23] to Amend.

Petitioner seeks to have the Court consider additional legal and factual arguments. While Petitioner's arguments do not change the result here, the Court will nevertheless grant Petitioner's Motion [23] and consider all objections he has raised in his original Objections [22] and in his Motion [23] to Amend.

B. The Court will overrule Petitioner's Objections and adopt the Magistrate Judge's Proposed Findings of Fact and Recommendation [20].

1. Standard of Review

Because Petitioner has filed written Objections to the Magistrate Judge's Proposed Findings of Fact and Recommendation [20], the Court "make[s] a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); Rule 8(b) of Rules Governing Section 2254 Cases in the United States District Courts. "Such review means that this Court will examine the entire record and will make an independent assessment of the law." *Lambert v. Denmark*, Civil No. 2:12-cv-74-KS-MTP, 2013 WL 786356, *1 (S.D. Miss. Mar. 1, 2013). In conducting a de novo review, the Court is not "required to reiterate the findings and conclusions of the magistrate judge." *Koetting v. Thompson*, 995 F.2d 37, 40 (5th Cir. 1993).

Having conducted a de novo review of the record, and for the reasons that follow, the Court agrees with the conclusions reached by the Magistrate Judge and will adopt his Proposed Findings of Fact and Recommendation.

2. Relevant Legal Authority

28 U.S.C. § 2254(d) provides that

[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). “This is a difficult to meet, and a highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.” *Boyer v. Vannoy*, 863 F.3d 428, 440–41 (5th Cir. 2017) (quotation omitted).

3. Petitioner’s Insufficiency of the Evidence Claim

The United States Supreme Court has held that

in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 324 (1979). “In applying this standard, a federal habeas court refers to the state’s criminal law for the substantive elements of the offense.” *Hughes v. Johnson*, 191 F.3d 607, 619 (5th Cir. 1999).

Petitioner was charged with aggravated assault in violation of Mississippi Code § 97-3-7(2)(b).² This statute provides, in relevant part, that a person is guilty of aggravated assault if he attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm. Miss. Code Ann. § 97-3-7(2)(b) (2011).³ The

² Petitioner does not challenge his sentence or the determination that he qualified as a habitual offender under Mississippi Code § 99-19-81.

³ This subsection is now located at Mississippi Code § 97-3-7(2)(A)(ii).

indictment charged that Petitioner used a deadly weapon, specifically a knife. R. [16-1] at 11.

Petitioner does not dispute that he assaulted the victim. The crucial factual dispute, in Petitioner's view, is whether lacerations the victim sustained on her face were caused by a knife or by shards of glass from the victim's eye glasses. However, evidence was adduced at trial demonstrating that the lacerations were caused by Petitioner stabbing the victim. The jury was presented with sufficient evidence from which a rational trier of fact could have found proof of Petitioner's guilt beyond a reasonable doubt, including the victim's own testimony that Petitioner stabbed her in the face and head with a knife, R. [16-2] at 130-31, and the testimony of an emergency room physician who treated the victim that the victim's lacerations were consistent with being stabbed or cut with a knife, R. [16-3] at 3.

3. Petitioner's Ineffective Assistance of Counsel Claims

To establish ineffective assistance of counsel, Petitioner bears the burden of proving deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). "With respect to prejudice, a challenger must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting

Strickland, 466 U.S. at 694).

The standards created by *Strickland* and § 2254(d) are “highly deferential.” *Id.* at 105 (quoting *Strickland*, 466 U.S. at 689). The Supreme Court has held that, “when the two apply in tandem, review is ‘doubly’ so.” *Id.* (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). When § 2254(d) applies, the question is not whether counsel’s actions were reasonable, but whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard. *See id.* As the Magistrate Judge pointed out, there are reasonable arguments that Petitioner’s counsel satisfied *Strickland*’s deferential standard. *See* Proposed Findings of Fact and Recommendation [20] at 6-8.

a. Admission of Hair Dryer, Curling Iron, and Radio into Evidence

Evidence of another offense is admissible if that offense is so clearly related to the charged crime as to form a single transaction or a closely related series of transactions. *See Townsend v. State*, 681 So. 2d 497, 506 (Miss. 1996). Such evidence “must be integrally related to time, place, and fact to that for which defendant stands trial.” *Id.* The evidence must be essential for telling a complete, rational, and coherent story. *See id.*

The victim testified Petitioner hit her with the hair dryer, curling iron, and radio after the knife he was using to stab her broke. *See* R. [16-2] at 131-33. These items were admissible because they were substantially necessary to present the complete story of the crime to the jury. *See, e.g., id.; Davis v. State*, 40 So. 3d 525, 530 (Miss. 2010). “Because failure to make a frivolous objection does not cause

counsel's performance to fall below an objective level of reasonableness," *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998), Petitioner has not shown constitutionally deficient performance by his trial counsel in this regard.

Nor has Petitioner shown prejudice. The trial court instructed the jury in relevant part that, in order to convict Petitioner of aggravated assault, it had to find beyond a reasonable doubt that Petitioner feloniously, willfully, and purposefully caused bodily injury to the victim "with a deadly weapon, to wit, a knife" by stabbing the victim "with said deadly weapon." R. [16-3] at 92-93. The jury is presumed to have followed the trial court's instructions. *Charles v. Thaler*, 629 F.3d 494, 500 (5th Cir. 2011).

b. The Prosecution's Reference to Injuries Caused by the Hair Dryer, Curling Iron, and Radio

Petitioner has not demonstrated deficient performance by his trial counsel in not objecting to the prosecutor's reference to injuries caused by the hair dryer, curling iron, and radio. A prosecutor may comment upon any facts introduced into evidence and may draw whatever deductions seem to him proper from these facts, *Bell v. State*, 725 So. 2d 836, 851 (Miss. 1998), and "failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness," *Green*, 160 F.3d at 1037.

4. Petitioner's Constructive Amendment Claim

"[I]n federal courts, the fifth amendment's guarantee of a grand jury indictment prohibits . . . constructive amendment of the indictment . . ." *Tarpley v.*

Estelle, 703 F.2d 157, 161 n.7 (5th Cir. 1983). “That constitutional protection, however, has never been incorporated into the fourteenth amendment’s due process clause; it is inapplicable to state proceedings.” *Id.*

Petitioner had a Sixth Amendment right to adequate notice of the charges against him. *See Nelson v. Scott*, 66 F.3d 323, 1995 WL 534996, *2 n.2 (5th Cir. 1995) (citing *McKay v. Collins*, 12 F.3d 66, 69 (5th Cir. 1994)). “An indictment should be found sufficient unless no reasonable construction of the indictment would charge the offense for which the defendant has been convicted.” *McKay*, 12 F.3d at 69 (citation omitted). In considering the sufficiency of an indictment, the standard is based upon practical considerations, not technical ones, and “involves minimal constitutional standards, not whether a better indictment could have been written.” *Id.* However, unless an indictment is so defective that it deprived the state court of jurisdiction, the sufficiency of a state indictment is not a matter for federal habeas relief. *See id.* at 68.

As the Magistrate Judge found, the record demonstrates that Petitioner was convicted of the charge for which he was indicted. The indictment set forth each of the *prima facie* elements of the offense of aggravated assault, fairly informed Petitioner of the charges against him, and provided Petitioner with a double jeopardy defense against future prosecutions. *See id.*; *see also* R. [16-1] at 11-12 (indictment). This constituted fair notice of the nature and cause of the accusation and comported with the Sixth Amendment. Petitioner is not entitled to relief on his claim of constructive amendment.

5. Petitioner's Claim as to the Admissibility of Evidence

To the extent Petitioner claims that the trial court erred in admitting the hair dryer, curling iron, and radio into evidence, such argument is unavailing. The Court agrees with the Magistrate Judge's determination that this claim should be dismissed based upon Petitioner's failure to exhaust state remedies because his claims are now procedurally barred in state court and also in this Court. *See Proposed Findings of Fact and Recommendation* [20] at 9-11 (citing *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001)). Nor has Petitioner shown cause for the non-exhaustion or prejudice, and he cannot demonstrate the Court's failure to consider his claim on its merits will result in a fundamental miscarriage of justice because Petitioner has not demonstrated that he is actually innocent of the substantive offense. *See Hughes v. Quarterman*, 530 F.3d 336, 341 (5th Cir. 2008); *Morris v. Dretke*, 413 F.3d 484, 491-92 (5th Cir. 2005). In this case, the State presented overwhelming evidence of Petitioner's guilt at trial.

In addition, "in reviewing state court evidentiary rulings, the federal habeas court's role is limited to determining whether a trial judge's error is so extreme that it constituted denial of fundamental fairness under the Due Process Clause."

Castillo v. Johnson, 141 F.3d 218, 224 (5th Cir. 1998) (quotation omitted). As the Court stated earlier, it finds no error in the admission of the hair dryer, curling iron, and radio in order to tell the complete and coherent story of the crime. Even if the admission of this evidence was erroneous, Petitioner has not demonstrated that the error was so extreme that it rose to the level of denial of fundamental fairness.

6. Alleged Misrepresentation to the Grand Jury

Petitioner's next claim is that a GPD police detective's purported misstatement in his investigative report was presented to the grand jury. Mot. [23] at 3. Petitioner appears to assert that, because of this alleged misrepresentation, his indictment was constitutionally defective. The alleged misrepresentation was "that the victim's medical records documented that the victim suffered multiple stab wounds to her face," as opposed to lacerations, which caused the grand jury to return an indictment accusing Petitioner of stabbing the victim. *Id.*

Petitioner appears to raise this claim for the first time in his Objections to the Magistrate Judge's Proposed Findings of Fact and Recommendation [20]. For this reason, this claim should be dismissed due to Petitioner's failure to exhaust state remedies. Petitioner cannot return to the Mississippi courts to cure this deficiency because Mississippi Code § 99-39-23(6) would bar a second motion for post-conviction relief. *See, e.g., Turner v. Epps*, 460 F. App'x 322, 329 (5th Cir. 2012). Petitioner has not shown cause for this default or prejudice attributable to it, nor has he demonstrated that failure to consider the federal claim will result in a fundamental miscarriage of justice. *See Finley*, 243 F.3d at 220. This claim is procedurally defaulted. *See id.*

Alternatively, this claim lacks merit. There is no allegation that the State knowingly used perjured testimony to obtain a conviction. Nor has Petitioner shown that the State knowingly used perjured testimony to secure a grand jury indictment. In fact, Petitioner has not demonstrated that any false testimony was

presented to the grand jury. "Laceration" is a medical term meaning "a tearing or rupturing of soft tissue (e.g., skin, brain, liver) by blunt trauma," or a "torn or jagged wound." Stedmans Medical Dictionary 475050. The GPD detective's investigation apparently led him to the conclusion that the medical records demonstrated that the victim had suffered multiple stab wounds to her face, *see Detective's Report [23-1] at 1*, which is not inconsistent with the victim's medical records. Petitioner's claim on this point should be dismissed.

III. CONCLUSION

To the extent the Court has not addressed any of the parties' arguments, it has considered them and determined that they would not alter the result. Petitioner's Objections [22], [23] should be overruled, the Magistrate Judge's Proposed Findings of Fact and Recommendation [20] should be adopted as the finding of the Court, and Petitioner's Petition [1] for Writ of Habeas Corpus should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Petitioner James M. Ferguson's Motion [23] to Amend his Objections [22] is **GRANTED**.

IT IS, FURTHER, ORDERED AND ADJUDGED that Petitioner James M. Ferguson's Objections [22], [23] to the Proposed Findings of Fact and Recommendation [20] of United States Magistrate Judge Robert H. Walker are **OVERRULED**.

IT IS, FURTHER, ORDERED AND ADJUDGED that the Magistrate Judge's Proposed Findings of Fact and Recommendation [20] is **ADOPTED** as the

finding of the Court.

IT IS, FURTHER, ORDERED AND ADJUDGED that the 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus [1] filed by Petitioner James M. Ferguson is **DENIED**.

SO ORDERED AND ADJUDGED, this the 13th day of November, 2017.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JAMES M. FERGUSON

PETITIONER

VERSUS

CIVIL ACTION NO. 1:15CV261-HSO-RHW

MARSHALL FISHER

RESPONDENT

PROPOSED FINDINGS OF FACT AND RECOMMENDATION

Before the Court is James M. Ferguson's 28 U.S.C. § 2254 petition for writ of habeas corpus. Ferguson currently is serving a life sentence as an habitual offender following a jury trial and conviction for aggravated assault in the First Judicial District of Harrison County, Mississippi. Doc. [16-1] at 101. In his petition, Ferguson argues that (1) trial counsel was ineffective for (a) failing to object to the introduction of a hair dryer, curling iron, and radio into evidence, (b) failing to object to the prosecution's reference in opening and closing arguments to injuries caused by the hair dryer, curling iron, and radio; and (2) the indictment was constructively amended by the admission of the hair dryer, curling iron, and radio into evidence at trial. Respondent identifies as a third claim that the trial judge erred in allowing the hair dryer, curling iron, and radio into evidence. Doc. [15] at 6. Based on the undersigned's review of Ferguson's petition and amended petition, it does not appear that Ferguson raised this specific claim. *See* Doc. [1] & [5]. Rather, the admission into evidence of these items is bound up with Ferguson's claims of ineffective assistance of counsel and constructive amendment of the indictment. Nevertheless, out of an abundance of caution, the Court will address this claim as well.

Standard of Review

With the exception of Ferguson's claim that the trial judge erred by allowing certain evidence admitted at trial, each of the claims raised in Ferguson's § 2254 petition was considered and rejected by the Mississippi Supreme Court. *See Ferguson v. State of Mississippi*, 137 So.3d 240 (Miss. 2014); Doc. [15-2]. Accordingly, the Court must consider those claims in light of 28 U.S.C. § 2254 (d), which provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Subsection (d)(2) applies to a state court's factual determinations, and subsection (d)(1) governs review of questions of law and mixed questions of law and fact. *See Morris v. Cain*, 186 F.3d 581, 584 (5th Cir. 2000). As to questions of law, a federal court must defer to the state court's decision on the merits of such claim unless that decision was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court. A state court decision is contrary to federal law when the state court reaches a conclusion opposite to that of the United States Supreme Court on a question of law or if the state court decides a case differently than the United States Supreme Court has on a set of materially indistinguishable facts. *Murphy v. Dretke*, 416 F.3d 427, 432 (5th Cir. 2005). A state court decision involves an unreasonable application of federal law when the state court properly

identifies the applicable federal principle but unreasonably applies the principle to the facts of the petitioner's case. *Id.* As to questions of fact, federal habeas courts presume that state court factual findings are correct unless the findings are "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *See Knox v. Johnson*, 224 F.3d 470, 476 (5th Cir. 2000). Section 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). A federal habeas court presumes that the state court's findings of fact are correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Murphy*, 416 F.3d at 432.

Sufficiency of the Evidence

Before addressing Ferguson's enumerated claims, the undersigned notes that underlying each of Ferguson's claims is what amounts, in essence, to a sufficiency-of-the evidence claim. Prior to trial, Ferguson argued to the trial judge that he did not stab the victim and that the victim's medical records support his claim, because the records refer to "lacerations" and not "stab wounds". Doc. [16-2] at 76-77. He filed a *pro se* motion to dismiss based on insufficient evidence. Doc. [16-1] at 66-69. Ferguson's attorney presented this argument to the trial court. The trial court denied the motion. Doc. [16-2] at 79-80. In his petition and in response to Respondent's answer, Ferguson continues to argue that he did not stab the victim and that the evidence does not support such a conclusion. *See* Doc. [1] at 7; Doc. [17] at 2, 4-5. Because the evidence does not support a finding that he stabbed the victim with a knife, Ferguson asserts that he committed a "simple domestic assault" and not an aggravated assault. Doc. [17] at 2.

Ferguson also raised a sufficiency claim on direct appeal, which the Mississippi Supreme Court rejected. *See Ferguson*, 137 So.3d at 243-44.

Each of Ferguson's habeas claims builds off of the premise that he did not stab the victim with a knife. By implication, he instead was convicted of assault with a curling iron, hair dryer, and radio; but not a knife. Hence, he contends that trial counsel was ineffective for failing to object to the introduction of these items into evidence and for failing to object to the prosecution's reference to these items in opening and closing statements. By the same token, Ferguson argues that the indictment against him was constructively amended because he was tried and convicted of committing an assault with a curling iron, hair dryer, and radio. Finally, he suggests that the trial judge committed error in allowing these items to be admitted into evidence.

To the extent that Ferguson protests his innocence, the undersigned finds that there was constitutionally sufficient evidence to find Ferguson guilty of the offense as charged. In assessing the sufficiency of the evidence to support a state conviction, a federal habeas court must inquire, after viewing the evidence in a light most favorable to the prosecution, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *West v. Johnson*, 92 F.3d 1385, 1393 (5th Cir. 1996). This Court is required to accept all credibility choices and conflicting inferences in favor of the jury's verdict. *See Ramirez v. Dretke*, 398 F.3d 691, 694 (5th Cir. 2005). This requirement encompasses both direct and circumstantial evidence. *Schrader v. Whitley*, 904 F.2d 282, 287 (5th Cir. 1990). *See also Jackson*, 443 U.S. at 324-25. Witness credibility determinations are within the province of the jury and it "retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of the witnesses."

United States v. Loe, 262 F.3d 427, 432 (5th Cir. 2001). On habeas review, the court defers to the trier of fact in resolving conflicts requiring credibility determinations. *Galvan v. Cockrell*, 293 F.3d 760, 764 (5th Cir. 2002).

In the instant case, the victim testified that Ferguson stabbed her with a knife and that the knife blade broke off during the attack. Doc. [16-2] at 129-32. Officer Jeremy Hayes testified that when he arrived at the crime scene he observed the victim with lacerations and puncture wounds to her face. Doc. [16-2] at 147-48. The medical records indicated that the victim suffered “lacerations”. *See* Doc. [16-1] at 70-72. Although it appears Ferguson is correct, in that the medical records did not specifically state that the victim sustained “stab wounds”, the treating physician testified at trial that the victim’s lacerations were consistent with knife wounds. Doc. [16-3] at 3, 6. Investigating officers found a knife blade, with reddish brown stains, in the closet where the assault occurred. Doc. [16-3] at 15, 30, 41. Based on the foregoing, the evidence was more than adequate for a rational trier of fact to find Ferguson guilty of aggravated assault with a knife.

Ineffective Assistance of Counsel

There are two parts to Ferguson’s ineffective assistance of counsel claim. First, he asserts that counsel should have objected to the introduction into evidence of the curling iron, hair dryer, and radio. Second, he argues that trial counsel should have objected to the prosecution’s reference to these items during opening and closing statements.

Federal courts examine ineffective assistance of counsel claims pursuant to *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy *Strickland*, petitioner must demonstrate not only that counsel was objectively deficient and not functioning as the counsel guaranteed the defendant by the Sixth Amendment, but also that this deficient performance prejudiced the

defense. *Id.* In order to show that counsel's performance was deficient, petitioner "must identify the acts and omissions of counsel that are alleged not to have been the result of reasonable judgement." *Id.* at 690. For the second prong, in order to show that his defense was prejudiced, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id.* at 694. Furthermore, "a court need not address both prongs [of an ineffective assistance of counsel claim,] ... but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test." *Amos v. Scott*, 61 F.3d 333, 348 (5th Cir.1995).

The Mississippi Supreme Court considered Ferguson's ineffective assistance of counsel claims and found that he failed to meet the requisite prongs for deficient performance and prejudice under *Strickland*. Doc. [15-2]. According to the victim's testimony, Ferguson began attacking her with a knife. When the knife blade broke, he continued his assault using the curling iron, hair dryer, and radio. Introduction of these items at trial would be permitted under Mississippi law "to tell the complete story". *See Williams v. State of Mississippi*, 991 So.2d 593, 607 (Miss. 2008); *Townsend v. State of Mississippi*, 681 So.2d 497, 506 (Miss. 1996). The prosecution has a legitimate interest in presenting evidence of other crimes or bad acts by a criminal defendant in order to give the jury a rational and coherent story of what happened. *Williams*, 991 So.2d at 607. Where the acts are so interrelated that they constitute a single transaction or occurrence, proof of other crimes or acts is admissible. *See Townsend*, 681 So.2d at 506; *Bruce v. State of Mississippi*, 35 So.3d 1236, 1239 (Miss.Ct.App. 2010). *See also Robinson v. Whitley*, 2 F.3d 562, 567 (5th Cir. 1993)(applying Louisiana evidentiary law in habeas context and holding that evidence of burglary was admissible in trial for rape because "the evidence had independent relevance as an integral part of the crime for which he was tried

and convicted.”). The evidence at issue is admissible to “complete the story of the crime by proving the immediate context of events in time and place” and to “evaluate all of the circumstances under which the defendant acted”. *United States v. Rice*, 607 F.3d 133, 141 (5th Cir. 2010)(discussing admissibility of “other acts” evidence in direct criminal appeal). Given the evidence’s admissibility, the undersigned finds that trial counsel’s objection to introduction of the curling iron, hair dryer, and radio would have been futile; therefore, counsel’s performance cannot be deemed constitutionally deficient. *See Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998)(holding that counsel’s failure to make frivolous objection does not cause performance to fall below objective level of reasonableness).

Even assuming that counsel should have objected, Ferguson cannot demonstrate prejudice. The trial court instructed the jury that to find Ferguson guilty it must find that he stabbed the victim with a knife. Doc. [16-3] at 92-93. The jury convicted Ferguson of aggravated assault with a knife. The jury is presumed to have followed the instructions when it reached its verdict. *See Charles v. Thaler*, 629 F.3d 494, 500 (5th Cir. 2011); *Galvan v. Cockrell*, 293 F.3d 760, 765 (5th Cir. 2002). As explained previously, there was more than sufficient evidence for a jury to conclude that Ferguson in fact assaulted the victim with a knife. Even if somehow erroneous, the introduction of these extraneous items into evidence does not rebut the presumption that the jury followed the instructions of the trial court and convicted Ferguson of assault with a knife.

Ferguson’s contention that counsel should have objected to the prosecution’s reference to injuries caused by the hair dryer, curling iron, and radio likewise is without merit. The prosecution “may comment upon any facts introduced into evidence. He may draw whatever deductions seem to him proper from these facts”. *Bell v. State of Mississippi*, 725 So.2d 836,

851 (Miss. 1998). Because these items were referenced in victim's first-hand account of the ongoing assault, counsel had no valid basis for objecting to the prosecution's reference to the curling iron, hair dryer, and radio during opening and closing statements.

Constructive Indictment

Ferguson argues that the introduction of evidence regarding the curling iron, hair dryer, and radio resulted in constructive amendment of the indictment, thereby depriving him of a fair trial. In other words, he contends that introduction into evidence of the curling iron, hair dryer, and radio permitted the jury to convict him of assault with these items; whereas, he was only indicted with assault with a knife.

A challenge to the sufficiency of a state indictment is not subject to federal habeas review unless the indictment is so defective to deprive the state court of jurisdiction. *See McKay v. Collins*, 12 F.3d 66, 68 (5th Cir. 1994); *Yohey v. Collins*, 985 F.2d 222, 229 (5th Cir. 1993). To the extent that Ferguson challenges a constructive amendment to the indictment under the Fifth Amendment, this Fifth Amendment right has not been incorporated into the Fourteenth Amendment Due Process Clause; therefore, it is inapplicable in state proceedings. *See Tarpley v. Estelle*, 703 F.2d 157, 161 n.7 (5th Cir. 1983); *Williams v. Haviland*, 467 F.3d 527, 531-31 (6th Cir. 2006); *Barbe v. McBride*, 740 F.Supp.2d 759, 785 (N.D.W.Va. 2010). However, a state criminal defendant may not be convicted of an offense for which he was not charged. *See Tarpley*, 703 F.2d at 160-61. Rather, a criminal defendant is entitled under the Sixth and Fourteenth Amendments to fair notice "of the nature and cause of the accusation" against him. *See Spinkellink v. Wainwright*, 578 F.2d 582, 609 n. 32 (5th Cir.1979); *Watson v. Jago*, 558 F.2d 330, 338 (6th Cir. 1977).

Ferguson was charged with aggravated assault, and he was convicted of aggravated assault. The record demonstrates that he was convicted of the same conduct for which he was indicted. The instructions submitted to the jury specifically advised that to find Ferguson guilty of aggravated assault the jury was required to find that Ferguson assaulted the victim with a knife. Doc. [16-3] at 92-93. At no point in the proceedings did the prosecution or the trial judge state that Ferguson could be convicted of aggravated assault based on his attack with the curling iron, hair dryer, or radio. To the contrary, the trial judge instructed the jury that for Ferguson to be convicted of aggravated assault, the jury must find that Ferguson caused bodily harm to the victim “with a deadly weapon, to wit, a knife”. Doc. [16-3] at 92-93. The trial judge further instructed the jury that “[i]t is a question of fact for you to determine whether the knife claimed to have been used by the defendant was a deadly weapon in the manner claimed to have been used in this case.” *Id.* at 93. During closing arguments, the prosecution emphasized that to find Ferguson guilty of the offense of aggravated assault, the state must prove to the jury that Ferguson stabbed the victim with a knife. *Id.* at 99, 101-02. The prosecution focused on the knife as the deadly weapon. *Id.* at 103. The indictment and the jury instructions clearly required that a finding of guilt be based on assault with a knife. Ferguson’s claim of constructive amendment is without merit.

Admissibility of the Curling Iron, Hair Dryer, and Radio

Ferguson argues that the trial judge erred in admitting into evidence the curling iron, hair dryer, and radio. The undersigned finds that this claim should be dismissed based on Ferguson’s failure to exhaust state remedies. In the alternative, as previously discussed, the claim lacks merit because the items were admissible.

Applicants seeking federal habeas relief under § 2254 are required to exhaust their claims in state court prior to requesting federal collateral relief. *See* 2254(d); *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998). In order to complete the exhaustion of state remedies, Ferguson was required to present this claim to the Mississippi Supreme Court. *See* Miss. R. App. P. 4 & 17. He did not do so. If Ferguson were to attempt to return to state court to exhaust his state remedies, a motion for post-conviction relief would be considered successive and dismissed as procedurally barred. *See* Miss. Code Ann. §§ 99-39-23(6) & 99-39-27(9); *Sneed v. State of Mississippi*, 722 So.2d 1255, 1256 (Miss. 1998). Because the claims are procedurally barred in state court, the undersigned concludes that Ferguson's claims are likewise barred from consideration in this court. *See Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001); *Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995). "If a petitioner fails to exhaust state remedies, but the court to which he would be required to return to meet the exhaustion requirement would now find the claims procedurally barred, then there has been a procedural default for purposes of federal habeas corpus relief." *Finley*, 243 F.3d at 220.

The Court may still reach the merits of a petitioner's claim despite the procedural bar if the petitioner can show cause for the non-exhaustion and prejudice, or if he can show that the Court's failure to consider the merits of petitioner's claim will result in a fundamental miscarriage of justice. *Morris v. Dretke*, 413 F.3d 484, 491-92 (5th Cir. 2005). Ferguson offers no explanation for his failure to pursue state remedies with respect to this issue. Therefore, the undersigned finds that he cannot demonstrate cause for his failure to exhaust. Moreover, Ferguson cannot demonstrate a fundamental miscarriage of justice because he has not demonstrated that he is actually innocent of the underlying conviction. *See Hughes v. Quarterman*, 530 F.3d 336, 341-42 (5th Cir. 2008). The State presented overwhelming evidence

of Ferguson's guilt, which included the victim's first-hand account of the assault, testimony from the treating physician who described her injuries, and testimony from investigating officers who recovered a knife blade from the crime scene.

In the alternative, the undersigned finds Ferguson's claim to be without merit. Federal habeas corpus review is limited to errors of constitutional dimension and federal courts do not sit to review the mere admissibility of evidence under state law. *Castillo v. Johnson*, 141 F.3d 218, 222 (5th Cir. 1998). Federal courts do not review the admissibility of evidence under state law rules unless an erroneous evidentiary ruling was so extreme as to result in a denial of a constitutionally fair proceeding. *Jackson v. Johnson*, 194 F.3d 641, 656 (5th Cir. 1999). The Fifth Circuit has explained that the evidentiary ruling must be so extreme that it constituted a denial of fundamental fairness. *Green v. Johnson*, 160 F.3d 1029, 1047 (5th Cir. 1998). Only where the error was material in the sense of being a crucial, critical, or highly significant factor will the petitioner be afforded habeas relief. *Id.*

As discussed previously, testimony and evidence regarding the hair dryer, curling iron, and radio related to an ongoing transaction or occurrence and merely completed the story of the assault. Under Mississippi law, such evidence is admissible. *See Williams*, 991 So.2d at 607; *Townsend*, 681 So.2d at 506. Even if somehow erroneous, Ferguson has not demonstrated that admission of the evidence was material such that its admission constituted a denial of fundamental fairness. The hair dryer, curling iron, and radio were peripheral to the central, factual question of whether Ferguson assaulted the victim with a knife. The indictment and jury instructions required a finding that Ferguson committed assault with a deadly weapon, to wit, a knife. The evidence presented at trial supported such a finding. The jury is presumed to have

followed the instructions and properly found Ferguson guilty of assault with a knife. *See Charles*, 629 F.3d at 500; *Galvan*, 293 F.3d at 765.

RECOMMENDATION

Based on the foregoing, the undersigned recommends that James Ferguson's 28 U.S.C. § 2254 petition for writ of habeas corpus be denied and dismissed with prejudice.

NOTICE OF RIGHT TO APPEAL/OBJECT

Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to this report must serve and file written objections within fourteen (14) days after being served with a copy unless the time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions and recommendations to which objections are being made; the District Court need not consider frivolous, conclusive or general objections. Such party shall file the objections with the Clerk of the Court and serve the objections on the District Judge and on all other parties. A party's failure to file such objections to the proposed findings, conclusions and recommendation contained in this report shall bar that party from a de novo determination by the District Court. Additionally, a party's failure to file written objections to the proposed findings, conclusions, and recommendation contained in this report within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the proposed factual findings and legal conclusions that have been accepted by the district court and for which there is no written objection. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

SO ORDERED AND ADJUDGED, this the 27th day of April, 2017.

/s/ Robert H. Walker
ROBERT H. WALKER
UNITED STATES MAGISTRATE JUDGE