NO. ________________

In the

Supreme Court of the United States

RAYMOND ANDREW RICHARDSON, ***Petitioner*****,**

v.

JONATHAN FRAME, Superintendent, ***Respondent.***

APPENDIX A
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Wesley P. Page
Federal Public Defender

Jonathan D. Byrne
Appellate Counsel
Counsel of Record

OFFICE OF THE FEDERAL PUBLIC DEFENDER
Southern District of West Virginia
300 Virginia Street, East, Room 3400
Charleston, West Virginia 25301
304/347-3350
jonathan_byrne@fd.org

Counsel for Petitioner

165 F.4th 187
United States Court of Appeals, Fourth Circuit.

Raymond Andrew RICHARDSON, Petitioner – Appellant,
v.
Jonathan FRAME, Superintendent, Respondent – Appellee.

No. 23-7147
|
Argued: December 9, 2025
|
Decided: January 20, 2026

Synopsis

Background: After petitioner's West Virginia convictions for offenses including first-degree robbery were affirmed on appeal, 2016 WL 5030312, petitioner sought federal habeas relief based on argument that trial counsel provided ineffective assistance by failing to object to a variance between the indictment and the State's theory at trial. The United States District Court for the Southern District of West Virginia, John T. Copenhaver, Jr., Senior District Judge, 2023 WL 6796565, rejected in part the report and recommendation of Omar J. Aboulhosn, United States Magistrate Judge, 2022 WL 20805075, and denied petition. Petitioner appealed.

[Holding:] The Court of Appeals, Wilkinson, Circuit Judge, held that variance between indictment and State's trial theory as to method by which defendant committed first-degree robbery was not so unfair as to rise to level of due process violation.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (13)

[1] **Habeas Corpus** Review de novo

Court of Appeals reviews de novo the district court's decision to deny federal habeas relief.

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[2] Habeas Corpus 🔑 Federal Review of State or Territorial Cases

Bar for grant of federal habeas relief to petitioner convicted in state court is a high bar, and petitioner must show that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. 28 U.S.C.A. § 2254(d).

[3] Habeas Corpus 🔑 Adequacy and Effectiveness of Counsel

When a petitioner's habeas claim challenging a state court ruling is based on the ineffective assistance of counsel, federal court reviews the claim through the additional lens of *Strickland* and its progeny. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

[4] Criminal Law 🔑 Deficient representation and prejudice in general

Under *Strickland* standard, to show ineffective assistance, defendant much show that counsel's representation fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. U.S. Const. Amend. 6.

[5] Criminal Law 🔑 Presumptions and burden of proof in general

In analysis of an ineffective assistance claim, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. U.S. Const. Amend. 6.

[6] Criminal Law 🔑 Prejudice in general

Prejudice exists, as required to support ineffective assistance claim, only if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S. Const. Amend. 6.

[7] Habeas Corpus 🔑 Adequacy and Effectiveness of Counsel

Habeas Corpus 🔑 Counsel

The standard created by *Strickland* for an ineffective assistance claim and the standard of statute providing for federal habeas review on a petition by state prisoner are both highly deferential, and when the two apply in tandem, review is doubly so. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

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[8] Constitutional Law Relation between allegations and proof; variance

Robbery Issues, proof, and variance

Variance between how first-degree robbery count was charged in state court indictment and how it was presented to jury was not so unfair as to rise to level of due process violation, in prosecution under state statute providing two methods of committing first-degree robbery, in which indictment charged defendant under method involving "threat of deadly force," while State's theory at trial rested on the other method, namely actual use of violence against a person, in case arising from incident in which defendant attacked victim at door of her home and then took money which victim had left on her ironing board; variance did not broaden the charge, and variance was irrelevant to theory of defense, which argued that defendant had not taken any money from victim. U.S. Const. Amend. 14; W. Va. Code Ann. § 61-2-12(a).

[9] Constitutional Law Charging Instruments; Indictment and Information

The due process clause of the Fourteenth Amendment requires that a criminal defendant receive reasonable notice of a charge against him. U.S. Const. Amend. 14.

[10] Constitutional Law Charging Instruments; Indictment and Information

"Reasonable notice" to a defendant of charge against him, as required by due process clause, sufficiently apprises the defendant of what he must be prepared to meet such that he has a meaningful opportunity to defend himself at trial. U.S. Const. Amend. 14.

1 Case that cites this headnote

[11] Constitutional Law Relation between allegations and proof; variance

A conviction upon a charge not made constitutes a denial of due process. U.S. Const. Amend. 14.

[12] Constitutional Law Relation between allegations and proof; variance

Where a variance between indictment and State's trial theory does not constitute a broadening of the charges, it does not ordinarily offend principles of due process. U.S. Const. Amend. 14.

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[13] **Constitutional Law** Form, requisites, and sufficiency

Due process clause does not require the method by which the crime was committed to be alleged in the indictment. U.S. Const. Amend. 14.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, Jr., Senior District Judge. (2:20-cv-00573)

Attorneys and Law Firms

ARGUED: Jonathan D. Byrne, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant. Holly J. Wilson, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellee. ON BRIEF: Wesley P. Page, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant. Patrick Morrisey, Attorney General, Michael R. Williams, Solicitor General, Spencer J. Davenport, Assistant Attorney General, Darius J. Iraj, Legal Fellow, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellee.

Before WILKINSON, KING, and GREGORY, Circuit Judges.

Opinion

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge King and Judge Gregory joined.

WILKINSON, Circuit Judge:

***189** Following his conviction for first-degree robbery, Raymond Richardson sought habeas relief in federal court. He claimed his trial counsel provided ineffective assistance by failing to object to a variance between the indictment and the State's theory at trial. While the indictment charged Richardson with accomplishing the robbery by threatening Denise Cool with deadly force, the State argued at trial that he committed the robbery by physically assaulting her. The district court denied Richardson's petition, and we affirm.

The indictment informed Richardson that he was charged with committing first-degree robbery, and he was found guilty of the same offense. That is ordinarily sufficient to satisfy the demands of due process. In any event, Richardson received actual notice that he was charged with assaulting

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Cool during the robbery, so he could not have been surprised when the State presented evidence of the assault at trial. Indeed, Richardson has failed to show how the presentation of his defense was hindered by the variance.

I.

A.

Richardson arrived at Cool's door early one morning to offer her $200 worth of cocaine. Cool was wary. Richardson had recently been selling her cocaine mixed with baking soda. Suspecting that this cocaine was also "trash," J.A. 222, Cool refused his offer. When Richardson insisted that she pay him anyway, Cool told him to leave. Instead, he violently attacked her and took $103 she had left on her ironing board.

Richardson was arrested by the police a few days later. In an interview with detectives, ***190** Richardson admitted to hitting Cool but insisted he had not taken her money. A West Virginia grand jury ultimately indicted Richardson on six counts, three of which went to trial: first-degree robbery, assault during the commission of a felony, and possession with intent to deliver cocaine. This appeal concerns the robbery count. West Virginia law provides that:

> Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon, is guilty of robbery in the first degree ....

W. Va. Code § 61-2-12(a). The indictment charged Richardson with first-degree robbery under the second method, alleging that he "use[d] the threat of deadly force upon the person of Denise Cool" to "steal, take and carry away [$103] in violation of Chapter 61, Article 2, Section 12(a)." J.A. 113.

At trial, however, the State's theory rested on the first method for committing first-degree robbery: Richardson's actual use of violence against Cool. The State described in its opening remarks how Richardson "beat down" Cool. J.A. 207. Cool then testified that Richardson "punched [her] straight in the face" and "kept pounding [her]" even after she had "dropped to the floor." J.A. 225. And in its closing remarks, the State emphasized to the jury that Richardson "hit [Cool] because she wasn't giving him the money that he wanted." J.A. 510.

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The trial court's instructions to the jury likewise focused on Richardson's use of violence. The court explained that first-degree robbery is committed when a person takes the property of another "by partial strangulation or suffocation or by striking or beating or by the threat of presenting of firearms, or by other deadly weapon or instrumentality." J.A. 474. Then the court told the jury that it could convict Richardson if it found, among other elements, that he had "committ[ed] violence against Denise Cool." J.A. 475.

Richardson did not challenge the variance between how the robbery count was charged in the indictment and how it was presented to the jury. In his opening and closing remarks, defense counsel conceded that Richardson had "beat up" Cool but argued that he had done so because Cool demeaned him with a racial slur—not because he was trying to rob her. J.A. 214, 491. Indeed, Richardson's defense at trial was that he had not taken any money from Cool.

The jury convicted Richardson of all three counts.

B.

After his convictions were affirmed on appeal, Richardson petitioned the state court for habeas relief. Among other issues, Richardson claimed he had received ineffective assistance because his trial counsel did not object to the variance. The court held an evidentiary hearing in which Richardson and his trial counsel testified.

Trial counsel acknowledged that he should have challenged the validity of the indictment but testified that the variance did not affect Richardson's defense:

> Q. Were you in any way hampered by the presentation of your defense by the fact that the indictment said "by threat of deadly force" and the proof was by striking and beating?
>
> A. No. I think the defense would have been the same.
>
> Q. I mean, the defense was --the defense was not that Mr. Richardson used deadly force as opposed to striking and beating ***191** or that he used striking and beating as opposed to deadly force. The defense to the robbery was that there was no larceny of the money and, therefore, there could be no robbery; correct?
>
> A. Correct.
>
> Q. Therefore it did not matter in terms of your defense how that first degree robbery was accomplished?

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A. Correct.

J.A. 745–46. When asked if he had been surprised when the State presented evidence of the assault, trial counsel said only that he had "missed that issue in the indictment." J.A. 758. He also agreed that another count in the indictment "very clearly said" that Richardson assaulted Cool "by means of striking and blows and violence." J.A. 746. Specifically, the assault count charged Richardson with "punch[ing], kick[ing] and wound[ing] Denise Cool, during the commission of ... first degree robbery." J.A. 113.

For his part, Richardson acknowledged that "[t]he defense's theory was that yes, there was a domestic issue that happened bordering on possibly a battery or assault and battery, but there was no robbery." J.A. 725. And he conceded that the options available to the defense were limited by his admission to the police that he had gotten into a physical altercation with Cool. Nevertheless, Richardson testified that he was surprised when the State presented evidence of the assault because he had "based [his] defense on that version of the indictment" charging him with threatening Cool with deadly force. J.A. 766.

The state court denied Richardson's habeas petition, finding that he "quite clearly knew the offense with which he was charged." J.A. 80. The court explained that the indictment informed Richardson that he was charged with first-degree robbery and included the statute he was charged with violating. It also observed that the assault count in the indictment put Richardson on notice that he was charged with committing violence against Cool "by punching, kicking, and wounding her." J.A. 80. In any event, the court found that Richardson had not been prejudiced because whether the robbery "was accomplished with a gun or by physical violence was, frankly, not germane to [his] defense." J.A. 80. The court thus concluded that it would have overruled any objection to the variance that Richardson might have made at trial or in a post-trial motion.

The West Virginia Supreme Court of Appeals affirmed the state court's decision. It explained that the indictment informed Richardson that he was charged with first-degree robbery under § 61-2-12(a) and that the State planned to introduce evidence of the assault. The court also observed that "the means by which [Richardson] accomplished the robbery ... was irrelevant to the defense theory." J.A. 103. Accordingly, the court held that "any difference between the allegations in the indictment and the evidence at trial did not mislead [Richardson], subject him to any additional burden of proof, or otherwise prejudice him and so was an amendment in form, only." J.A. 103.

After exhausting his ability to seek habeas relief in state court, Richardson petitioned the district court for federal habeas relief under 28 U.S.C. § 2254. The district court denied the petition, finding that Richardson received actual notice "sufficient to apprise him of the charges he needed to be prepared to meet at trial, as required by the Fourteenth Amendment Due Process Clause." J.A.

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687–88. The district court granted Richardson's motion for a certificate of appealability, however, and this appeal followed.

II.

A.

[1] **[2]** We review de novo the district court's decision to deny federal habeas relief. ***192** *Bryant v. Stirling*, 126 F.4th 991, 995–96 (4th Cir. 2025). Our review of the West Virginia Supreme Court of Appeals' decision is far more deferential, however. We may not grant habeas relief unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "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 high bar. Richardson "must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

[3] **[4]** **[5]** **[6]** When a petitioner's habeas claim is based on the ineffective assistance of counsel, "we review the claim through the additional lens of *Strickland* and its progeny." *Richardson v. Branker*, 668 F.3d 128, 139 (4th Cir. 2012). Under that standard, the petitioner much show "that counsel's representation fell below an objective standard of reasonableness" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052. And prejudice exists only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052.

[7] "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105, 131 S.Ct. 770 (citations omitted). For the reasons set forth below, Richardson has come nowhere close to meeting this "doubly deferential" standard. *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009).

B.

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[8] Richardson claims the variance between how the robbery count was charged in the indictment and how it was presented to the jury deprived him of his Fourteenth Amendment right to due process. He argues that his counsel's failure to challenge the variance was objectively unreasonable and prejudiced his defense. We disagree. The variance did not deprive Richardson of due process, so any objection by counsel would have been futile. Accordingly, Richardson cannot establish that he was prejudiced by counsel's inaction. *See Peterson v. Murray*, 904 F.2d 882, 888 (4th Cir. 1990).

[9] **[10]** **[11]** The Due Process Clause of the Fourteenth Amendment requires that a criminal defendant receive "reasonable notice of a charge against him." *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948). "Reasonable notice 'sufficiently apprises the defendant of what he must be prepared to meet' " such that he has a meaningful opportunity to defend himself at trial. *Stroud v. Polk*, 466 F.3d 291, 296 (4th Cir. 2006) (quoting *Russell v. United States*, 369 U.S. 749, 763, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962)). "[A] conviction upon a charge not made ... constitutes a denial of due process." *Jackson v. Virginia*, 443 U.S. 307, 314, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Richardson has not shown that the variance at issue here was "so egregiously unfair as to amount to a deprivation of [his] right to due process." *Ashford v. Edwards*, 780 F.2d 405, 407 (4th Cir. 1985).

To begin with, the variance did not even "broaden[ ] the bases for conviction" such ***193** that Richardson was "actually convicted of a crime other than that charged in the indictment." *United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999) (quoting *United States v. Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991)). The indictment charged Richardson with violating West Virginia Code § 61-2-12(a), and the jury found him guilty of that very same offense. Richardson thus received "notice of the specific charge" upon which he was ultimately convicted. *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

[12] **[13]** It is true that § 61-2-12(a) provides two alternative means by which first-degree robbery can be accomplished. The indictment charged Richardson with robbing Cool by one means (threatening deadly force), while the evidence presented at trial showed he had done so by the other (committing violence). Where a variance does not "constitute a broadening of the charges," however, it does not ordinarily offend principles of due process. *United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996); *see also Barbe v. McBride*, 477 F. App'x 49, 51–53 (4th Cir. 2012) (per curiam). After all, "the Constitution does not require the method by which the crime was committed to be alleged in the indictment." *Hartman v. Lee*, 283 F.3d 190, 194 n.3 (4th Cir. 2002).

Richardson relies on two out-of-circuit decisions to argue that a variance violates a defendant's right to due process. *See* Opening Br. at 19–20 (discussing *Lucas v. O'Dea*, 179 F.3d 412 (6th Cir. 1999), and *Cokeley v. Lockhart*, 951 F.2d 916 (8th Cir. 1991)). But in both of those cases, the defendant was convicted of a different offense than the one he was initially charged with. *Lucas*,

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179 F.3d at 415; *Cokeley*, 951 F.2d at 920. In cases where the variance at issue concerned only *how* the charged offense was committed, both the Sixth Circuit and the Eighth Circuit have held that a defendant's due process rights are not violated. *Martin v. Kassulke*, 970 F.2d 1539, 1543–47 (6th Cir. 1992); *Stephens v. Norris*, 83 F.3d 223, 224–25 (8th Cir. 1996) (per curiam).

For example, in *Martin*, the defendant was charged with first-degree rape by forcible compulsion. 970 F.2d at 1542. At trial, however, the court told the jury that it could also convict him of first-degree rape if the victim was physically helpless. *Id.* Following his conviction, the defendant sought habeas relief in federal court. *Id.* at 1541. The Sixth Circuit explained that the "key question" was "whether rape by forcible compulsion and rape due to physical helplessness should be seen as two alternative crimes or merely two alternative methods by which the one crime, rape, could have been committed." *Id.* at 1543. After concluding that the statute "provides only one offense of rape with two different methods of commission," the Sixth Circuit held that the variance did not violate the defendant's right to due process. *Id.* at 1545.

Similarly, in *Stephens*, the defendant was charged with rape for engaging in sexual intercourse by forcible compulsion. 83 F.3d at 223. At trial, however, the court told the jury that it could convict the defendant of rape if he "had engaged in either sexual intercourse or deviate sexual activity" by forcible compulsion, and the State presented evidence of both sexual acts. *Id.* at 224. Following his conviction, the defendant sought habeas relief in federal court. *Id.* The Eighth Circuit held that there was no due process violation because "controlling [state] law at the time of [the defendant's] trial provided that [the] two 'ways' to commit rape constituted variations of a single crime." *Id.* at 225.

Like *Martin* and *Stephens*, the statute at issue here does not involve two distinct ***194** crimes but a single crime that can be accomplished in two alternative ways. *See, e.g., State v. Pannell*, 751, 225 W.Va. 743, 696 S.E.2d 45, 53 (2010) (per curiam) (stating that there are "two statutory methods for committing the offense of robbery"); *State v. Wilkerson*, 230 W.Va. 366, 738 S.E.2d 32, 37–38 & n.12 (2013) (similar). Therefore, Richardson "knew or should have known that he could be convicted for engaging in either form of" first-degree robbery when he was charged with violating § 61-2-12(a). *Barbe*, 477 F. App'x at 52.

What is more, Richardson had actual notice that he was charged with committing violence against Cool. The assault count in the indictment charged Richardson with punching, kicking, and wounding her during the commission of the robbery. Richardson thus "clearly had notice of the charges against him, was able to prepare a defense, and was not surprised by the evidence introduced at trial." *Thompson v. Nagle*, 118 F.3d 1442, 1454 (11th Cir. 1997). Due process requires nothing more. *See Hulstine v. Morris*, 819 F.2d 861, 864 (8th Cir. 1987) ("Due process requirements may be satisfied if a defendant receives *actual notice* of the charges against him, even if the indictment or information is deficient."); *Stroud*, 466 F.3d at 296–97.

Finally, even if we were to assume that Richardson was surprised by the change in the State's theory, he still must show that the variance "hinder[ed] the preparation of his defense." *Randall*, 171 F.3d at 203; *see also Ashford*, 780 F.2d at 407; *Barbe*, 477 F. App'x at 52. The West Virginia Supreme Court of Appeals found that Richardson had failed to do so, and there is ample evidence to support its conclusion.

As Richardson testified, the defense's strategy was to argue that Richardson had not taken any money from Cool. Whether Richardson threatened Cool with deadly force or physically attacked her is irrelevant to the presentation of that defense. Moreover, Richardson admitted to the police that he had assaulted Cool and conceded the same at trial. There is no reason to believe that Richardson would have changed course had the robbery count charged him with committing violence against Cool. Indeed, Richardson's trial counsel testified in no uncertain terms that the defense would have been the same notwithstanding the variance and that the variance did not hamper the presentation of the defense in any way.

For the foregoing reasons, we agree with the state court that any objection to the variance would have been futile. Accordingly, Richardson cannot show that he was prejudiced by trial counsel's failure to make such an objection. *Peterson*, 904 F.2d at 888. The district court's denial of Richardson's habeas petition is in all respects affirmed.

AFFIRMED

All Citations

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Wesley P. Page
Federal Public Defender

Jonathan D. Byrne
Appellate Counsel
Counsel of Record

OFFICE OF THE FEDERAL PUBLIC DEFENDER
Southern District of West Virginia
300 Virginia Street, East, Room 3400
Charleston, West Virginia 25301
304/347-3350
jonathan_byrne@fd.org

Counsel for Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

RAYMOND RICHARDSON,

Petitioner,

v. Civil Action No. 2:20-00573

DONALD AMES, Superintendent,
Mount Olive Correctional Center,

Respondent.

MEMORANDUM OPINION AND ORDER

Pending is the petitioner's Amended Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 (ECF 40), and respondent's motion for summary judgment (ECF 42), filed December 10, 2021. Petitioner alleges the following: (1) trial counsel was ineffective by failing to object to a constructive amendment of the grand jury indictment, and (2) trial counsel was ineffective by failing to investigate an alleged relationship between the jury foreman and one of the prosecutors. ECF 40 at 2-3.

I. Procedural History

On November 20, 2013, the Grand Jury of Kanawha County, West Virginia delivered an indictment against the

petitioner charging him with, inter alia, robbery in the first degree under W. Va. Code § 61-2-12(a), which read as follows:

> COUNT THREE: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present the said RAYMOND ANDREW RICHARDSON, on the __ [sic] day of August, 2013, and prior to the date of the finding of this Indictment, in the said County of Kanawha, did unlawfully and feloniously use the threat of deadly force upon the person of [the victim], and $103.00 in lawful United States currency, Of the money, property, goods, effects and chattels of the said [victim], and lawfully in her control and custody and against her will, then and there feloniously and violently did steal, take and carry away, in violation of Chapter 61, Article 2, Section 12(a), West Virginia Code 1931, as amended, against the peace and dignity of the State.

ECF 40-1 at 3-4 (emphasis supplied).

Section 61-2-12(a) provides that one element of the offense of first-degree robbery can be met in either of two ways: "(1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon." W. Va. Code § 61-2-12(a). The petitioner's indictment charged him with first-degree robbery under the second theory but omitted reference to the statutory element of "by the presenting of a firearm or other deadly weapon." See ECF 40-1 at 3-4.

At trial, the prosecution's case against the petitioner on the first-degree robbery count focused not on the

charged "threat of deadly force," but on the petitioner's use of violence against the victim (ECF 40-2 at 93; ECF 40-3 at 186, 204) and relied principally on evidence of the petitioner's physical assault of the victim, which was also charged in a separate count of the indictment as assault during the commission of the felony offense of first degree robbery. See ECF 40-2 at 111-13; ECF 40-3 at 51, 53. The trial court provided the following jury instruction:

> **First degree robbery is committed when one person takes from the person of another person or in his presence against his will any property, money or other thing of value belonging to or in the care, custody, control, management or possession of such other person by partial strangulation or suffocation or by striking or beating or by the threat of presenting of firearms, or by other deadly weapon or instrumentality with the intent to deprive the victim permanently of the property, money or other thing of value.**
> ...
> **Before the defendant, Raymond Richardson, can be convicted of first degree robbery, the State of West Virginia must overcome the presumption that the defendant, Raymond Richardson, is innocent and prove to the satisfaction of the jury beyond a reasonable doubt that: 1) the defendant, Raymond Richardson; 2) in Kanawha County, West Virginia; 3) on or about the 24th day of August, 2013; 4) did commit a robbery; 5) against [the victim]; 6) by committing violence against [the victim]; 7) and by such action did remove $103.00 in lawful United States currency from [the victim]; 8) with the intent to permanently deprive [the victim] of $103.00 in lawful United States currency.**

ECF 40-3 at 172-73 (emphasis supplied).

In his Amended Section 2254 Petition, petitioner contends that the evidentiary presentation of the case and the jury instructions at trial were an impermissible constructive amendment of the indictment against him, to which his trial counsel's failure to object denied him his Sixth Amendment right to effective assistance of counsel. ECF 41.

This action was previously referred to the Honorable Omar J. Aboulhosn, United States Magistrate Judge, for submission of proposed findings and a recommendation ("PF&R") pursuant to 28 U.S.C. § 636(b)(1)(B). On June 2, 2022, the magistrate judge entered a PF&R recommending that the court grant Petitioner's Amended Section 2254 Petition with respect to the claim of ineffective assistance of counsel concerning constructive amendment of the indictment and deny respondent's Motion for Summary Judgment insofar as it related to that claim. ECF 47 at 1.

The magistrate judge also recommended that the court grant respondent's Motion for Summary Judgment and deny Petitioner's Amended Section 2254 Petition with respect to a separate claim of ineffective assistance of counsel regarding trial counsel's alleged failure to investigate the relationship between one of the prosecutors and the jury foreperson. Id. Inasmuch as neither party objects to this recommendation, the

PF&R is adopted to that extent and need not be further addressed.

On June 16, 2022, the respondent timely filed objections to the magistrate judge's recommendation as to ineffective assistance of counsel based on failure to raise the constructive amendment contention. ECF 48. Respondent specifically objects to the magistrate judge's findings that: (1) the Supreme Court of Appeals of West Virginia ("WVSCA") erred in its ruling against the petitioner on his claim in prior state habeas proceedings that amendment of the indictment was a fatal variance in violation of petitioner's Fifth Amendment rights, and (2) petitioner was prejudiced by trial counsel's ineffective assistance. Id. at 2. On June 30, 2022, the petitioner, through counsel, filed a response to the respondent's objections arguing that the court should adopt the PF&R and overrule respondent's objections. ECF 49.

II. Legal Standard

Upon objection to a PF&R, the court must "make a de novo review determination of those portions of the report or specified findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Absent a "specific written objection," a district court is "free to adopt the magistrate

judge's recommendation . . . without conducting a de novo review." Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 316 (4th Cir. 2005).

Federal habeas relief may only be granted where a prisoner is held "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). As relevant here, such relief is unavailable on federal review where the issues were considered on the merits in state court habeas corpus proceedings, unless the state court's decision 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). This entitles state court applications of federal law to deference, and a writ may not issue simply because a federal court, in its independent judgment, finds that the relevant state court's application of clearly established federal law was merely erroneous or incorrect. See Williams v. Taylor, 529 U.S. 362, 412-13 (2000). A petitioner must show that a state court ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). "[F]ederal habeas corpus relief does not lie for errors of state law."

Lewis v. Jeffers, 497 U.S. 764, 780 (1990); see also Estelle v. McGuire, 502 U.S. 62, 67–68 (1991).

Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Material" facts are those necessary to establish the elements of a party's cause of action. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth., 597 F.3d 570, 576 (4th Cir. 2010). A "genuine" dispute of material fact exists if, in viewing the record and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party, a reasonable fact-finder could return a verdict for the non-moving party. Anderson, 477 U.S. at 248.

Inferences that are "drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). A party is entitled to summary judgment if the record, as a whole, could not lead a rational trier of fact to find for the non-moving party. Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991). Conversely, summary judgment is inappropriate if the evidence is sufficient for a reasonable

fact-finder to return a verdict in favor of the non-moving party. Anderson, 477 U.S. at 248.

III. Discussion

Respondent makes two objections to the PF&R. First, the respondent objects to the magistrate judge's finding that the WVSCA erred in finding that the state's presentation of its case at trial was a mere "amendment of form" rather than a constructive amendment of the grand jury indictment, and to the magistrate judge's conclusion that this was a fatal variance in violation of the Fifth Amendment. ECF 48 at 2. Second, the respondent objects to the finding that trial counsel's failure to object to the alleged constructive amendment prejudiced the petitioner. Id.

The court first considers whether the petitioner has appropriately exhausted his remedies in state court such that this court may consider his claims. State prisoners must give state courts a fair opportunity to act on their habeas corpus claims. O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999) (citing 28 U.S.C. § 2254(c)). A federal court may not rule on a habeas corpus claim in a state criminal prosecution before the state courts have had an opportunity to hear and rule upon it. See Picard v. Connor, 404 U.S. 270, 275 (1971). To meet the

statutory exhaustion requirements, a petitioner's claim in state court need not be identical but must present the substance of the federal habeas corpus claim, see id. at 278, including all of the operative facts and controlling principles of law related to each claim, to the state's highest court. Mahdi v. Stirling, 20 F.4th 846, 892 (4th Cir. 2021); Jones v. Sussex I State Prison, 591 F.3d 707, 713 (4th Cir. 2010). "Whether the exhaustion requirement has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." Dye v. Hofbauer, 546 U.S. 1, 3 (2005) (per curiam) (quoting Smith v. Digmon, 434 U.S. 332, 333 (1978) (per curiam)).

As an initial matter, the court notes the incongruency between the constructive amendment claim addressed by the WVSCA and the impermissible constructive amendment found by the magistrate judge. In his PF&R, the magistrate judge reviewed federal precedent under Stirone v. United States, 361 U.S. 212 (1960) regarding constructive amendment of indictments and concluded that the discrepancy between petitioner's indictment and the jury instructions provided by the trial court

constituted an impermissible constructive amendment.[1] ECF 47 at 35–41. The magistrate judge further reviewed the decision of the WVSCA with respect to a constructive amendment claim raised by the petitioner in an appeal of his first state habeas petition,[2] finding that it was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 41.

While the magistrate judge considered whether the trial court's jury instruction constituted a constructive amendment of the indictment for purposes of an ineffective assistance of counsel claim, the assignment of error alleged by petitioner in the first state habeas petition and considered on appeal by the WVSCA considered a separate, if related, ground for constructive amendment. In the state proceedings, petitioner's Amended Petition sought relief because of "an impermissible variance in proof between the charges contained in

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[1] The terms "constructive amendment" and "fatal variance" are sometimes used interchangeably. See United States v. Allmendinger, 706 F.3d 330, 339 (4th Cir. 2013) (quoting United States v. Malloy, 568 F.3d 166, 178 (4th Cir. 2009)). For the sake of clarity, this court refers only to constructive amendment, while noting that the magistrate judge's PF&R uses both terms.

[2] The petitioner filed a second petition for habeas corpus in state court concerning an additional allegation of error not presently before this court.

the Indictment and the evidence adduced at trial resulting in a constructive amendment of Indictment." ECF 10-8 at 5 (emphasis added). In assessing this claim on appeal, the WVSCA issued a memorandum opinion, which applied the test in State v. Adams wherein constructive amendment occurs when a defendant is misled, subjected to an added burden of proof, or otherwise prejudiced. 193 W. Va. 277, Syl. Pt. 3 (1995). The WVSCA's application of the test is reproduced in toto:

> The indictment informed petitioner that he was charged with first degree robbery, West Virginia Code § 61-2-12(a) (2000). The indictment also informed petitioner that he was charged with assault during the commission of a felony, § 61-2-10 (1882), so he was aware that the State planned to present evidence of bodily harm to the victim. For that same reason, any difference between the indictment and evidence offered at trial did not subject petitioner to any added burden of proof. Finally, petitioner's trial counsel testified repeatedly during the omnibus hearing that the defense to the robbery charge was that petitioner did not steal, take away, or carry $103 from [the victim's] apartment, i.e., that the robbery did not occur, at all. So, the means by which petitioner accomplished the robbery (by threat of force or the commission of violence) was irrelevant to the defense theory. Any difference between the robbery count in the indictment and the State's evidence at trial resulted in, at most, an amendment of form – rather than an impermissible constructive amendment – to the first degree robbery count of the indictment.

ECF 10-11 at 4 (emphasis supplied).

As evidenced here, while the magistrate judge's finding to which the respondent objects addressed the variance between indictment and jury instruction, the WVSCA decision

focused first on the variance between petitioner's indictment and the evidence presented at trial as set forth above. The WVSCA then characterized the ineffective assistance claim as resting upon trial counsel's "failing to object to the constructive amendment of the indictment with regard to the charge of first-degree robbery, . . . and failing to object to an incomplete jury instruction as to the elements of first degree robbery" before affirming the reasoning of the state trial court's decision denying post-conviction relief ("PCR"). Id. at 4-5. In doing so, the WVSCA found that the lower court "applied an objective standard to determine that counsel's performance was not outside the broad range of professionally competent assistance" and that it "did not err in concluding that petitioner had not satisfied the two-pronged test of Strickland."

Taken as a whole, the WVSCA opinion shows that the petitioner has exhausted his state court remedies as to the claim of ineffective assistance for trial counsel's failure to object to a constructive amendment between the indictment and proof at trial. The WVSCA considered, even if in summary fashion, both the legal principles of ineffective assistance and constructive amendment, as well as the operative facts to support a claim of constructive amendment as to the proof

presented at trial. However, the WVSCA opinion alone does not provide a sufficient basis to conclude that the petitioner has exhausted his state court remedies as to the claim of ineffective assistance for trial counsel's failure to object to a constructive amendment between the indictment and the jury instructions. Although the WVSCA's characterization of the ineffective assistance claim as trial counsel's "failing to object to the constructive amendment of the indictment with regard to the charge of first-degree robbery, . . . and failing to object to an incomplete jury instruction as to the elements of first degree robbery" could arguably encompass the variance between the indictment and both the proof at trial and the instructions to the jury, the court is mindful that "oblique references which hint that a theory may be lurking in the woodwork will not turn the trick." Mallory v. Smith, 27 F.3d 991, 995 (4th Cir. 1994) (quoting Martens v. Shannon, 836 F.2d 715, 717 (1st Cir. 1988)).

Nevertheless, exhaustion requires only that a petitioner present his claim before the state courts, not that the state courts must have passed judgment upon it. See Dye, 546 U.S. at 3. In this, regardless of the extent of the WVSCA's treatment of the constructive amendment issue as to the jury instruction, the record reflects that the petitioner has exhausted the claim

in state court. The petitioner's initial pro se state habeas petition states the claim most directly:

> **Trial counsel was ineffective for failing to fully investigate count three of the indictment, and then failing to file pre-trial or post-trial motions on the issue of a fatal variance between the indictment, the evidence produced by the state's attorney, and the juror instruction given by the trial court.**

ECF 10-7 at 12.

Subsequently, the petitioner was appointed counsel who filed an amended petition alleging the following relevant assignments of error:

> **1. The Petitioner received ineffective assistance of counsel;**
>
> **2. Under the plain error analysis, the Trial Court erred by giving an incomplete and incorrect Instruction on First-Degree Robbery;**
>
> **4. Under the plain error analysis, the Petitioner's conviction was obtained by an impermissible variance in proof between the charges contained in the Indictment and the evidence adduced at trial resulting in a constructive amendment of Indictment[.]**

ECF 10-8 at 4-5.

While the ineffective assistance of counsel assignment of error was framed broadly, the analysis in the amended petition regarding counsel's alleged deficiencies concerning a constructive amendment of the indictment included reference to both the proof at trial and the jury instruction:

> [P]roof at trial of the offense of the First-Degree Robbery differed from the charge of the First-Degree Robbery alleged in the Indictment. While Count Three of the Indictment charged the Petitioner with the use of the threat of deadly force, presumably by the presentation of a firearm or other deadly weapon, the form of proof at trial (and the Trial Court's instruction to the jury) focused on "committing violence" to the person of [the victim], "by striking or beating."

Id. at 10.

It would be hard to contend that the presentation of the jury instruction issue in the amended petition was exactly pellucid, but the state PCR court seemed to understand the contention as reaching the issue of constructive amendment as to both evidence and instruction. In an order on the amended petition, the state PCR court characterized the issue raised as "ineffectiveness of counsel dealing with the indictment for robbery, including dealing with a 'constructive variance.'" ECF 10-10 at 19. Although analyzing the constructive amendment issue in particular depth only as to the variance between indictment and proof, id. at 40-45, the state PCR court acknowledged that the amended petition presented "separate, but related, arguments that trial counsel was ineffective for failing to object to an incomplete instruction on first-degree robbery." Id. at 47.

On appeal, the petitioner alleged the same assignments of error. While the WVSCA did not address the claim as such, it

is clear enough from the record that the petitioner has met the fair presentation requirement so as to have exhausted his state court remedies as required under Section 2254. The petitioner's ineffective assistance claim in the amended petition, while framed broadly, was intended to cover trial counsel's failures with respect to each of the alleged plain errors, and it included all of the operative facts and relevant legal principles to confront trial counsel's failure to object to constructive amendment of the indictment in the trial court's jury instruction. Although neither the state PCR court nor the WVSCA confronted the jury instruction issue head-on in its analysis of ineffective assistance regarding the constructive amendment of the indictment, the petitioner did enough to satisfy his burden of fairly presenting the matter for their consideration.

The court next considers petitioner's Sixth Amendment claim for ineffective assistance of counsel for trial counsel's failure to object to an alleged constructive amendment insofar as it concerns a variance between the indictment and proof at trial. The thrust of Mr. Richardson's amended petition for federal habeas relief is that trial counsel provided him ineffective assistance by failing to object to the constructive

amendment of his indictment by the prosecution's presentation of the case at trial. ECF 41 at 8-14.

To succeed on this theory, petitioner must establish that: (1) performance of trial counsel was so deficient as to fall below an objective standard of reasonableness, and (2) counsel's deficient performance resulted in prejudice to the petitioner such that the results of the trial were rendered unreliable. Strickland v. Washington, 466 U.S. 668, 687-91. Decisions of counsel are viewed with great deference and entitled to a strong presumption that they represented sound trial strategies. Id. at 689. Ineffective assistance claims are not an opportunity for a court to engage in "Monday morning quarterbacking" in reviewing counsel's trial strategy. Stamper v. Muncie, 944 F.2d 170, 178 (4th Cir. 1991). This deference to counsel's judgment, paired with the deference to the application of the Strickland standard by a state court commanded by Section 2254, means that federal habeas review of these claims must be "doubly deferential." Woods v. Donald, 575 U.S. 312, 316 (2015)(per curiam).

When reviewing an ineffective assistance of counsel claim, a federal court may begin its inquiry with either prong of the Strickland test and need not decide "both components of the inquiry if the defendant makes an insufficient showing on

one." Strickland, 466 U.S. at 697; Moore v. Hardee, 723 F.3d 488, 500 (4th Cir. 2013). Where a claim of ineffective assistance of counsel rests solely on trial counsel's failure to object to an alleged constitutional defect, the claim will fail for want of prejudice if no such defect lies. See Peterson v. Murray, 904 F.2d 882, 888-89 (4th Cir. 1990). Thus, the petitioner's ability to establish prejudice under Strickland turns on the existence of a meritorious ground for objection foregone.

Here, the parties do not dispute the factual basis for a putative objection. The petitioner was charged by a grand jury under an indictment for the criminal offense of first-degree robbery by threat of deadly force, while he was tried and convicted for the criminal offense of first-degree robbery by commission of violence to the person of another. This indictment was also deficient in that it omitted the statutory element that accompanies threat of deadly force, namely, presentation of a firearm or other deadly weapon; but the factual basis for an objection that this court must consider is the variance between the charge in the indictment and either the evidence adduced against the petitioner at trial or the instructions provided by the trial court to the jury.

In his amended petition for federal habeas relief, the petitioner appears to argue that he was prejudiced because trial counsel had meritorious grounds for objection in that the alleged constructive amendment of the indictment violated the petitioner's rights under the federal Constitution. Specifically, he cites to case law suggesting that the alleged constructive amendment to the indictment violated either the Fifth Amendment Grand Jury Clause, see ECF 41 at 8-9 (citing United States v. Randall, 171 F.3d 195, 203 (4th Cir. 1999)), or the Fourteenth Amendment right to procedural due process. See ECF 41 at 9 (citing Cole v. Arkansas, 333 U.S. 196, 201 (1948)). In his response to the respondent's objections to the PF&R, the petitioner reiterates that the present collateral attack rests solely on Sixth Amendment grounds. ECF 49 at 2. Thus, his argument is that he was denied effective assistance of counsel by trial counsel's failure to object to the alleged constructive amendment of his indictment and thereby vindicate his rights under the Fifth or Fourteenth Amendments.

Turning first to the possibility of a constructive amendment claim in violation of petitioner's right to indictment by grand jury under the Fifth Amendment, the court notes that the Fifth Amendment Grand Jury Clause has not been incorporated against the states. See Hurtado v. California, 110 U.S. 516,

538 (1884). While many state constitutions include similar requirements that indictment be made only by a grand jury, there is no such federal requirement applicable to the states. See Branzburg v. Hayes, 408 U.S. 665, 688 n.25 (1972); United States v. Floresca, 38 F.3d 706, 709 n.5 (4th Cir. 1994), abrogated on other grounds by United States v. Banks, 29 F.4th 168 (4th Cir. 2022); see also Kelly v. Peyton, 420 F.2d 912, 914 (4th Cir. 1969) ("[T]here is no constitutional right to be tried on an indictment in a state criminal prosecution"). Accordingly, the Fifth Amendment provides no basis for challenging the alleged constructive amendment of an indictment on federal habeas review. See Barbe v. McBride, 740 F. Supp. 2d 759, 768 (N.D. W. Va. 2010) ("Barbe I"), aff'd 477 F. App'x. 49 (4th Cir. 2012) (per curiam) ("Barbe II"). To the extent the magistrate judge's analysis relied on authority concerning the Fifth Amendment Grand Jury Clause, it is not adopted.

The court next considers whether petitioner's counsel could have challenged the alleged constructive amendment of his indictment as a procedural due process violation of the Fourteenth Amendment. "Variances and other deficiencies in state court indictments are not ordinarily a basis for federal habeas corpus relief unless the deficiency makes the trial so egregiously unfair as to amount to a deprivation of the

defendant's right to due process." Ashford v. Edwards, 780 F.2d. 405, 407 (4th Cir. 1985). Procedural due process requires that a defendant receive fair notice of the specific charges being brought against him. Cole, 333 U.S. at 201. Fair notice is "among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." Id. (citing In re Oliver, 333 U.S. 257, 273 (1948)); see also Dilworth v. Ballard, 970 F. Supp. 2d 498, 507 (N.D. W. Va. 2013) ("The only challenge to the way a state charges a criminal defendant, grounded in the notions of due process, can be whether Petitioner received adequate notice of the charges he was facing in order to present an adequate defense to those charges."). A claim that constructive amendment of petitioner's indictment violated his constitutional right to procedural due process under the Fourteenth Amendment is therefore cognizable on federal habeas review.

To satisfy due process, a defendant must receive "[r]easonable notice [that] sufficiently apprises [him] of what he must be prepared to meet.'" Stroud v. Polk, 466 F.3d 291, 296 (4th Cir. 2006) (quoting Russell v. United States, 369 U.S. 749, 763 (1962)). Standards for evaluating constructive amendment under the Grand Jury Clause do not inform the analysis of a procedural due process claim. Wilson v. Lindler, 995 F.2d

1256, 1264 (4th Cir. 1993) (Widener, J., dissenting), adopted, 8 F.3d 173, 175 (4th Cir. 1993) (en banc) (per curiam) ("[F]ederal cases involving indictments are of little value when evaluating the sufficiency . . . of a state accusatory pleading."). "The Due Process Clause 'does not require the method by which the crime was committed to be alleged in the indictment.'" Barbe II, 477 F. App'x. at 52 (quoting Hartman v. Lee, 283 F.3d 190, 194 n.3 (4th Cir. 2002)).

Respondent argues that the due process question was squarely resolved by the Barbe case. See ECF 48 at 2-4. In Barbe, the defendant was charged under an original indictment for two counts of second-degree sexual assault under W. Va. Code § 61-8B-4(a)(2) for engaging in "sexual intercourse" with a minor victim. See Barbe I, 740 F. Supp 2d at 766. West Virginia Code Section 61-8B-4(a)(2) provides that "[a] person is guilty of sexual assault in the second degree when . . . such person engages in sexual intercourse or sexual intrusion with another person who is physically helpless." (Emphasis supplied). At Barbe's trial, the prosecution presented testimonial evidence from the victim of digital penetration by the defendant. Barbe I, 740 F. Supp. 2d at 766. The trial court further instructed the jury that second-degree sexual

assault would be proven if they found the defendant had engaged in sexual intrusion. Id. at 767.

On federal habeas review, Barbe contended that his due process rights had been violated because of the variance between the charging language in the indictment that referred to "sexual intercourse" and the jury instructions at trial that referred to "sexual intrusion." Id. at 763. After noting the inapplicability of the Fifth Amendment Grand Jury Clause and Stirone, the district court found that inclusion of the charge of second-degree sexual assault in the original indictment was sufficient to put Barbe on notice of the charge against him and that sexual intrusion and sexual intercourse were merely different methods of proof under the statute. Id. at 771-72 ("The charge . . . never changed, only the method by which it was proven did so" and such alternative proof was "expressly provided" for by statute).

In an unreported decision, the Fourth Circuit upheld the district court's holding on appeal as a matter of due process under the Fourteenth Amendment. Barbe II, 477 F. App'x. at 51. It found that the disjunctive wording of the statute made clear that "'sexual intercourse' and 'sexual intrusion' [were] not two separate offenses, but two alternative methods of proving the same offense," which provided Barbe with actual or

constructive knowledge that he could be convicted for either form of sexual conduct. Id. at 52. "The fact that the [one] method replaced the [other] in the terms of his indictment d[id] not offend constitutional guarantees." Id. Respondent argues that this court should apply the Barbe courts' "one crime, two proofs" logic to the disjunctive language of the state statutory provision under which petitioner was convicted of first-degree robbery. See ECF 48 at 4-5. Applying the "one crime, two proofs" logic to the petitioner's case, respondent argues that petitioner received sufficient notice of the charge against him so as not to offend his due process rights and provided no basis upon which trial counsel could have raised an objection. See id.

In response to the respondent's objections, the petitioner makes two contentions. First, he argues that the decision in Barbe has "no bearing" on the case at bar because the petitioner seeks habeas relief for ineffective assistance of counsel under the Sixth Amendment, while the petitioner in Barbe sought habeas relief for violations of his due process rights under the Fifth and Fourteenth Amendments. See ECF 49 at 2. Second, the petitioner distinguishes the Barbe case on account of the timing and nature of the variance, that is, whereas the alleged constructive amendment in Barbe occurred prior to trial

after a hearing on the issue, the petitioner's indictment was constructively amended only at the trial itself. Id. at 3-4.

Petitioner's first contention — that this court should regard the decisions of two other courts reviewing a similarly-worded criminal statute in Barbe as having "no bearing" on his case because it is embedded in an ineffective assistance of counsel claim — is unpersuasive.[3] Contrary to petitioner's contentions, whether or not a colorable constructive amendment objection under federal law existed at the time of trial counsel's alleged ineffectiveness certainly has a bearing on the analysis, and Barbe is instructive to that end. For one, Barbe demonstrates the narrowness of the grounds upon which trial counsel might have been able to make a constructive amendment objection whose omission would have resulted in prejudice to the petitioner. As in Barbe, any objection trial counsel might have raised under the Fifth Amendment Grand Jury Clause would have been unavailing and so would not have resulted in prejudice to him. Similarly, if trial counsel had objected on Fourteenth Amendment Due Process grounds, Barbe illustrates the extent to which petitioner would need to show that the alleged

[3] While addressing the persuasive authority of Barbe, the court takes care to note that its authority is not controlling. See Ham v. Breckon, 994 F.3d 682, 693 (4th Cir. 2021) (unpublished Fourth Circuit decisions not accorded precedential value).

constructive amendment of his indictment deprived him of fair notice in order for trial counsel's omission to have resulted in prejudice to him.

To be sure, petitioner is correct that Barbe does not resolve his ineffective assistance of counsel claim, but it does illustrate what is required of petitioner to show he was prejudiced under the second prong of the Strickland test. At least as to the prejudicial effect of trial counsel's failure to make a constructive amendment objection under the federal Constitution, petitioner may only succeed by meeting Strickland's high bar and showing that he was deprived of his due process rights under the Fourteenth Amendment.

Petitioner's second contention has some merit in light of the express limits the Fourth Circuit placed on its holding in Barbe II. The court prefaced its consideration of Barbe's due process argument by noting that it was "important to clarify the limited nature of this claim." Barbe II, 477 F. App'x. at 51. It also noted the fact that the prosecution had moved the trial court to amend Barbe's grand jury indictment one month after it was handed down, upon which motion the trial judge held a hearing and settled the question over seven weeks before the start of trial. Id. at 49-50, 52. Indeed, the Fourth Circuit contrasted Barbe's situation with a scenario where a defendant

was exposed to charges for which he lacked notice or an opportunity to plan a defense, id. at 52 (citing Lucas v. O'Dea, 179 F.3d 412, 417 (6th Cir. 1999)), because Barbe had actual knowledge of the amended complaint and the nature of the testimony to be presented against him well in advance of trial. Id. at 52–53.

In petitioner's case, the record shows that he received actual notice of the prosecution's intent to proceed against him under a first-degree robbery theory of violence against the victim, rather than the theory of threat of deadly force included in the indictment. The state PCR court's opinion on the first state habeas corpus petition noted trial counsel "testified that he and Petitioner knew that he was charged with accomplishing the robbery by beating the victim." ECF 10-10 at 41. The opinion does not indicate whether counsel's testimony refers to petitioner's knowledge at the time of trial or at a time prior to trial while preparing a defense. In either case, while petitioner's receipt of actual notice about the alleged amendment to his indictment may not have cured any constitutional infirmity were the Grand Jury Clause and Stirone applicable to a state prosecution, actual notice was sufficient to apprise him of the charges he needed to be prepared to meet

at trial, as required by the Fourteenth Amendment Due Process Clause. See Stroud, 466 F.3d at 296 (4th Cir. 2006).

Because the protections of the Grand Jury Clause do not attach in a state criminal prosecution and because the petitioner's receipt of actual notice about the prosecution's case at trial satisfied the minimal requirements of procedural due process, the only remaining way for petitioner to establish prejudice for the purpose of his Sixth Amendment claim is by virtue of a provision of state law. Although a federal habeas court may not review a state court's resolution of state-law questions, it may address ineffective assistance of counsel claims based on counsel's failure to raise state-law issues. Shaw v. Wilson, 721 F.3d 908, 914 (7th Cir. 2013).

Under the Grand Jury Clause of the West Virginia Constitution, a defendant has the right to be tried only on felony offenses charged by a grand jury in an indictment. W. Va. Const. art. III, § 4; State v. Adams, 193 W. Va. 277, Syl. Pt. 1 (1995). Any substantial amendment of an indictment must be resubmitted to the grand jury, while a mere "amendment of form" need not be. Id., Syl. Pt. 3. An amendment of form "occurs when the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced." Id. When a defendant is convicted upon a

constructively amended indictment, "*per se* error has occurred, and the conviction cannot stand and must be reversed." *State v. Corra*, 223 W. Va. 573, Syl. Pt. 7 (2009), *modified on other grounds Lewis v. Ames*, 242 W. Va. 405, Syl. Pt. 6 (2019).

The decision of the WVSCA is sufficient to resolve the question of prejudice with respect to constructive amendment of indictment by the proof presented at trial. The WVSCA applied the *Adams* test to the precise facts of the petitioner's case and found the variance between the robbery charge in the petitioner's indictment and the proof adduced at trial to be a mere amendment of form and not a constructive amendment under West Virginia law. *See* ECF 10-11 at 4. Because the WVSCA adjudged this to be a mere amendment of form, any objection by trial counsel would have been unavailing and, consequently, petitioner cannot establish that he was prejudiced under West Virginia law by counsel's failure to object to the constructive amendment in the proof at trial.

The jury instructions that followed adopted the "amendment as to form" and provided the elements of robbery as including "by committing violence against [the victim.]" *See*, *infra*, p.3. That element was amply supported by the evidence adduced at trial and the case was tried on that basis. From the record, it appears that the prosecution and defense agreed on

the jury instructions, with the exception that trial counsel reserved an objection to the instruction on another count. ECF 10-10 at 11, 25. Trial counsel did not object to the robbery instruction. Id. at 11.

To succeed under Strickland, the petitioner must show that trial counsel's performance was deficient because of "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Counsel's performance is adjudged according to an objective standard of reasonableness and entitled to a high degree of deference. Id. at 687-91. Counsel's decisions are "virtually unchallengeable" where they represent strategic decisions following a thorough investigation of relevant facts and law, while "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91.

The WVSCA applied Strickland in its July 30, 2020, decision, citing syllabus points 5 and 6, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995):

> **In West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an**

> objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.
>
> In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

The WVSCA found that the lower court in this instance "applied an objective standard to determine that counsel's performance was not outside the broad range of professionally competent assistance and that even if it had been, the results of petitioner's trial would not have been different." ECF 10-11 at 5.

The court agrees that counsel's performance was not outside the broad range of professionally competent assistance.

The court finds that the issues arising in the petition in this case were adequately considered on the merits in the state court habeas proceedings and that the state court decisions are neither contrary to nor involved an unconstitutional application of clearly established federal law.

IV. Conclusion

It, is accordingly, ORDERED that:

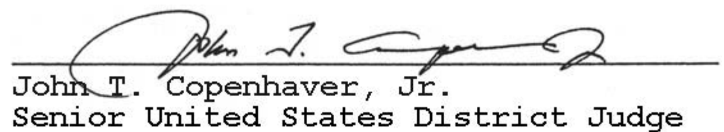
1. The respondent's objections to the PF&R (ECF 48) be, and hereby are, SUSTAINED;

2. The respondent's motion for summary judgment (ECF 42) be, and hereby is GRANTED;

3. The petitioner's amended petition for writ of habeas corpus be, and hereby is, DENIED.

The Clerk is directed to transmit copies of this order to all counsel of record and any unrepresented parties.

ENTER: October 13, 2023



John T. Copenhaver, Jr.
Senior United States District Judge

NO. ________________

In the

Supreme Court of the United States

RAYMOND ANDREW RICHARDSON, ***Petitioner*****,**

v.

JONATHAN FRAME, Superintendent, ***Respondent.***

APPENDIX C
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Wesley P. Page
Federal Public Defender

Jonathan D. Byrne
Appellate Counsel
Counsel of Record

OFFICE OF THE FEDERAL PUBLIC DEFENDER
Southern District of West Virginia
300 Virginia Street, East, Room 3400
Charleston, West Virginia 25301
304/347-3350
jonathan_byrne@fd.org

Counsel for Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

RAYMOND ANDREW RICHARDSON,

Plaintiff/Petitioner,

v. Civil Action No. 2:20-cv-00573

DONNIE AMES,

Defendant/Respondent.

ORDER

Pending is petitioner's Motion for Certificate of Appealability (ECF No. 52), filed November 13, 2023. Petitioner is appealing (ECF No. 53) the court's October 13, 2023 order (ECF No. 51) denying petitioner's request for habeas relief under 28 U.S.C. section 2254.

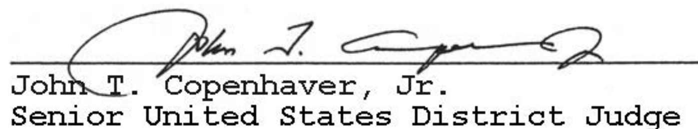
The Court of Appeals remanded this case (ECF No. 56) for the limited purpose of permitting the court to supplement the record with an order granting or denying a certificate of appealability. Petitioner seeks a certificate of appealability for his claim that due to the change in prosecution theory between the indictment and the facts and jury instructions presented at trial, he did not have sufficient notice of the actual charge against him to satisfy due process. See Mot. 1, ECF No. 52.

The court has considered whether to grant a certificate of appealability. See 28 U.S.C. § 2253(c). A certificate will not be granted unless there is "a substantial showing of the denial of a constitutional right." Id. § 2253(c)(2). The standard is satisfied only upon a showing that reasonable jurists could debate whether or find that the petition should have been resolved differently or that the issues merit further consideration. See Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F. 3d 676, 683-84 (4th Cir. 2001).

The court has reviewed petitioner's arguments set forth in his motion and, in belated response to the remand of the Court of Appeals, concludes that the issue raised as set forth above is debatable among reasonable jurists. The court GRANTS petitioner's motion for a certificate of appealability for the issue identified above.

The Clerk is directed to transmit copies of this order to all counsel of record and any unrepresented parties.

ENTER: September 30, 2024



John T. Copenhaver, Jr.
Senior United States District Judge

NO. ________________

In the
Supreme Court of the United States

RAYMOND ANDREW RICHARDSON, ***Petitioner*****,**

v.

JONATHAN FRAME, Superintendent, ***Respondent*****.**

APPENDIX D
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Wesley P. Page
Federal Public Defender

Jonathan D. Byrne
Appellate Counsel
Counsel of Record

OFFICE OF THE FEDERAL PUBLIC DEFENDER
Southern District of West Virginia
300 Virginia Street, East, Room 3400
Charleston, West Virginia 25301
304/347-3350
jonathan_byrne@fd.org

Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

RAYMOND RICHARDSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Civil Action Nos. 2:20-00573**
	)	
DONALD AMES, Superintendent,	)	
	)	
Respondent.	)	

PROPOSED FINDINGS AND RECOMMENDATION

Pending before the Court is Respondent's Motion for Summary Judgment (Document No. 42), filed on December 10, 2021. By Standing Order, this matter was referred to the undersigned United States Magistrate Judge for submission of proposed findings of fact and a recommendation for disposition pursuant to 28 U.S.C. § 636(b)(1)(B). (Document No. 5.) Having thoroughly examined the record in this case, the undersigned respectfully recommends that the District Court deny in part and grant in part Respondent's Motion for Summary Judgment (Document No. 42) and deny in part and grant in part Petitioner's Amended Section 2254 Petition (Document No. 40). Concerning Petitioner's claim of ineffective assistance of counsel concerning Juror Hicks, the undersigned recommends that Respondent's Motion for Summary Judgment (Document No. 42) be **GRANTED** and Petitioner's Amended Section 2254 Petition (Document No. 40) be **DENIED**. Concerning Petitioner's claim of ineffective assistance of counsel concerning the constructive amendment of the Indictment, the undersigned recommends that Respondent's Motion for Summary Judgment (Document No. 42) be **DENIED** and Petitioner's Amended Section 2254 Petition (Document No. 40) be **GRANTED**.

PROCEDURAL HISTORY

A. Criminal Action No. 03-F-103:

On November 20, 2013, the Grand Jury of Kanawha County, West Virginia, returned an Indictment against Petitioner charging him with two counts of manufacturing, delivering and possessing with intent to deliver crack cocaine and cocaine, a Schedule II controlled substance, in violation of W. Va. Code § 60A-4-401 (Counts One and Five); one count of manufacturing, delivering and possessing with intent to deliver marijuana, a Schedule I controlled substance, in violation of W. Va. Code § 60A-4-401 (Count Two); one count first-degree robbery in violation of W. Va. Code § 61-2-12(a) (Count Three); and one count of assault during the commission of a felony in violation of W. Va. Code § 61-2-10 (Count Four). State v. Richardson, Case No. 13-F-806 (Cir. Ct. Kanawha Co. February 21, 2014); (Document No. 1-1, pp. 17, 23 – 25, 43.) Subsequently, Counts One and Two of the Indictment were dismissed. (Id., pp. 41 and 43.) On January 22, 2014, following two-day jury trial, Petitioner was convicted as to Counts Three, Four and Five. (Id.) On February 3, 2014, Petitioner filed a Motion for Judgment of Acquittal. (Id., p. 43.) By Order filed on February 24, 2014, the Circuit Court denied Petitioner's Motion for Judgment of Acquittal and sentenced Petitioner to consecutive terms of 100 years for first-degree robbery, two (2) to ten (10) years for assault during the commission of a felony, and one (1) to fifteen (15) years for assault during the commission of a felony, and one (1) to fifteen (15) years for possession with intent to deliver cocaine. (Id.) When imposing Petitioner's sentence, the Circuit Court explained as follows:

> I too have given a great deal of consideration as to what the appropriate sentence in a circumstance like this is and have not only done some research similar to yours as to what our Supreme Courts and District Courts have considered excessive, but I've also looked back over some of the sentences that I've handed

> down. Just within the last couple of years a young man just in his teens was involved in a series of robberies and he was sentenced to 75 years for first degree robbery.
>
> And he did not have any history anywhere approaching the history that you have, Mr. Richardson.
>
> Mr. Richardson, I've watched you over the years and presided over the bulk of the charges that the prosecutor has mentioned and listened to the recitation of the facts of the crimes that you committed, and quite honestly I find you to be a very violent, dangerous man, and I don't say that lightly. But you are—you—the acts that you have committed have been heinous and torturous and unthinkable in the past, and that has to be a consideration in determining what the appropriate sentence in this case is.

State v. Richardson, 2016 WL 5030312, * 2 (W. Va. Sept. 16, 2016).

Petitioner, by counsel, Justin Collin, filed an appeal with the Supreme Court of Appeals of West Virginia ("SCAWV"). (Id., pp. 45 - 50.) In his appeal, Petitioner raised the following assignments of error:

> 1. The trial court erred by denying Petitioner's motion for judgment of acquittal after the evidence failed to establish that a weapon was used during the assault.
>
> 2. The prosecution failed to present sufficient evidence of an unlawful taking of $103.
>
> 3. The victim's testimony is inherently incredible and that the testimony is insufficient to prove an unlawful taking beyond a reasonable doubt.
>
> 4. Petitioner's sentence was disproportionate to the crimes committed.

(Id.) By a Memorandum Decision entered on September 16, 2016, the SCAWV affirmed Petitioner's conviction and sentence. State v. Richardson, 2016 WL 5030312 (W. Va. Sept. 16, 2016). Petitioner did not file a petition for writ of certiorari with the United States Supreme Court.

On July 15, 2017, Petitioner, acting *pro se*, filed a Motion to Correct Sentence pursuant to Rule 35(a). (Document No. 10-3.) Petitioner argued that "[d]ue to the charging language in the defendant's indictment, said indictment is actually an indictment for 2nd Degree Robbery under

the guise of a 1st Degree Robbery." (Id.) On July 17, 2017, the Circuit Court filed its "Order Denying Motion to Correct Sentence." (Document No. 10-4.) Petitioner filed an appeal to the SCAWV. (Document No. 1-1, pp. 65 – 67.). By Memorandum Decision filed on March 9, 2018, the SCAWV affirmed the Circuit Court's Order denying Petitioner's Motion for Correction of Sentence pursuant to Rule 35(a). (Id.); State v. Richardson, 2018 WL 1225535 (W. Va. March 9, 2018). The SCAWV issued its Mandate on April 10, 2018. (Document No. 1-1, p. 88.)

B. First State *Habeas* Petition:

On October 6, 2017, Petitioner, acting *pro se*, filed his Petition for Writ of *Habeas Corpus* in the Circuit Court of Kanawha County. Richardson v. Ballard, Case No. 17-P-382 (Cir. Ct. Kanawha Co.); (Document No. 10-7.). As grounds for relief, Petitioner asserted the following:

1. Trial counsel as ineffective in failing to adequately investigate the case.
    a. Trial counsel was ineffective in failing to investigate the personal relationship between the jury foreman and the prosecuting attorney.
    b. Trial counsel was ineffective in failing to investigate or object to the impermissible, literal, constructive amendment of the robbery count of the indictment.
2. Trial counsel failed to conduct an effective cross examination.
3. Trial counsel consciously and deliberately permitted the State to advance a theory of the "taking of the money" during the robbery premised on perjury, despite the State's expressed affirmative recognition that both theories were unknown to the State without objections.
4. Trial counsel failed to identify or challenge the trial court's instructions to the jury on robbery that there was no instruction defining what constitutes a robbery or its elements, or gave an instruction on intent.
5. Trial counsel was ineffective for failing to request a 404(b) evidentiary instruction on realizing that the trial court did not do the required balancing under Rule 403.

6. Trial counsel was ineffective for failing to object to the State's testimony from Denise Cool, which was inconsistent and had not been timely disclosed.

7. Trial counsel failed to object to the State's prejudicial characterization of Mr. Richardson as being a drug dealer, who sold drugs to Denise Cool for over a year, which assertion was not in evidence.

8. Trial counsel was ineffective for conducting a haphazard voir dire, largely ignoring issues of jury foreperson Ashley Hicks' personal relationship with Assistant Prosecutor Bailey and if jurors held any racial bias.

9. Trial counsel failed to object to the Court's instruction regarding robbery in that it did not contain all the essential elements constituting robbery.

10. Petitioner's State and Federal constitutional rights were violated:

    a. When appellate counsel ineffectively failed to bring forth the trial court's erroneous robbery instruction invoking the plain error rule.

    b. By the impermissible, literal, constructive amendment of the robbery count of the indictment.

    c. By jury foreman's misconduct.

    d. By Petitioner's wrongful arrest.

    e. By the Prosecuting Attorney knowingly allowing material false testimony at trial and failing to step forward and make the falsities known, and exploiting the falsities in his closing argument.

    f. When the State induced and procured false eyewitness testimony during the preliminary hearing.

    g. Due to a defective indictment procured by false and misleading testimony before the grand jury.

    h. Due to a fatally defective indictment because it failed to charge defendant with the crime of robbery.

    i. The State's non-disclosure of favorable impeachment evidence in violation of *Brady* and its progeny.

    j. By the effects of cumulative error.

k. All additional grounds which may become apparent upon further investigation of his matter.

(Id.) Subsequently, Matthew Victor was appointed has *habeas* counsel for Petitioner. (Document No. 10-10, p. 19.) On January 28, 2018, Petitioner, by counsel, filed an Amended Petition asserting the following grounds for relief:

1. The Petitioner received ineffective assistance of counsel.

2. Under the plain error analysis, the trial court erred by giving an incomplete and incorrect instruction on first-degree robbery.

3. Under the plain error analysis, the trial court erred by admitting unduly prejudicial West Virginia Rules of Evidence, Rule 404(b) evidence.

4. Under the plain error analysis, the Petitioner's conviction was obtained by an impressible variance in proof between the charges contained in the Indictment and the evidence adducted at trial resulting in a constructive amendment of Indictment.

5. There was insufficient evidence to convict the Petitioner on all charges.

6. The State of West Virginia obtained the conviction on all counts against the Petitioner by use of false and/or misleading testimony of the witness with the State of West Virginia's tacit acquiescence to the same.

7. The State of West Virginia obtained the Indictment against the Petitioner by use of false and/or misleading testimony.

8. Under the plain error analysis, the trial court erred by providing an unduly suggestive comment to the jury result in the Petitioner's conviction on the count of possession with intent to deliver cocaine.

9. The trial court erred by sentencing the Petitioner to a constitutionally prohibited excessive sentence.

10. The cumulative error in the trial court proceedings deprived the Petitioner of his due process right to a fair trial.

(Document No. 10-8.) On June 27, 2018, Petitioner supplemented his Petition by adding an

additional jury instruction error. (Document No. 10-9.) Specifically, Petitioner claimed that "[t]he trial court erroneously instructed the jury regarding the 'beyond reasonable doubt' standard and the Petitioner's counsel was ineffective for failing to object to the constitutionally defective instruction." (Id.) The Circuit Court conducted an omnibus hearing on August 2, 2018. (Document No. 10-10, p. 20.) The Circuit Court heard testimony from the following: (1) Justin Collins, Petitioner's trial counsel; and (2) Petitioner. (Id.) On October 24, 2018, the Circuit Court entered its "Final Order" denying Petitioner's Amended *habeas* Petition. (Document No. 10-10.)

On November 14, 2018, Petitioner, by counsel, Matthew A. Victor, filed his Notice of Appeal concerning the Circuit Court's decision denying his *habeas* Petition. (Document No. 1-6, pp. 43.) Petitioner raised the same eleven assignment of error he made before the Circuit Court. (Document No. 10-11.) On May 10, 2019, the State filed its "Response Brief." (Document No. 2-6, pp. 46 – 73 and Document No. 1-7.) By Memorandum Decision filed on July 30, 2020, the SCAWV affirmed the decision of the Circuit Court. (Document No. 10-11.); Richardson v. Ames, 2020 WL 4354920 (W. Va. July 30, 2020).

C. Second State *Habeas* Petition:

On August 23, 2019, Petitioner, acting *pro se*, filed his second Petition for Writ of *Habeas Corpus* in the Circuit Court of Kanawha County. Richardson v. Ames, Case No. 19-P-342 (Cir. Ct. Kanawha Co.); (Document No. 10-13.). As grounds for relief, Petitioner asserted the following: "Newly discovered evidence. Brady violation by State for withhold additional alias and criminal conviction of Denise Cool that were ordered to be turned over in discovery material." (Id.) By "Final Order" filed on October 3, 2019, the Circuit Court denied and summarily dismissed Petitioner's Petition. (Document No. 10-14.) Petitioner filed an appeal to the SCAWV concerning

the Circuit Court's decision denying his *habeas* Petition. (Document No. 10-15.) By Memorandum Decision filed on November 4, 2020, the SCAWV affirmed the decision of the Circuit Court. Richardson v. Ames, 2020 WL 6482782 (W. Va. Nov. 4, 2020).

D. Section 2254 Petition:

On August 31, 2020, Petitioner, acting *pro se*, filed his Petition Under 28 U.S.C. § 2254 for Writ of *Habeas Corpus* By a Person in State Custody. (Document No. 1.) As grounds for *habeas* relief, Petitioner asserted the following:

1. Petitioner's state and federal constitutional rights were violated by the ineffective assistance of trial counsel:

    A. Trial counsel was ineffective in failing to investigate the personal relationship between the jury foreman and the prosecuting attorney.

    B. Trial counsel was ineffective in failing to investigate or object to the impermissible, literal, constructive amendment of the robbery count of the indictment.

    C. Trial counsel failed to conduct an effective cross-examination.

    D. Trial counsel consciously and deliberately permitted the State to advance a theory of the "taking of the money" during the robbery premised on perjury, despite the State's expressed affirmative recognition that both theories were unknown to the State without any objections.

    E. Trial counsel failed to identify or challenge the trial court's instructions to the jury on robbery that there was no instruction defining what constitutes a robbery or its elements, or gave an instruction on intent.

    F. Trial counsel was ineffective for failing to request a 404(B) evidentiary instruction on realizing that the trial court did not do the required balancing under Rule 403.

    G. Trial counsel was ineffective for failing to object to the State's testimony from Denise Cool, which was inconsistent and had not

been timely disclosed.

H. Trial counsel failed to object to the State's prejudicial characterization of [Petitioner] as being a drug dealer, who sold drugs to Denise Cool for over a year, which assertion was not in evidence.

I. Trial counsel was ineffective for conducting a haphazard voir dire, largely ignoring issues of jury foreperson Ashley Hicks' personal relationship with Assistant Prosecutor Bailey and if jurors held any racial bias.

J. Trial counsel failed to object to the Court's instruction regarding robbery in that it did not contain all the essential elements constituting robbery.

2. Petitioner's state and federal constitutional rights were violated when appellate counsel ineffectively failed to bring forth the trial court's erroneous robbery instruction involving the plain error rule.

3. Petitioner's state and federal constitutional rights were violated by the impermissible, literal, constructive amendment of the robbery count of the indictment.

4. Petitioner's state and federal constitutional rights were violated by jury foreman's misconduct.

5. Petitioner's state and federal constitutional rights were violated by his wrongful arrest.

6. Petitioner's state and federal constitutional rights were violated by the Prosecuting Attorney knowingly allowing materially false testimony at trial and failing to step forward and make the falsities known, and exploiting the falsities in his closing argument.

7. Petitioner's state and federal constitutional rights were violated when the State induced and procured false eyewitness testimony during the preliminary hearing.

8. Petitioner's state and federal constitutional rights were violated due to a defective indictment procedure by false and misleading testimony before the grand jury.

9. Petitioner's state and federal constitutional rights were violated due to a

fatally defective indictment because it failed to charge [Petitioner] with the crime of robbery.

10. Under *Brady* and its progeny, the Petitioner's federal and state constitutional rights were violated by the State's non-disclosure of favorable impeachment evidence.

11. Petitioner's state and federal constitutional rights were violated by the effects of cumulative error.

12. Petitioner also asserts all additional grounds which may become apparent upon further investigation of this matter.

(Document No. 1-1, pp. 1 – 10.)

As Exhibits, Petitioner attached the following: (1) A copy of a letter dated January 5, 2015, from the Judicial Investigation Commission (Id., p. 14.); (2) A copy of a dismissal letter dated May 30, 2014, from the Judicial Investigation Commission concerning Complaint No. 50-2014 (Id., p. 15.); (3) A copy of a letter from the Kanawha County Office of the Prosecuting Attorney dated April 25, 2018, concerning Petitioner's Freedom of Information Act request (Id., p. 16.); (4) A copy of Petitioner's Indictment (Id., pp. 17, 23 - 25.); (5) A copy of Petitioner's "Motion for Leave to File Supplemental Grounds to Petitioner's Amended Petition for Writ of Habeas Corpus" as filed in the Circuit Court of Kanawha County in Case No. 17-P-382 (Id., pp. 18 – 22.); (6) A copy of pertinent jury instructions (Id., pp. 26 – 40.); (7) A copy of the Jury Verdict Form (Id., pp. 41 – 42.); (8) A copy of the Docket Sheet for Case No. 13-F-806 (Id., pp. 43 – 44.); (9) A copy of the SCAWV's Memorandum Decision filed on September 16, 2016, affirming Petitioner's conviction and sentence (Id., pp. 45 – 50.); (10) A copy of Petitioner's "Motion for Arrest of Judgment" as filed in Case No. 13-F-806 (Id., pp. 51 – 57.); (11) A copy of Petitioner's "Motion for Formal Demand that the Defendant's Motion for Arrest of Judgment Filed with the Court be Heard and Adjudicated" as filed in Case No. 13-F-806 (Id., pp. 58 – 64.); (12) A copy of the SCAWV's

Memorandum Decision as filed on March 9, 2018, affirming the Circuit Court's Order denying Petitioner's motion for correction of sentence pursuant to Rule 35(a) (Id., pp. 65 – 67.); (13) A copy of Petitioner's Reply Brief as filed with the SCAWV concerning his appeal of the Circuit Court's Order denying his motion for correction of sentence (Id., pp. 68 – 86.); (14) A copy of the Circuit Court's Order entered on July 6, 2017, denying Petitioner's motion for correction of sentence (Id., p. 87.); (15) A copy of the SCAWV's Mandate as entered on April 10, 2018 (Id., p. 88.); (16) A copy of Petitioner's "Motion for Leave to Supplemental Grounds to Amended Petition for Writ of Habeas Corpus" as filed in Case No. 17-P-382 (Document No. 1-2, pp. 1 – 4.); (17) A copy of the SCAWV's Memorandum Decision filed on July 30, 2020, affirming the Circuit Court's decision denying *habeas* relief (Id., pp. 5 – 10.); (18) A copy of Petitioner's "Losh Checklist" as filed in Case No. 17-P-382 (Id., pp. 11 – 16.); (19) A copy of pertinent arguments asserted in Case No. 17-P-382 (Id., pp. 18 – 71, Document No. 1-3, pp. 4 -50, Document No. 1-4, pp. 1 – 7, 15 – 20; Document No. 1-5, pp. 1 – 19, 29 – 63; Document No. 1-6, pp. 1 - 37.); (20) A copy of a letter dated September 26, 2016, from the Petitioner addressed to Public Defender Justin Collin (Document No. 1-2, p. 72.); (21) A copy of a letter dated September 29, 2016, from the Public Defender Collin addressed to Petitioner (Id., p. 73.); (22) A copy of letters dated November 11, 2016, from Petitioner addressed to Public Defender Collin (Id., pp. 74 – 75.); (23) A copy of Facebook messages between Natalie Boyle and Robert Arrington (Document No. 1-3, pp. 1 – 3 and Document No. 1-4, pp. 20 - 23.); (24) A copy of pertinent articles from Criminal Legal News (Document No. 1-4, pp. 8 – 12.); (25) A copy of what appears to be Petitioner's legal research (Id., pp. 12 – 14; Document No. 1-5, pp. 20 – 28, Document No. 1-12, pp. 22 - 30.); (26) A copy of a letter dated January 13, 2017, from Public Defender Collin addressed to Petitioner (Document No.

1-4, pp. 24 – 25.); (27) A copy of James Bailey and Ashley Noland's Facebook Profiles (Id., pp. 26 – 30.); (28) A copy of an article about Sean Noland (Id., pp. 31 – 33.); (29) A copy of information about Sean Noland from Linkin (Id., p. 34.); (30) A copy of information about Shley Noland (Id., p. 35.); (31) A copy of the Circuit Court's "Order Appointing Counsel and Setting Briefing Scheduled" as filed in Case No. 17-P-382 (Document No. 1-6, pp. 38 – 39.); (32) A copy of Assistant Attorney General Elizabeth D. Grant's "Notice of Appearance" as filed with the SCAWV in Case No. 18-0999 (Id., pp. 40 – 42.); (33) A copy of the SCAWV's "Scheduling Order" as filed in Case No. 18-0999 (Id., pp. 43 – 44.); (34) A copy of the SCAWV's Order as filed in Case No. 18-0999 granting Petitioner's motion to seal certain documents (Id., p. 45.); (35) A copy of the State's "Response Brief" as filed with the SCAWV in Case No. 18-0999 (Id., pp. 46 – 73 and Document No. 1-7.); (36) A copy of Petitioner's Appendix Volumes I – IV as filed with the SCAWV in Case No. 18-0999 (Document Nos. 1-8, 1-9, 1-10, 1-11, 1-12, pp. 1 – 5.); (37) A copy of State v. Rollins, 142 W.Va. 118 (1956) (Document No. 1-12, pp. 6 -11.); (38) A copy of State v. Johnson, 219 W.Va. 697 (2006) (Id., pp. 12 – 21.); (39) A copy of information on Denise Cool (Id., pp. 31 – 39.); and (40) A copy of two DVDs (Document Nos.7 and 9.).

By Order entered September 4, 2020, the undersigned directed Respondent to file a Response to Petitioner's Petition. (Document No. 6.) On October 15, 2020, Respondent filed his "Motion to Dismiss Without Prejudice or to Stay Due to Petitioner's Failure to Exhaust his State Remedies" and Memorandum in Support thereof with Exhibits. (Document Nos. 10 - 11.) Specifically, Respondent argued that Ground 10 of Petitioner's Petition was unexhausted. (Document No. 11.) Respondent, therefore, requested that Petitioner's Petition be dismissed without prejudice, or in the alternative, stayed pending full exhaustion. (Id.)

As Exhibits, Respondent filed the following: (1) A copy of the Docket Sheet for Case No. 13-F-806 (Document No. 10-1.); (2) A copy of the SCAWV's Memorandum Decision in Case No. 14-0382 (Document No. 10-2.); (3) A copy of Petitioner's Rule 35 Motion as filed in Case No. 13-F-806 (Document No. 10-3.); (4) A copy of the Circuit Court's Order denying Petitioner's Rule 35 Motion as filed in Case No. 13-F-806 (Document No. 10-4.); (5) A copy of the SCAWV's Memorandum Decision in Case No. 17-0850 (Document No. 10-5.); (6) A copy of the Docket Sheet for Case No. 17-P-382 (Document No. 10-6.); (7) A copy of Petitioner's *habeas* Petition as filed in Case No. 17-P-382 (Document No. 10-7.); (8) A copy of Petitioner's Amended Petition as filed in Case No. 17-P-382 (Document No. 10-8.); (9) A copy of Petitioner's Supplemental Petition as filed in Case No. 17-P-382 (Document No. 10-9.); (10) A copy of the Circuit Court's Final Order denying Petitioner's *habeas* petition as filed in Case No. 17-P-382 (Document No. 10-10.); (11) A copy of the SCAWV's Memorandum Decision as filed in Case No. 18-0999 (Document No. 10-11.); (12) A copy of the Docket Sheet for Case No. 19-P-342 (Document No. 10-12.); (13) A copy of Petitioner's *habeas* Petition as filed in Case No. 19-P-342 (Document No. 10-13.); (14) A copy of the Circuit Court's Final Order denying Petitioner's *habeas* petition as filed in Case No. 19-P-342 (Document No. 10-14.); and (15) A copy of Petitioner's Petition for Appeal as filed with the SCAWV in Case No. 19-0974 (Document No. 10-15.).

On October 16, 2020, Notice pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), was issued to Petitioner, advising him of the right to file a response to Respondent's "Motion to Dismiss Without Prejudice or to Stay Due to Petitioner's Failure to Exhaust his State Remedies." (Document No. 12.) On October 21, 2020, Petitioner filed his "Motion for Leave to File Supplemental Grounds to Petitioner's Petition for Writ of Habeas Corpus." (Document No.

13.) Specifically, Petitioner stated that he wished to supplement his Petition to include the following: (1) "The grounds and argument contained in Petitioner's Amended Petition;" and (2) "The face of the indictment showed no crime was committed (insufficient)." (Id.) As Exhibits, Petitioner attached the following: (1) A copy of what appeared to be the arguments contained in his Amended Petition (Id., pp. 8 - 51.); and (2) A copy of his argument that "the face of the indictment shows no crimes were committed and insufficient for the first-degree robbery and assault during the commission of a felony" (Id., pp. 4 – 7.). On October 29, 2020, Petitioner filed his Response in Opposition to Respondent's Motion to Dismiss and "Memorandum of Law in Support of Petitioner's Motion in Response and Motion for Summary Judgment." (Document Nos. 16 and 17.)

By Order entered on March 30, 2021, the undersigned directed Respondent to file a Response to Petitioner's "Motion for Leave to File Supplemental Grounds to Petitioner's Petition for Writ of Habeas Corpus." (Document No. 18.) On April 27, 2021, Respondent filed his Response to Petitioner's "Motion for Leave to File Supplemental Grounds to Petition for Writ of Habeas Corpus." (Document No. 19.) Specifically, Respondent conceded Petitioner had now fully exhausted his claims, Petitioner should be granted leave to supplement his Petition, and Respondent's Motion to Dismiss should be denied as moot. (Id.)

By Proposed Findings and Recommendations ("PF&R") entered on May 7, 2021, the undersigned recommended that the District Court deny as moot Respondent's "Motion to Dismiss Without Prejudice or to Stay Due to Petitioner's Failure to Exhaust his State Remedies" (Document No. 10) and Petitioner's Motion for Summary Judgment (Document No. 17), and refer the matter back to the undersigned for further proceedings. (Document No. 21.) By Order also

entered on May 7, 2021, the undersigned granted Petitioner's "Motion for Leave to File Supplemental Grounds to Petitioner's Petition for Writ of Habeas Corpus." (Document No. 22.) Specifically, the undersigned directed Petitioner to file his Amended Section 2254 Petition by June 7, 2021. (Id.) Petitioner filed Objections on May 24, 2021. (Document No. 24.) On June 17, 2021, Petitioner filed a Motion for Appointment of Counsel. (Document No. 29.) By Order entered on June 21, 2021, the undersigned granted Petitioner's Motion for Appointment of Counsel and directed that appointed counsel file an Amended Petition on Petitioner's behalf by August 9, 2021. (Document No. 30.) The undersigned noted that "[t]his Amended Petition will supersede all prior Petitions filed by Petitioner, acting *pro se*." (Id.) By Memorandum Opinion and Order entered on July 20, 2021, United States District Judge John T. Copenhaver, Jr. overruled Petitioner's Objections to the undersigned's PF&R and Order granting Petitioner's "Motion for Leave to File Supplemental Grounds to Petitioner's Petition for Writ of Habeas Corpus," adopted the undersigned's PF&R, and denied as moot Respondent's Motion to Dismiss and Petitioner's Motion for Summary Judgment. (Document Nos. 34 and 37.)

On October 15, 2021, Petitioner, by counsel, Jonathan Byrne, Assistant Federal Public Defender, filed an "Amended Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254" and Memorandum in Support. (Document Nos. 40 and 41.) As grounds for relief, Petitioner argued that he was denied his Sixth Amendment right to effective assistance of counsel during his underlying criminal trial based on the following:

A. Trial counsel was ineffective for failing to object to a fatal variance between the indictment – which charged Richardson with committing robbery via the threat of deadly force – and the proof and instructions at trial which allowed him to be convicted based on the actual use of physical force.

B. Trial counsel was ineffective for failing to more fully investigate the

> ongoing relationship between a juror and one of the prosecutors, who were friends since high school and continued to be friends on social media.

(Id.) As Exhibits, Petitioner attached the following: (1) A copy of Petitioner's underlying Indictment (Document No. 40-1); (2) A copy of the trial transcript (Document Nos. 40-2 and 40-3).

On December 10, 2021, Respondent filed his "Motion for Summary Judgment" and Memorandum in Support. (Document Nos. 42 and 44.) Specifically, Respondent argues that Petitioner's Amended Petition should be dismissed based on the following: (1) "Counsel was not ineffective in failing to object to a fatal variance, as a fatal variance did not exist in this matter" (Document No. 44, pp. 16 – 18.) and (2) "Counsel was not ineffective in failing to further inquire of Juror A.H. as Petitioner's claim that she had implied bias is baseless" (Id., pp. 18 – 22.). Petitioner filed his Response in Opposition on December 23, 2021. (Document No. 46.) Specifically, Petitioner argues as follows: (1) "That Cool testified [Petitioner] threatened her does not mean that the argument and instructions did not broaden the bases on which [Petitioner] could be convicted of robbery" (Id., pp. 1 – 5.); and (2) "Juror Hicks' false answer during *voir dire* that she had no ongoing friendship with one of the prosecutors is sufficient to call her impartiality into question" (Id., pp. 5 – 7.).

FACTUAL BACKGROUND

The parties do not appear to dispute the SCAWV's summary of the factual background concerning the alleged offense committed by Petitioner. Specifically, the SCAWV summarizes the background as follows:

> During the early morning hours of August 24, 2013, petitioner attacked the sixty-one year old victim in her home. Petitioner went to the victim's home to sell her cocaine. The victim characterized her cocaine use as a "daily habit." Before the

attack, petitioner, a thirty-five year old man, had sold the victim cocaine for over a year. The two frequently communicated via cell phone to arrange drug transactions. The victim's testimony at trial indicated that in the week leading up to the attack, the cocaine she purchased from petitioner was sometimes cut with baking soda.

On the evening before the attack, the victim and petitioner agreed to meet at a bar in South Charleston. At the bar, the victim bought $200 worth of what she thought was powder cocaine from petitioner and returned home. The victim later testified that the cocaine product was inferior and that it was mostly baking soda. That night, petitioner repeatedly called the victim. The victim ignored his calls until around 2:00 o'clock in the morning when he called to tell her that he would make up for selling her bad cocaine. At that time, the victim told petitioner that she was going to bed. Later that same morning, petitioner called the victim and then woke her up by knocking on her door. Once inside, petitioner offered the victim $200 worth of crack cocaine. She told him that it was trash and threw it on the kitchen table. Petitioner told the victim that he needed money in order to travel out of state and "re-up," so he told the victim that she needed to pay him for the product that she destroyed. An argument escalated at the victim's house when she demanded that petitioner leave. The victim testified that petitioner proceeded to punch the victim in the face. Petitioner continued to hit her even after she fell to the floor. The victim later testified that $103 she had earned in tips the previous night was taken by petitioner.

After petitioner left the victim's home, she called 911. The police responded to the scene but she lied to them about the drug transaction and the identity of her attacker. Later, at trial, she explained that she lied because she was embarrassed by her addiction, which she had hidden from her children and customers at a local pizza parlor, some of whom were the policemen who responded to her 911 call.

Once at the hospital, the victim eventually admitted the truth to Detective Gordon about her drug addiction and the identity of her attacker. Detective Gordon conducted a follow-up interview at the victim's home and made a video of the scene. The victim indicated that the money she kept hidden in her closet, as well as the money in her purse, was not missing. Days after the interview with Detective Gordon, the victim contacted Gordon to tell him that she realized that $103 in tip money had been taken from her ironing board on the morning of the attack. At trial, the victim testified that she heard petitioner grab the cash from her ironing board when she was on the floor after the attack.

On August 28, 2013, petitioner was arrested and detectives executed a search of his home, where they found cash and a shirt stained with a substance that looked like blood. After his arrest, petitioner was interviewed by two detectives and admitted to selling the victim drugs. Petitioner initially denied that he had been at the victim's house the morning of the attack, but later admitted to being in her home. Petitioner told the detectives at first that the victim fell, but later admitted to hitting her. Throughout the interview, petitioner insisted that he did not rob the victim. Petitioner was tried and the jury returned a guilty verdict on all three offenses.

Richardson, 2016 WL 5030312, at * 1 – 2.

THE APPLICABLE STANDARDS

Federal *habeas* relief is available to a State prisoner under 28 U.S.C. § 2254, only if the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a)(2002); See also Sargent v. Waters, 71 F.3d 158, 160 (4th Cir. 1995). Section 2254(d) provides that when the issues raised in a Section 2254 Petition were raised and considered on the merits in State Court *habeas* proceedings, federal *habeas* relief is unavailable unless the State Court's decision:

> (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.

To trigger the above AEDPA deference, a State Court's decisions must be "adjudicated on the merits." Gordon v. Braxton, 780 F.3d 196, 202 (4th Cir. 2015)(If the State court's decision does not qualify as an "adjudication on the merits," AEDPA deference is not triggered and the Court must review the issue *de novo*.). A claim is "adjudicated on the merits" if the claim "is exhausted in state court and not procedurally defaulted." Gray v. Zook, 806 F.3d 783, 798 (4th Cir. 2015)(citation omitted); also see Thomas v. Davis, 192 F.3d 445, 455 (4th Cir. 1999)(explaining that a claim has been adjudicated upon the merits where the claim was "substantively reviewed and finally determined as evidenced by the state court's issuance of a formal judgment or decree"); Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997), *abrogation on other grounds recognized*, United States v. Barnett, 644 F.3d 192 (4th Cir. 2011)(Exhaustion requires that a claim be "fairly

presented," such that the claim was presented face-up and squarely, providing an opportunity for review by the highest state court.) It is a case-specific inquiry as to whether a claim has been "adjudicated on the merits," but a "claim is not 'adjudicated on the merits' when the state court makes its decision 'on a materially incomplete record.'" Braxton, 780 F.3d at 202 (citing Winston v. Kelly (Winston I), 592 F.3d 535, 544 (4th Cir. 2010)(The record may be materially incomplete if a state court "unreasonably refuses to permit further development of the facts.") The Fourth Circuit has explained that where a state court "unreasonably refuses to permit further develop of the facts," it passes up the opportunity that exhaustion ensures. Winston v. Pearson (Winston II), 683 F.3d 489, 496 (4th Cir. 2012)(exhaustion requires that a state court have an opportunity to apply the law and consider all relevant evidence to petitioner's claim). Additionally, the "adjudication on the merits" requirement does not exclude "claims that were decided in state court, albeit in a summary fashion." Thomas v. Taylor, 170 F.3d 466, 475 (4th Cir. 1999); also see Winton II, 683 F.3d at 502(discussing Harrington v. Richter, 562 U.S 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)(noting that although a state court's summary denial may be presumed an "adjudication on the merits," a federal court may still find that the state court did not adjudicate a claim on the merits if the thoroughness of the state court's development of the record is challenged and there was a materially incomplete record before the state court.) When a state court summarily rejects a claim and does not set forth its reasoning, the federal court independently reviews the record and clearly established Supreme Court law. Bell v. Jarvis, 236 F.3d 149 (4th Cir.), cert. denied, 524 U.S. 830, 122 S.Ct. 74, 151 L.Ed.2d 39 (2001). The Court, however, must still "confine [it's] review to whether the court's determination '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.'" Id. at 158; also see Harrington, 562 U.S at 98 – 99, 131 S.Ct. at 770("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated.").

In Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the Supreme Court stated that under the "contrary to" clause in § 2254(d)(1), a federal *habeas* Court may grant *habeas* relief "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412-13, 120 S.Ct. at 1523. A federal *habeas* Court may grant relief under the "unreasonable application" clause of § 2254(d)(1) where the State Court identified the appropriate Supreme Court precedent but unreasonably applied the governing principles. Id.(A "federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly."); also see Woods v. Donald, 575 U.S. 312, 135 S.Ct. 1372, 191 L.Ed.2d 464 (2015)(*per curiam*)(For a state court's decision to be an unreasonable application of clearly established federal law, the ruling must be "objectively unreasonable, not merely wrong; even clear error will not suffice.") Thus, a litigant must "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S at 103, 131 S.Ct. at 770. When a petitioner challenges the factual determination made by the State Court, "federal habeas relief is available only if the state

court's decision to deny post-conviction relief was 'based on an unreasonable determination of the fact.'" 28 U.S.C. § 2254(d)(2). In reviewing a State Court's ruling on post-conviction relief, "we are mindful that 'a determination on a factual issue made by the State court shall be presumed correct,' and the burden is on the petitioner to rebut this presumption 'by clear and convincing evidence.'" Tucker v. Ozmint, 350 F.3d 433, 439 (4th Cir. 2003); also see 28 U.S.C. § 2254(e).[1] On this framework, consideration should be given to the Motions for Summary Judgment.

Motion for Summary Judgment:

Summary judgment is appropriate under Federal Rule of Civil Procedure 56 when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Once the moving party demonstrates the lack of evidence to support the non-moving party's claims, the non-moving party must go beyond the pleadings and make a sufficient showing of facts

[1] Title 28, U.S.C. Section 2254(e) provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

presenting a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 - 87, 106 S.Ct.1348, 89 L.Ed.2d 538 (1986). All inferences must be drawn from the underlying facts in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356. Summary judgment is required when a party fails to make a showing sufficient to establish an essential element of a claim, even if there are genuine factual issues proving other elements of the claim. Celotex, 477 U.S. at 322-23, 106 S.Ct. at 2552-53. Generally speaking, therefore, summary judgment will be granted unless a reasonable jury could return a verdict for the non-moving party on the evidence presented. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If no facts or inferences which can be drawn from the circumstances will support non-moving party's claims, summary judgment is appropriate.

ANALYSIS

1. Ineffective Assistance of Counsel:

The standards established by the United States Supreme Court in determining whether or not a defendant was denied his Sixth Amendment right to effective assistance of counsel are set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ineffective assistance of counsel claims consist of mixed questions of fact and law. Id. Under the two-pronged standard, a Petitioner must show (1) that counsel's performance was so deficient that it fell below an objective standard of reasonableness, and (2) that counsel's deficiency resulted in prejudice so as to render the results of the trial unreliable. Id. at 687-91, 104 S.Ct. at 2064-66. Counsel's performance is entitled to a presumption of reasonableness and judicial review of counsel's strategic decisions is highly deferential. Id. at 689, 104 S.Ct. at 2065. Thus, a petitioner

challenging his conviction on the grounds of ineffective assistance must overcome a strong presumption that the challenged actions constituted sound trial strategies. Id. The Court in Strickland cautioned against the ease in second-guessing counsel's unsuccessful assistance after the adverse conviction and sentence are entered. Id. The Fourth Circuit Court of Appeals specifically recognized that ineffective assistance of counsel may not be established by a "Monday morning quarterbacking" review of counsel's choice of trial strategy. Stamper v. Muncie, 944 F.2d 170, 178 (4th Cir. 1991), cert. denied, 506 U.S. 1087 (1993).

Where the State court applies the Strickland standard in the adjudication of a petitioner's ineffective assistance of counsel claim, the standard of review in a Section 2254 proceeding differs from the standard used in the direct review of a Strickland challenge. The United States Supreme Court has explained as following:

> The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This differs from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an *unreasonable* application of federal law is different from an *incorrect* application of federal law. *Williams*, *supra*, at 410, 120 S.Ct. 1495. A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

Harrington, supra, 562 U.S. at 101, 131 S.Ct. at 785. The Supreme Court acknowledged that "[s]urmounting *Strickland's* high bar is never an easy task," and "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." Id., 562 U.S. at 105, 131 S.Ct. 788("The standards created by *Strickland* and § 2254(d) are both 'highly deferential," and when the two apply in tandem, review is 'doubly' so."); also see Woods, supra, 575 U.S. at 315, 135 S.Ct. at 1376(For claims of ineffective assistance of counsel, "AEDPA review

must be doubly deferential in order to afford both the state court and the defense attorney the benefit of the doubt.")(internal quotations omitted). The Supreme Court warned that "[f]ederal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)." Harrington, supra, 562 U.S. at 105, 131 S.Ct. 788. Under Section 2254(d), "a habeas court must determine what arguments or theories supported, or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurist could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the United States Supreme Court]." Id., 562 U.S. at 101, 131 S.Ct. at 785. To obtain *habeas* relief from a federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id., 562 U.S. at 103, 131 S.Ct. at 787. Applying these standards, and based upon all of the evidence of record, the Court will address the merits of each of Petitioner's allegations of ineffective assistance of counsel as set forth above.

A. Counsel's failure regarding a fatal variance between Petitioner's Indictment and his conviction.

In his Amended Petition, Petitioner argues that "[t]rial counsel was ineffective for failing to object when the State's argument and evidence at trial, as well as the trial court's instructions, created a fatal variance between the version of robbery [Petitioner] was charged with committing and the version of the offense of which the jury convicted him." (Document No. 41, pp. 8 – 14.) Petitioner contends that he "was charged with one form of robbery, while the proof at trial and the trial court's instructions to the jury allowed for his conviction of another form of robbery, creating a fatal variance to which trial counsel should have objected." (Id., p. 9.) Petitioner explains that

W. Va. Code § 61-2-12(a) provides for two forms of first-degree robbery: (1) Robbery committed by "[c]omitting violence to the person, including, but not limited to, partial strangulation or suffocation;" and (2) Robbery committed by the use of "the threat of deadly force by presenting a firearm or other deadly weapon." (Id., p. 10.) Petitioner notes that he was charged in Count Three of the Indictment with committing robbery when he used "the threat of deadly force upon the person of Denise Cool." (Id.) Petitioner argues that the Indictment "did **not** charge [Petitioner] with the actual use of force as a means of committing robbery." (Id.) Petitioner, however, complains that the evidence at trial adduced that Petitioner committed robbery only by the actual use of force and not by the threat of deadly force. (Id.) Specifically, Petitioner states that the only evidence against him was that he punched the victim in the face and continued to hit her in the head after she fell to the floor. (Id.) Petitioner asserts there is no testimony or evidence that he threatened the use of deadly force. (Id.) Petitioner further complains that the jury instruction advised the jury that Petitioner could be found guilty because he employed "partial strangulation or suffocation or by striking or beating" or by the "presenting of firearms, or by other deadly weapon or instrumentality." (Id.) Petitioner claims that his "trial was the classic example of a variance between the charge and proof." (Id.) Specifically, Petitioner states the trial court's instructions . . . allowed the jury to convict [Petitioner] on the theory of the case not charged in the Indictment." (Id., p. 11.) Petitioner further argues that the "variance was fatal because it 'infringed [the defendant's] substantial rights and thereby resulted in actual prejudice.'" (Id.) Petitioner explains "prejudice is evident from the fact that the State never produced sufficient evidence that [Petitioner] committed the offense actually charged in the Indictment." (Id.) Petitioner argues that if the trial court would have properly instructed the jury, he would have been acquitted because

there was no evidence that he threatened the use of force with a deadly weapon. (Id.)

Next, Petitioner argues that the "trial court unreasonably applied settled federal law when it concluded that even if a variance had occurred the State 'could have easily presented the case to the grand jury once again or been given leave to add the words 'by violence to the person.'" (Id., p. 12.) Respondent argues that this is incorrect. (Id.) Respondent explains that a fatal variance arises when there is discontinuity between the indictment and the proof adduced at trial. (Id.) Thus, Respondent notes that a variance cannot become apparent until after evidence has begun to be received and at this point, a defendant's right to protection against Double Jeopardy has attached. (Id.) Respondent concludes that "[r]eturning to the grand jury at the point the variance becomes evident would have required a mistrial, caused the State's need to fix its own mistake, which likely would have prevented any subsequent retrial." (Id.) Petitioner also argues that the fact that Petitioner was charged in another count of the Indictment with assault of the victims, such "does not mitigate the prejudice of the fatal variance." (Id., p. 12.) Finally, Petitioner argues that "[t]he trial court's conclusion that [Petitioner's] defense was not impacted by the variance because it was focused on whether the money was taken (and thus whether a robbery occurred), rather than the type of force used, highlights the nature of trial counsel's ineffectiveness." (Id., p. 13.) Petitioner states that "[h]ad trial counsel recognized the variance issue he could have object to the trial court's instructions allowing the jury to convict on either basis or sought acquittal with the argument that the State never proved that [Petitioner] used a weapon." (Id.) Petitioner argues that trial counsel's failure to object to the fatal variance was not objectively reasonable. (Id.) Petitioner also asserts that trial counsel's failure was "prejudicial because there was insufficient evidence to convict [Petitioner] of the offense he was actually charged with committing." (Id.) Petitioner concludes

that "[t]he trial court unreasonably applied federal law by concluding otherwise." (Id.)

In his Motion for Summary Judgment, Respondent argues that trial "counsel was not ineffective in failing to object to a fatal variance, as a fatal variance did not exist in this matter." (Document No. 42 and Document No. 44, pp. 16 – 18.) Respondent acknowledges that the Indictment charged that Petitioner "did unlawfully and feloniously use the threat of deadly force upon the person of Denise Cool." (Id., p. 16.) Respondent, however, contends that the evidence presented at trial supported this charge. (Id.) Specifically, Respondent notes that the victim testified as follows: (1) Petitioner threatened to "kill" her or have someone else harm or kill her; and (2) She was in fear of death following the beating. (Id.) Next, Respondent argues that "[e]ven if there was some amendment in this case, the WVSCA properly found that the amendment was merely an amendment of form, not a fatal variance." (Id., p. 17.) Respondent states that "the indictment properly informed Petitioner he was charged with first-degree robbery as well as assault during the commission of a felony, making Petitioner well aware that evidence of him causing bodily harm to the victim would be presented." (Id.) Respondent further claims that Petitioner was not subjected to an added burden of proof or "surprised or hindered in his defense." (Id.) Respondent concludes that "Petitioner has shown no prejudice in this matter." (Id.) Therefore, Respondent argues that Petitioner's claim must failed because he "has not shown that the WVSCA opinion regarding any possible variance in this case was an unreasonable application of federal law or an unreasonable application of the facts to the relevant law." (Id., p. 18.) Respondent further argues that "Petitioner has failed to prove that he suffered ineffective assistance of counsel because counsel had no valid basis to object to the variance, as it was not fatal." (Id.) Respondent explains that Petitioner was not prejudiced by trial counsel's failure to object because "any objection would

have been fruitless." (Id.)

In Response, Petitioner argues that Cool's testimony that Petitioner "threatened her does not mean that the argument and instructions did not broaden the bases on which [Petitioner] could be convicted of robbery." (Document No. 46, pp. 1 - 5.) Petitioner argues that the "evidence, argument, and instructions presented to the jury allowed it to find [Petitioner] guilty on a theory of robbery that had not been charged in the indictment." (Id., p. 2.) Petitioner explains that Cool's testimony "detailed how [Petitioner] used actual violence against her" and the "state focused on actual violence in its arguments to the jury." (Id.) More importantly, Petitioner argues that the "trial court instructed the jury that it could find [Petitioner] guilty either because he employed 'partial strangulation or suffocation or by striking or beating' or by the 'presenting of firearms, or by other deadly weapon or instrumentality." (Id.) Petitioner notes that "when setting forth the elements of the offense of robbery, the only means of committing the offense was by 'committing violence against Denise Cool.'" (Id.) Next, Petitioner acknowledges that Cool testified that Petitioner threatened to kill her during the beating and threatened that if she told anyone about the attack he or his associates would "come back and kill me." (Id., p. 3.) Petitioner argues that "a threat of violence in the moment could be sufficient to constitute robbery, a threat of future violence would not." (Id.) Petitioner notes that "[u]nlike the evidence of actual violence,[2] the only evidence of threats of violence came from Cool's testimony and thus could only be credited if she

[2] Petitioner admits that the evidence of actual violence was strong based on the following evidence presented at trial: (1) Cool testified that Petitioner beat her during the incident; (2) The State introduced photographs of Cool taken before she went to the hospital that showed she had been injured; (3) The State introduced photographs of Cool's apartment showing the bloody aftermath of the incident; and (4) Petitioner gave a statement admitting to being at the scene and hitting Cool. (Document No. 46, p. 3.)

was credible." (Id., 4.) Petitioner claims that Cool was not credible because she made conflicting statements. (Id., pp. 4 – 5.) Petitioner explains that Cool initially told police on the night of the assault that she had nothing to do with the drugs, she could not identify her attacker, and she failed to report any missing money. (Id., p. 4.) Subsequently, Petitioner continued to deny that anything had been taken from her apartment during a follow-up interview. (Id., pp. pp. 4 – 5.) A few days after the follow-up interview, Petitioner reported that money was missing. (Id., p. 5.) At trial, Petitioner testified that she "heard [Petitioner] grab the cash from her ironing board when she was on the floor after the attack." (Id.) Petitioner, however, admitted that she initially testified during a preliminary hearing that she saw Petitioner take the money "through the blood dripping down" her face. (Id.) Petitioner again notes that "the only mention of threats in the instructions to the jury was 'by the threat of presenting of firearms, or by other deadly weapon or instrumentality" and there was no testimony that any weapon was used to threaten Cool. (Id.) Petitioner concludes he was prejudiced because "[i]f the decision about whether to convict [him] would have had to be based entirely on Cool's testimony regarding threats, rather than the expanded offense that included actual violence, it is likely the jury might have come to a different conclusion." (Id.)

After identifying the Strickland standard and the equivalent West Virginia authority as the applicable precedent, the Circuit Court addressed the above issue, in pertinent part, as follows:

> 77. Here, no fatal variance existed between the robbery count as charged and the proof adduced at trial. The State did not engage in a "constructive" amendment to the indictment. Although counsel did testify that perhaps he should have addressed any issues with the indictment but simply missed them, this Court does not find counsel to be ineffective as to this issue. Even assuming that counsel's performance regarding the indictment was objectively deficient, the failure to raise any concerns about the indictment did not prejudice Petitioner. Even had the Court ruled the indictment to be deficient in any way, the State could have easily presented the case to the grand jury once again or been given leave to add the words "by violence to the person." Counsel testified that he and Petitioner knew that he

> was charged with accomplishing the robbery by beating the victim. The defense was in no way hampered. The indictment was sufficient to protect Petitioner against double jeopardy. Petitioner has failed to satisfy the prejudice prong of *Strickland/Miller*.
>
> 78. Trial counsel was not constitutionally ineffective for failing to object to such alleged "constructive" amendment. No constructive amendment of the indictment occurred, nor did any variance between the indictment and proof adduced at trial.

(Document No. 10-10, p. 41.) After identifying the Strickland standard and the equivalent West Virginia authority as the applicable precedent, the SCAWV addressed the issue, in pertinent part, as follows:

> Based on our review of the record in appeal, the parties' arguments, and the circuit court's order, we agree with the circuit court that any difference between the allegations in the indictment and the evidence at trial did not mislead petitioner, subject him to any additional burden of proof, or otherwise prejudice him and so was an amendment of form, only. ("An 'amendment of form' which does not require resubmission of an indictment to the grand jury occurs when the defendant is not misled in any sense, is no subjected to any added burden of proof, and is not otherwise prejudiced." Syl. Pt. 3, in part, *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995).)
>
> The indictment informed petitioner that he was charged with first degree robbery, West Virginia Code § 61-2-12(a) (2000). The indictment also informed petitioner that he was charged with assault during the commission of a felony, § 61-2-10 (1882), so he was aware that the State planned to present evidence of bodily harm to the victim. For the same reason, any difference between the indictment and evidence offered at trial did not subject petitioner to any added burden of proof. Finally, petitioner's trial counsel testified repeatedly during the omnibus hearing that the defense to the robbery charge was that petitioner did not steal, take away, or carry $103 from Ms. Cool's apartment, i.e., that the robbery did not occur, at all. So, the means by which petitioner accomplished the robbery (by threat of force or the commission of violence) was irrelevant to the defense theory. Any difference between the robbery count in the indictment and the State's evidence at trial resulted in, at most, an amendment of form – rather than an impressible constructive amendment – to the first degree robbery count of the indictment.

(Document No. 10-11, p. 4.)

First, Petitioner does not dispute that the Circuit Court and the SCAWV correctly referenced the Strickland standard as applicable law to Petitioner's ineffective assistance of

counsel claim. Petitioner, however, argues that the Circuit Court and the SCAWV unreasonably applied Strickland to the facts of his case. Considering what arguments or theories supported, or could have supported the Circuit Court's and the SCAWV's decisions, the undersigned finds that fairminded jurists could disagree that those arguments or theories are inconsistent with existing law. As stated above, the Circuit Court and the SCAWV determined that Petitioner was not prejudiced by trial counsel's failure to object because (1) even if a variance occurred, the State "could have easily presented the case to the grand jury once again or been given leave to add the words 'by violence to the person'" and (2) "[a]ny difference between the robbery count in the indictment and the State's evidence at trial resulted in, at most, an amendment of form." The Circuit Court noted that during the omnibus hearing, trial counsel "did testify that perhaps he should have addressed any issues with the indictment but simply missed them." (Document No. 10-10.) The Circuit Court concluded that "[e]ven assuming that counsel's performance regarding the indictment was objectively deficient, the failure to raise any concerns about the indictment did not prejudice Petitioner" "because "the State could have easily presented the case to the grand jury once again or been given leave to add the words 'by violence to the person.'" (Id.) The undersigned finds that the Circuit Court's finding that "the State could have easily presented the case to the grand jury once again or been given leave to add the words 'by violence to the person,'" was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

As to the Circuit Court's finding that the State "could have easily . . . been given leave to add the words 'by violence to the person'" to the Indictment, the undersigned finds that such a finding involved an unreasonable application of clearly established Federal law. The Fifth

Amendment provides that "[n]o person shall be held to answer for a capital, other otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. Additionally, "it is 'the exclusive province of the grand jury' to alter or broaden the charges set out in an indictment." United States v. Moore, 810 F.3d 932, 936 (4th Cir. 2016)(citing United States v. Whitfield, 695 F.3d 288, 309 (4th Cir. 2012)). The State's desire to alter or broaden the charges set out in Petitioner's indictment to include the additional element of "by violence to the person" was within the province of the grand jury. See Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 9 L.Ed.2d 240 (1962)(unless the change is merely a matter of form, an indictment may not be amended except by resubmission to the grand jury). Thus, the Circuit Court's conclusion that Petitioner was not prejudiced by trial counsel's failure to object to constructive amendment because the State "could have easily . . . been given leave to add the words 'by violence to the person'" was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

As to the Circuit Court's finding that "the State could have easily presented the case to the grand jury once again," the undersigned finds that such a finding involved an unreasonable application of clearly established Federal law. The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides that no person shall be "subject for the same offense to be twice in jeopardy of life or limb." U.S. Const. Amend. V. The Double Jeopardy Clause further "embraces the defendant's 'valued right to have his trial completed by a particular tribunal." Arizona v. Washington, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). In a jury trial, jeopardy attaches when the jury is empaneled. Crist v. Bretz, 437 U.S. 28, 35, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); United States v. Shafer, 987 F.2d 1054,

1047 (4th Cir. 1993). Once a jury is empaneled, "the defendant has a constitutional right, subject to limited exceptions, to have his case decided by that particular jury." Shafer, 987 F.2d at 1047. A retrial, however, may occur when a mistrial is properly granted. Arizona, 434 US. at 505, 98 S.Ct. at 824. When a defendant opposes a mistrial, the mistrial must be justified by showing a "manifest necessity" or that the ends of justice would be defeated if a mistrial were not granted. Id. Although the term "manifest necessity" does not require that "a mistrial be 'necessary' in the strictest sense of the word, it does require a 'high degree' of necessity." Gilliam, 75 F.3d at 895; also see Arizona, 434 US. at 506, 98 S.Ct. at 831. A clear example of "manifest necessity" is when a jury is unable to reach a verdict. Gilliam, 75 F.3d at 895. On the other extreme, wherein there is a lack of "manifest necessity," is when a prosecutor seeks a mistrial to obtain additional time to arrange for evidence to strengthen the case against the defendant. Id.; also see Arizona, 434 at U.S. at 508, 98 S.Ct. at 832(explaining that strict scrutiny should be applied when the basis for a mistrial is unavailability of critical prosecution evidence because the Double Jeopardy Clause is meant to protect a criminal defendant from multiple prosecutions where the prosecutor seeks a mistrial to "afford the prosecution a more favorable opportunity to convict the defendant."); Seay, 927 F.3d 781-83 (applying the strictest scrutiny standard of review, the court determined the district court erred in failing to grant *habeas* relief on petitioner's double jeopardy claim where the state court granted the prosecution's request for a mistrial based on the unavailability of the government's witness); Colvin v. Sheets, 598 F3d 242, 253 (6th Cir. 2010)(Reviewing courts apply a "sliding scale of scrutiny" concerning manifest necessity: the strictest scrutiny applies when the basis of the mistrial is judicial or prosecutorial misconduct, and the greatest deference extends to mistrials declared due to a deadlocked jury.). Between these two extremes "exists a spectrum of trial errors

and other difficulties, some creating manifest necessity for a mistrial and others falling far short of justifying a mistrial." Gilliam, 75 F.3d at 895.

At the time the alleged fatal variance became an issue in Petitioner's underlying jury trial, jeopardy had clearly attached. Specifically, the alleged fatal variance did not occur until evidence was presented at Petitioner's jury trial and the Circuit Court's gave the jury instruction on the first-degree robbery offense. The Circuit Court's finding that "the State could have easily presented the case to the grand jury once again" is contrary to clearly established federal law. The Circuit Court did not consider or find that a "manifest necessity" for the granting of a mistrial could be established based solely on a prosecutor's desire to return to the grand jury to reindict a defendant. Allowing a defendant to be placed in jeopardy by the empanelment of a jury, the government to present evidence to the jury that ultimately does not support the charges contained in the indictment, and then grant a mistrial for the sole purpose of allowing the prosecutor to return to the grand jury to reindict a defendant on charges that match the evidence presented at trial, is exactly what the Double Jeopardy Clause is meant to prevent. Thus, the Circuit Court's conclusion that Petitioner was not prejudiced by trial counsel's failure to object to constructive amendment because "the State could have easily presented the case to the grand jury once again," was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Next, the undersigned considers what arguments or theories supported, or could have supported the SCAWV's decision that Petitioner was not prejudiced by trial counsel's failure to object to constructive amendment because "[a]ny difference between the robbery count in the indictment and the State's evidence at trial resulted in, at most, an amendment of form."

(Document No. 10-11, p. 4.) The SCAWV reasoned that Petitioner was not subjected to "any added burden of proof" because the indictment charged Petitioner with first-degree robbery in violation of W.Va. Code § 61-2-12(a) and assault during the commission of a felony in violation of W.Va. Code § 61-2-10. (Id.) The SCAWV reasoned that Petitioner "was aware that the State planned to present evidence of bodily harm to the victim" based upon the charge for assault during the commission of a felony. (Id.) Finally, the SCAWV reasoned that the alleged constructive amendment was irrelevant to Petitioner's defense because trial counsel testified that Petitioner's defense to the first-degree robbery charge was that the robbery never occurred. (Id.) The SCAWV, therefore, concluded that "the means by which petitioner accomplished the robbery (by threat of force or the commission of violence) was irrelevant to the defense theory." (Id.) The undersigned finds that fairminded jurists could disagree as to whether the above arguments or theories are inconsistent with existing law.

As state above, the Fifth Amendment of the United States Constitution provides that "[n]o person shall be held to answer for a capital, other otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. "[I]t is 'the exclusive province of the grand jury' to alter or broaden the charges set out in an indictment." Moore, 810 F.3d at 936(citing Whitfield, 695 F.3d at 309); Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948)(finding that "[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge" are "among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal"). "An impermissible constructive amendment – also referred to as a 'fatal variance' – occurs when the government, usually through its presentation of evidence or argument,

or the district court, usually through its jury instructions, 'broadens the possible bases for conviction beyond those presented by the grand jury." Id.; also see Dunn v. United States, 442 U.S. 100, 105, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979)(a "variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment"); United States v. Holmes, 376 Fed.Appx. 346, 348 (4th Cir. 2010(quoting United States v. Foster, 507 F.3d 233, 242 (4th Cir. 2007)(internal quotations and citation omitted)("A constructive amendment to an indictment occurs when . . . the court (usually through its instructions to the jury) . . . broadens the possible bases for conviction beyond those presented by the grand jury, which results in a fatal variance [] because the indictment is altered to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment."). "The grand jury must have indicted for the crime actually proved." United States v. Johnson, 2017 WL 2531582, * 10 (S.D.W.Va. June 9, 2017)(citation omitted). Thus, a fatal variance in violation of the Fifth Amendment occurs "when the indictment is effectively altered 'to change the elements of the offense charged, such that a defendant is actually convicted of a crime other than that charged in the indictment." United States v. Banks, 29 F.4th168, 174 (4th Cir. 2022)(citations omitted). Thus, the Court must consider whether a defendant was tried on charges different from those listed in the indictment. United States v. Allmendinger, 706 F.3d 330, 339 (4th Cir. 2013); United States v. Ashley, 606 F.3d 135 (4th Cir. 2010)("To constitute a constructive amendment, the variance must in essence 'change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment."). The Fourth Circuit has explained that when a constructive amendment claim is based on allegedly erroneous jury instructions a reviewing court should consider the following:

> When a constructive amendment claim rests on allegedly erroneous jury instructions, a reviewing court is to consider the totality of the circumstances – including not only the instructions and the indictment but also the arguments of the parties and the evidence presented at trial – to determine whether a jury could have "reasonably interpreted" the challenged instructions as "license to convict" on an unindicted charge. *Lentz*, 524 F.3d at 514-15. If not – if a reasonable jury, in light of the full context, would have thought that it was permitted to convict on a ground not included in the indictment – then no constructive amendment has occurred. *Id.* at 515-16.

Moore, 810 F.3d at 936.

"[N]ot all differences between an indictment and the proof offered at trial, rise to the 'fatal' level of a constructive amendment." Randall, 171 F.3d at 203. A non-fatal "variance occurs when the facts proven at trial support a finding that defendant committed the indicted crime, but the circumstances alleged in the indictment to have formed the context of defendant's actions differ in some way nonessential to the conclusion that the crime must have been committed." United States v. Floresca, 38 F.3d 706, at 709 (4th Cir. 1994)(en banc), abrogated on other grounds by, United States v. Banks, 29 F.4th 168 (4th Cir. 2022); also see United States v. Fletcher, 74 F.3d 49, 53 (4th Cir. 1996)("As long as the proof at trial does not add anything new or constitute a broadening of the charges, then minor discrepancies between the Government's charges and the facts proved at trial generally are permissible.") Thus, a mere variance occurs "[w]hen different evidence is presented at trial but the evidence does not alter the crime charged in the indictment." United States v. Randall, 171 F.3d 195, 203 (4th Cir. 1999); also see Banks, 29 F.4th at 173-80(finding no constructive amendment based upon the court's inclusion of "or distributed" in the jury instructions for the possession with intent to distribute charge where a jury could not have found defendant guilty of only distribution and not possession with intent to distribute); Redd, 161 F.3d at 795(no constructive amendment where an indictment charged the defendant with bank

robbery and use of a firearm during a crime of violence, and provided the use of a firearm different than the firearm described in the indictment – a "black revolver" verses a "silver-colored handgun"); United States v. Robles-Vertiz, 155 F.3d 725 (5th Cir. 1998)(the use of the incorrect name of an alien in an indictment charging the transporting of an alien to the United States did not constitute a constructive amendment); United States v. Moss, 2018 WL 6834708, * 4 - 5 (N.D.W.Va. Dec. 21, 2018)(since dates are not elements of a crime, a mere variance occurs). A variance does not constitute a Fifth Amendment violation "unless it prejudices defendant either by surprising him at trial and hindering the preparation of his defense, or by exposing him to danger of a second prosecution of the same offense. Id.

The United States Supreme Court's decision in Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) and the Fourth Circuit's decisions in United States v. Holmes, 376 Fed.Appx. 346 (4th Cir. 2010) and United States v. Perry, 560 F.3d 246 (4th Cir. 2009) are instructive. In Stirone, the Supreme Court held that a constructive amendment occurred where the indictment charged the defendant with Hobbs Act extortion based on the interference with commerce in sand, but the evidence a trial and the jury instructions allowed the jury to convict based on the interference with commerce in sand and steel. Stirone, 361 U.S. at 218-19, 80 S.Ct. 270. The Supreme Court explained that "the indictment here cannot fairly be read as charging interference with movement of steel . . . [a]nd it cannot be said with certainty that with a new basis for conviction added, [defendant] was convicted solely on the charge made in the indictment the grand jury returned." Id. The Supreme Court determined that the admission of evidence concerning interference with steel to be "neither trivial, useless, nor innocuous" because it allowed a conviction for a separate offense not charged in the indictment - - a Hobbs Act violation based on

the interference with commerce in steel. Id.

In Holmes, the Fourth Circuit determined that court's instruction of the jury in the disjunctive that reflects the statute's disjunctive wording does not constructively amend the indictment when the indictment charges in the conjunctive. Holmes, 376 Fed.Appx. at 348. The indictment in Holmes charged the defendants with conspiring to "obstruct, delay, and affect commerce" by robbery in violation of 18 U.S.C. § 1951(a). Id. When instructing the jury, the court used disjunctive language that tracked the statutory language. Id. The Fourth Circuit determined that if a defendant is charged in the conjunctive, but the statutory language of the underlying offense is disjunctive, a court may properly instruct the jury in the disjunctive without constructively amending the indictment. Id. The Fourth Circuit reasoned that "[i]instructing otherwise would 'improperly add elements to the crime that are not contained in the statute itself.'" Id.(citing United States v. Montgomery, 262 F.3d 233, 242 (4th Cir. 2001). In Perry, the indictment charged the defendant in the conjunctive (both predicate offenses) placing the defendant on notice of the specific charges against him. Perry, 560 F.3d at 256. The Fourth Circuit noted that the court's disjunctive instruction as to the predicate offenses did not constitute a constructive amendment because the government was only required to prove a single offense pursuant to the statute. Id. The Fourth Circuit explained that "[t]he instruction did not broaden the possible bases for conviction beyond those presented in the indictment, or changed the elements of the offense charged so as to result in [defendant] being convicted of a crime different from that charged in the indictment." Id.

In Count Three of the Indictment, Petitioner was charged with first-degree robbery in violation of W. Va. Code § 61-2-12(a). The essential elements of first-degree robbery requires the State to prove the following: (1) the unlawful taking and carrying away, or the unlawful attempt

to take and carry away, (2) money or goods, (3) from the person of another or in his presence, (4) by violence or threat of deadly force by the presenting of a firearm or other deadly weapon, (5) with intent to steal the money or goods. Flack v. Ballard, 239 W.Va. 566, 803 S.E.2d 536 (2017); also see W. Va. Code § 61-2-12(a)("Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapons, is guilty of robbery in the first degree…."). West Virginia Code § 61-2-12(a) is disjunctive providing that first-degree robbery can be committed in two ways: (1) "committing violence to the person, including but not limited to, partial strangulation or suffocation or by striking or beating," or (2) "the threat of deadly force by presenting a firearm or other deadly weapon." W. Va. Code § 61-2-12(a). Count Three of the Indictment, however, charged Petitioner with a singular method of committing the first-degree robbery (by "the threat of deadly force"). (Document No. 40-1, p. 4.) At trial, the majority of the evidence presented focused on the fact that Petitioner punched Cool multiple times. Specifically, Cool testified that Petitioner punched her in the face, after which she fell to the floor and Petitioner "kept pounding" and "hit me so many times in my head I couldn't even think." (Document No. 40-2, pp. 110-12.) Cool also testified that while Petitioner was beating her, Petitioner said "I'm going to kill you" and that "if I told anybody, he would come back and kill me." (Id.) The State introduced photographs of Cool taken before she went to the hospital exhibiting her injuries and of Cool's apartment that showed blood in the apartment. (Document No. 40-3, pp. 51 and 53.) The States also introduced Petitioner's statement wherein he admitted to being at Cool's apartment and hitting her. Richardson, 2016 WL 5030312 at * 2. In its arguments to the jury, the State focused on Petitioner's

use of violence to support the first-degree robbery conviction. (Document No. 40-2, p. 93 and Document No. 40-3, pp. 186 and 204.) Importantly, the Circuit Court instructed the jury that the jury could find Petitioner guilty either because he employed "partial strangulation or suffocation or by striking or beating" or by the "presenting of firearms, or by other deadly weapon or instrumentality." (Document No. 40-3, p. 172.) Considering the Indictment and the Circuit Court's jury instruction concerning the first-degree robbery charge, the undersigned finds that the SCAWV's ruling on the constructive amendment claim is so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. Although W. Va. Code § 61-2-12(a) is disjunctive providing that first-degree robbery can be committed in two ways (actual violence or threat of violence), the Indictment charged Petitioner with a singular method of committing the first-degree robbery (by "the threat of deadly force"). The method of committing the first-degree robbery is an essential element, and the Circuit Court's jury instruction concerning the charge did not track the Indictment. United States v. Figueroa, 66 F.2d 1375, 1379 (11th Cir. 1982)(indictment unconstitutionally amended where court permitted jury to convict of air piracy by threats or intimidation even though indictment charged piracy by force and violence); United States v. Bizzard, 615 F.2d 1080, 1082 (5th Cir. 1980)(indictment unconstitutionally amended where it charged that defendant committed bank robbery and put the life of tellers in jeopardy but conviction was for bank robbery accompanied by assault, different statutory section). The Circuit Court changed an essential element of the offense by instructing the jury that Petitioner could be convicted of first-degree robbery based upon his use of violence. Importantly, the Indictment did not charge Petitioner with committing first-degree robbery by the use of violence. Therefore, the Circuit Court's jury

instruction broadened the possible bases for Petitioner's conviction beyond those presented by the grand jury. This clearly constituted a fatal variance in violation of the Fifth Amendment and the SCAWV's finding that the foregoing was merely 'an amendment of form" is contrary to established Federal law. Furthermore, the SCAWV's determination that trial counsel's failure to assert such a meritorious claim did not result in prejudice is contrary to established Federal law. Had trial counsel objected to the constructive amendment to the indictment at trial, the error would have been "fatal and reversible per se." Banks, 29 F.4th at 177(citing Whitfield, 695 F.3d at 308)(if a defendant objects to a constructive amendment at trial, the alleged constructive amendment is not examined under plain error review); also see United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)(citing Stirone, 361 U.S. at 214-19, 80 S.Ct. 272-74)(finding that violations of the Grand Jury Clause do not automatically require reversal, but distinguishing *Stirone* where reversal was proper because an objection to the fatal error had been made in the trial court). Although the SCAWV appears to place significant weight on the fact that trial counsel testified that Petitioner's defense was that Petitioner did not commit the robbery whether by threat or the use of violence, such defenses were not mutually exclusive. Asserting the above defense in no way prevented trial counsel from objecting to the fatal variance. Accordingly, the undersigned respectfully recommends that Respondent's Motion for Summary Judgment be denied as to the above claim and Petitioner's Amended Petition be granted as to the above claim.

B. Trial counsel's failure regarding Juror Hicks.

In his Amended Petition, Petitioner argues that "[t]rial counsel was ineffective for failing "to properly probe the extent of Juror Hicks' relationship with a prosecutor, including exploring any social media connections." (Document No. 41, pp. 14 – 19.) In support, Petitioner

argues that he had a Sixth Amendment right to a trial by an impartial jury. (Id., p. 14.) Petitioner contends that Juror Hicks had an implied bias against him due to her "relationship" with Assistant Prosecutor Bailey. (Id., pp. 15 – 16.) Petitioner claims that during *voir dire*, trial counsel failed to thoroughly question Juror Hicks concerning her relationship with Assistant Prosecutor Bailey. (Id., p. 16.) Although *voir dire* revealed that Juror Hicks went to high school with Assistant Prosecutor Bailey, trial counsel did not question Juror Hicks concerning any social media connections. (Id.) Petitioner contends that such questioning would have revealed that Juror Hicks and Assistant Prosecutor Bailey were "Facebook friends." (Id.) Petitioner argues that discovery of the foregoing would have been a basis for striking Juror Hicks. (Id.) Petitioner asserts that at the time of his trial, "the importance of social media to criminal trials had been well established." (Id.) Specifically, Petitioner claims that the "prevailing professional norms . . . were that counsel needed to be aware of social media as a tool and its potential impact at *voir dire*" and Petitioner's trial counsel "did not meet that standard." (Id., p. 17.) Petitioner argues that he was prejudiced by trial counsel's failure to probe Juror Hicks on the nature of her relationship with Assistant Prosecutor Bailey in two ways. (Id.) First, Petitioner states "that Juror Hicks had a current, ongoing relationship with one of the prosecutors was a different fact in the exploration of bias than whether they had been friends years before." (Id.) Thus, Petitioner argues that a "juror sitting in judgment of a case presented by a current acquaintance raises the kind of implied bias concerns that are present if a family member of one of the parties is sitting on the jury." (Id.) Second, Petitioner states that "had trial counsel probed Juror Hicks (or otherwise researched her social medical presence) and discovered the relationship it would have suggest bias on her part." (Id.) Petitioner states that Juror Hicks' denial of any such relationship that she admitted years later is relevant to actual bias because

"dishonesty, of itself, is evidence of bias." (Id.) Petitioner states that either of the foregoing "could have provided a basis for challenging Juror Hicks for cause." (Id.) Finally, Petitioner argues that "[t]he presence of a prosecution-favorable juror in [Petitioner's] case was particularly prejudicial because the case against him on the most serious charge, first-degree robbery, rose and fell on whether the jury believed Cool." (Id., p. 18.) Petitioner explains that "[w]hile the assault charge was supported by physical evidence and [Petitioner's] own statement, the gravamen of the robbery – that Cool's property was taken by [Petitioner] – could only be found beyond a reasonable doubt by the jury if they believed Cool." (Id.) Petitioner notes that Cool gave different testimony concerning the taking of the money and how it was taken at the initial interview with police, the preliminary hearing, and the jury trial. (Id.) Petitioner pointed out that it was Assistant Prosecutor Bailey that argued during closing statements that the jury should believe Cool in spite of her history of changing stories. (Id., p. 19.) Accordingly, Petitioner concludes that trial counsel was ineffective in his failure to adequately investigate and probe the nature of Juror Hicks' relationship with Assistant Prosecutor Bailey. (Id.)

In his Motion for Summary Judgment, Respondent argues that trial "counsel was not ineffective in failing to further inquire of Juror A.H. as Petitioner's claim that she had implied bias is baseless." (Document No. 42 and Document No. 44, pp. 18 – 22.) Respondent contends that Petitioner's foregoing claim fails because "there is no evidence the juror in question was anything other than a passing acquaintance of the assistance prosecuting attorney and acted as an unbiased juror." (Id., p. 18.) Respondent states that during *voir dire*, Juror Hicks admitted that the two attended the same high school but denied an ongoing personal relationship. (Id.) Respondent further asserts that Juror Hicks twice stated that she could be fair and impartial. (Id.) Respondent

notes that Petitioner relies upon a private correspondence initiated on his behalf where Juror Hicks indicated that Assistant Prosecutor Bailey "and I were acquaintances prior to the trial and were friends on Facebook at that time. To my knowledge I am not and was not friends with him on any other form of social media." (Id., pp. 18 – 19.) Respondent argues that Petitioner's claim that Juror Hicks "was somehow implicitly biased . . . has no support in fact or law in this case." (Id., p. 19.) Respondent states that "Petitioner points to no caselaw indicating that a juror who is a high school classmate and 'Facebook friend' who has no continuing relationship with the assistant prosecuting attorney, has not visited the attorney's home, and maintains that she could be unbiased somehow rises to the level of a juror who risks 'substantial emotional involvement.'" (Id.) Respondent further argues that "Petitioner claims baselessly that [Juror Hicks] was dishonest in her *voir dire* responses as she failed to disclose that she and the assistance prosecuting attorney were Facebook friends." (Id.) Citing Mascarella v. CPlace University SNF, LLC, 2015 WL 74322370 (M.D.La. Nov. 23, 2015), Respondent argues that a Facebook "friend" is not necessarily the same a friendship that might result in juror bias. (Id., pp. 20 – 21.) Respondent further contends that this "allegation of dishonesty is, at best, disingenuous on several levels" because Juror Hicks (1) "was clear that she knew the assistant prosecuting attorney from high school, (2) "was never asked, and thus, could not have been dishonest in answering, whether she was Facebook friends with him," (3) denied a continuing relationship with him, and (4) classified the assistant prosecutor as an acquaintance in her later correspondence. (Id., pp. 19 – 20.) Respondent argues that there has been no evidence of bias sufficient to strike Juror Hicks. (Id., p. 21.) Respondent, therefore, concludes that "the state court did not apply Strickland in an objectively unreasonable manner in finding that

there was no ineffective assistance of counsel regarding his *voir dire* of [Juror Hicks] as there is no possible prejudice to Petitioner." (Id.)

In Response, Petitioner argues "Juror Hicks' false answer during *voir dire* that she had no ongoing friendship with one of the prosecutors is sufficient to call her impartiality into question." (Document No. 46, pp. 5 - 7.) Petitioner continues to argue that Juror Hicks' "ongoing friendship" with Assistant Prosecutor Bailey "did not come to light until after [Petitioner's conviction, but could have been discovered by [Petitioner's] trial counsel who, in 2014, should have been aware of the role social media could play in jury selection." (Id., p. 6.) Petitioner states that "[b]y failing to follow up with Juror Hicks after she admitted knowing the prosecutor, [Petitioner's] trial counsel provided ineffective assistance of counsel." (Id.) Petitioner contends that the "ineffectiveness was prejudicial because the main charge against [Petitioner] – robbery – rose and fell on the credibility of Cool's testimony." (Id.) Petitioner again notes that Assistant Prosecutor Bailey "argued to the jury that it should believe Cool in spite of her history of changing stories." (Id., p. 7.) Petitioner concludes that "[i]f Juror Hicks gave the argument any additional weight, any benefit of the doubt, [Petitioner] was denied his right to an unbiased factfinder." (Id.)

The Circuit Court made the following findings of facts concerning the above issue:

> 33. Jury selection revealed that one prospective juror, Ms. Hicks, had gone to high school with assistant prosecutor Bailey. Ms. Hicks nonetheless stated that she would be able to impartially consider the evidence and decide the case without regard to that relationship. She did not have an ongoing personal relationship with Bailey. Ms. Hicks had never visited his home, nor had he visited hers. Ms. Hicks stated she could decide the case based upon the evidence without regard to having gone to high school with the assistant prosecutor.
>
> 34. Another juror was a friend of the family of the public defender Ms. Hasan, but stated that relationship would not affect any decision he made in the matter.

35. Another juror was acquainted (favorably, it seems) with Petitioner, but also assured the Court that she would be impartial.

* * *

152. Trial counsel personally had "friends" on Facebook with whom he did not have a personal, or at least close, personal relationship. He did not strike Ms. Hicks from the jury because there were other jurors he thought needed to be removed more than Ms. Hicks.

* * *

155. Trial counsel had no reason to believe that Ms. Hicks (the foreperson) had been anything other than fair and impartial.

(Document No. 10-10, pp. 6 - 25.) After identifying the Strickland standard and the equivalent West Virginia authority as the applicable precedent, the Circuit Court addressed the above issue, in pertinent part, as follows:

65. Trial counsel was not ineffective for failure to investigate the possible bias toward the State by a juror who went to high school with Mr. Bailey, one of the assistant prosecutors trying the case.

66. There is no evidence in the trial record whatsoever to suggest that the juror and the assistant prosecutor had any contact with one another after high school. The prospective juror properly brought to the Court's attention that she had gone to high school with Mr. Bailey. The Court properly made inquiry about that relationship and any possible ongoing relationship or bias because of the coincidence that the two attended high school together.

67. The prospective juror stated unequivocally that she would be able to listen impartially to the evidence and decide the case without regard to that relationship. She did not have an ongoing personal relationship with him and she had never visited his home, nor had he visited hers. She stated she could decide the case based upon the evidence, without regard to having gone to high school with the assistant prosecutor.

68. Although the trial court testified that perhaps he should have inquired about social media, Petitioner had not proven that in fact the juror and Mr. Bailey were social media "friends." Petitioner states they were, but provided no documentary evidence nor testimony other than his own to show the two had any social medica relationship.

69. This Court, however, decides the issue under the assumption that the assistant prosecutor and jury foreperson were Facebook "friends."

70. A criminal defendant is not entitled to a jury comprised of individuals who have never met any of the participants in the case. He is entitled to a jury that is free from partiality . . . .

***

71. The juror's response that she had gone to high school with Mr. Bailey was not a clear statement of bias. The mere acquaintance between the two might have indicated the possibility of bias. The trial court then properly questioned the prosecutive juror to determine whether or not actual bias or prejudice existed by the use of neutral questions not seeking a specific response nor questions that sought to rehabilitate the prospective juror.

72. She was asked whether her acquaintance with Mr. Bailey would tend to color her vision of the case. She unequivocally stated no. She said she had never visited with him in his home, nor had he been to her home. She unequivocally stated that she would decide the case based on the law and evidence. The questions and answers determined that she was free from bias and was completely impartial. There were no other questions to be asked by the State nor defense counsel.

73. Petitioner has not demonstrated that the juror was biased against Petitioner, nor has he demonstrated even the potential for bias as there is no evidence to refute the juror's unequivocal statement that she was impartial.

74. As the juror was completely impartial and no further investigation into her partiality or lack thereof would have been undertaken by an objectively reasonable practitioner, this contention affords Petitioner no relief. Moreover, Petitioner has failed to demonstrate that, in fact, the juror was not impartial so that the outcome of the trial would differ had she not been a juror. Petitioner satisfies neither prong of *Strickland/Miller* and this contention affords Petitioner no relief.

75. Again, Petitioner was entitled to an impartial jury, not one partial to him and or against the State. The purpose of *voir dire* is to obtain a panel of jurors free from bias or prejudice. "The true test to be applied with regard to qualifications of a juror is whether a juror can, without bias or prejudice, return a verdict based on the evidence and the court's instructions and disregard any prior opinions he may have had."

76. Petitioner has not demonstrated that the jurors who tried him – specifically

> the juror foreperson – were anything other than free from bias or prejudice. Trial counsel was no ineffective during the *voir dire*, and this contention affords Petitioner no relief.

(Document No. 10-10, pp. 38 - 40.) After identifying the Strickland standard and the equivalent West Virginia authority as the applicable precedent, the SCAWV adopted and incorporated the Circuit Court's findings and conclusions in affirming the Circuit Court's decision. (Document Nos 10-11, pp. 4 – 5.) Specifically, the SCAWV stated, in pertinent part, as follows:

> Here, the circuit court applied an objective standard to determine that counsel's performance was not outside the broad range of professionally competent assistance and that even if it had been, the results of petitioner's trial would not have been different. Upon review of the record on appeal, the parties' arguments, and the circuit court's order, we find that the circuit court did not err in concluding that petitioner had not satisfied the two-prong test of *Strickland v. Washington*. *See* Syl. Pt. 5, *Miller* at 3, 459 S.Ed.2d at 114.
>
> Upon our review and consideration of the circuit court's order, the parties' arguments, and the record submitted on appeal, we find no error or abuse of discretion by the circuit court. Our own review of the record and the parties' briefs supports the circuit court's decision to deny petitioner habeas relief based on the assignments of error presented on appeal. As we stated above, the circuit court's order contains detailed findings of fact and conclusions of law as to the errors raised before the circuit court and again on appeal. In light of our conclusions that the circuit court's order and the record before us disclose no clear error or abuse of discretion, we hereby adopt and incorporate the circuit court's findings and conclusions as they relate to petitioner's assignment of error raised herein and direct the Clerk to attach a copy of the circuit court's October 23, 2018, "Final Order" to this memorandum decision.

(Id.)

The Sixth Amendment, made applicable to the State through the Fourteenth Amendment, affords an accused the right to a trial by an impartial jury. The "touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.'" McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)(citation omitted). The United States Supreme Court has explained that *voir*

dire examination serves to protect the foregoing right "by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges." Id., 646 U.S. at 554, 104 S.Ct. 845. The Supreme Court, however, recognized the following:

> To invalidate the result of a three-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give. A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on voir dire examination.

Id., 646 U.S. at 555, 104 S.Ct. 845. The Supreme Court, therefore, held that for an accused to obtain a new trial based upon a claim of jury impartiality, the accused "must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." Id., 646 U.S. at 556, 104 S.Ct. 845. The Supreme Court recognized that even though "motives for concealing information may vary, . . . only those reasons that affect a juror's impartiality can truly be said to affect the fairness of trial." Id.; also see Conaway v. Polk, 453 F.3d 585 (4th Cir. 2006)("The inquiry into whether a trial's fairness was affected essentially constitutes a third part, however, as it must be satisfied before the juror's bias may be proven.")

The Fourth Circuit has recognized that the McDonough test applies "equally to deliberate concealment and to innocent non-disclosure." Conner v. Polk, 407 F.3d 198, 205 (4th Cir. 2005). Regarding the second prong of the McDonough test, "'[t]he category of challenges for cause is limited,' and traditionally, a challenge for cause is granted only in the case of actual bias or implied

bias." Jones v. Cooper, 311 F.3d 306, 312 (4th Cir. 2002); also see Person v. Miller, 854 F.2d 656, 664 (4th Cir. 1988)("Challenges for cause are typically limited to situations where actual bias is shown.") To establish actual bias, a party must prove that a juror was not "capable and willing to decide the case solely on the evidence before [him or her]." McDonough, 464 U.S. at 554, 104 S.Ct. at 845. Implied bias "is limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." See Person v. Miller, 854 F.2d 656, 664 (4th Cir. 1988), citing Smith v. Phillips, 455 U.S. 209, 221-24, 102 S.Ct. 940, 948-50, 71 L.Ed.2d 78 (1982). Examples of implied bias include "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." Conner, 407 F.3d at 206, citing Smith, 455 U.S. at 222, 102 S.Ct. at 949.

Considering the first McDonough factor, the undersigned finds that Juror Hicks did not fail to answer honestly a material question on *voir dire*. During *voir dire*, Juror Hicks was questioned as follows:

JUSTIN COLLIN:	Good morning, everyone. My name is Justin Collin. This is my co-counsel, Iram Hasan. And together we represent Raymond Richardson. Raymond goes by "Dre." That's what most people call him. And I don't think we'll be calling any witnesses today.
THE COURT:	All right.
JUSTIN COLLIN:	Is anyone acquainted with, first of all, any of the lawyer in this case, has a personal or business relationships with any of them?

All right, we have a couple of jurors. You are Ms. Hicks?

JUROR HICKS: Uh-huh. I went to high school with James.

THE COURT: All right. Do you have an ongoing personal relationship with him?

JUROR HICKS: No.

THE COURT: Have you visited in each other's homes?

JUROR HICKS: No.

THE COURT: Would you be able to listen fairly and impartially to the evidence in this case?

JUROR HICKS: Yes, I believe I would.

THE COURT: And decide this case based on the evidence and without regard to your having gone to school with James?

JUROR HICKS: Yes, I believe I would.

(Document No. 40-2, pp. 41 – 42.) Thus, Juror Hicks responded that she was acquainted with Assistance Prosecutor Bailey because they went to high school together, but she denied having any ongoing personal relationship. Juror Hicks was never specifically asked if she was "friends" with Assistance Prosecutor Bailey on social media. Although Petitioner attaches an Exhibit wherein Juror Hicks acknowledges she was "friends" with Prosecutor Bailey on Facebook, she continues to indicate that he was an acquaintance and there was no ongoing personal relationship. (Document No. 1-4, p. 23.)("James and I were acquaintances prior to the trial and were friends on Facebook at that time. To my knowledge I am not and was not friends with him on any other form of social media.") Thus, the undersigned cannot find that Juror Hicks failed to honestly answer a material question on *voir dire*. For purposes further consideration of the McDonough test, the

undersigned will assume that Juror Hicks' failure to disclose her status as a Facebook "friend" as a personal relationship constitutes an "innocent non-disclosure." Conner, 407 F.3d at 205.

Regarding the second McDonough factor, Petitioner must show that a correct response would have provided a valid basis for a challenge for cause. The undersigned, therefore, will consider whether actual or implied bias existed on the part of Juror Hicks. The undersigned has thoroughly reviewed the record and cannot find that the SCAWV's finding of no actual or implied bias was contrary to a reasonable application of Federal law, or based on an unreasonable determination of facts. Whether a particular juror is impartial is a question of fact, subject on a *habeas* petition to a presumption of correctness. See 28 U.S.C. § 2254(e)(1). It is well recognized that the trial court was in the best position to assess the demeanor and weigh the credibility of the juror in question. Patton v. Yount, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)("Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying . . . Demeanor, inflection, the flow of questions and answer can make confused and conflicting utterance comprehensible."); Wainwright v. Witt, 469 U.S. 412, 426 (1985)(since the trial court "sees and hears the juror," the trial court's credibility determination is entitled to "special deference"). The Circuit Court determined there was absolutely no evidence to suggest that Juror Hicks and Assistant Prosecutor Bailey had any ongoing personal relationship with one another after high school besides merely acquaintances. Juror Hicks acknowledged that she had never visited Assistant Prosecutor Bailey's home, nor had he visited hers. Furthermore, Juror Hicks unequivocally stated that she would be able to listen impartially to the evidence and decide the case without regard to having gone high school with the assistant prosecutor.

Next, the undersigned will consider whether an implied bias existed. Although the record reveals that Juror Hicks was Facebook "friends" with Assistant Prosecutor Bailey at the time of the criminal case, such alone does not establish an implied bias. As stated above, implied bias "is limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." The State court determined that evening assuming Juror Hicks was Facebook "friends" with Assistant Prosecutor Bailey, such did not constitute an implied bias. The State Court reasoned that "a criminal defendant is not entitled to a jury comprised of individuals who have never met any of the participants in the case." See United States v. Davis, 306 F.3d 398, 419 (6th Cir. 2002)(There "is no constitutional prohibition in jurors simply knowing the parties involved . . . .'"), cert. denied, 537 U.S. 1208, 123 S.Ct. 1280, 154 L.Ed.2d 1054 (2003). Additionally, the undersigned's review of the record fails to indicate that the fact that Juror Hicks was a Facebook "friend" of the assistance prosecutor rose to the level of extreme and exceptional cases where bias is conclusively implied. See Treesh v. Bagley, 612 F.3d 424, 437-38 (6th Cir. 2010)(bias is not implied where a juror had taken a student-teacher relationship with the prosecutor); Ross v. Petro, 2020 WL 1550878, * 12 (N.D.Oh. April 1, 2020)("The affidavit from Ross's father established only that, on the day after the verdict had come in, he had seen a picture of the foreperson identified as a friend on the [victim's] page. With no evidence to show that the juror had 'liked' the page during trial, it was not unreasonable for the state court to refuse to speculate that the foreperson had, in violation of her oath, showed bias or partiality against Ross (and in favor of the victim) by 'liking' the page during the trial.")

Additionally, the undersigned finds that Mascarella v. CPlace University SNF, LCC, is instructive on the above issue explaining as follows:

> But "friendships" on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships or relationships in the community, which are generally the concern during *voir dire*. The degree of relationship between Facebook "friends" varies greatly, from passing acquaintanceships and distant relatives to close friends and family. The mere status of being a "friend" on Facebook does not reflect this nuance and fails to reveal where in the spectrum of acquaintanceship the relationship actually falls. Facebook allows only one binary choice between two individuals where they either are "friends" or are not "friends," with no status in between.
>
> Indeed, some people have thousands of Facebook "friends," ... which suggests that many of those relationships are at most passing acquaintanceships. This is further complicated by the fact that a person can become "friends" with people to whom the person has no actual connection, such as celebrities and politicians. Thus, a Facebook member may be "friends" with someone in a strictly artificial sense.

Mascarella v. CPlace University SNF, LLC, 2015 WL 74322370, * 3 (M.D.La. Nov. 23, 2015)(citing Sluss v. Commonwealth of Kentucky, 381 S.W.3d 215 (Ky. 2012)). In the instant case, there is absolutely no evidence that the Juror Hicks' status as a Facebook "friend" of Assistant Prosecutor Bailey was any more than a mere acquaintance. Juror Hicks testified that she had no personal relationship with Assistant Prosecutor Bailey nor had either one visited the others home. Finally, Petitioner fails cite any Supreme Court precedent recognizing implied bias based on the foregoing circumstances. Accordingly, the undersigned finds no implied bias on the part of Juror Hicks. The undersigned, therefore, finds Petitioner cannot satisfy the second prong of the McDonough test because Petitioner has failed to show that a correct response would have provided a valid basis for a challenge for cause. Based upon the foregoing, the undersigned finds that Petitioner fails to satisfy the McDonough test. Thus, the undersigned finds that Petitioner has failed to demonstrate that he suffered any prejudice due to trial counsel's alleged ineffectiveness in

questioning Juror Hicks.

Based upon the foregoing, the undersigned finds that the State court's determination on the above claim was not contrary to, or an unreasonable application of, clearly established federal law; or based on an unreasonable determination of the facts. Accordingly, the undersigned respectfully recommends that Respondent's Motion for Summary Judgment be granted as to the above claim of ineffective assistance of counsel.

PROPOSAL AND RECOMMENDATION

The undersigned therefore hereby respectfully **PROPOSES** that the District Court confirm and accept the foregoing findings and **RECOMMENDS** that the District Court **GRANT in part and DENY in part** Respondent's Motion for Summary Judgment (Document No. 42) and Petitioner's Amended Section 2254 Petition (Document No. 40). Concerning Petitioner's claim of ineffective assistance of counsel concerning Juror Hicks, the undersigned recommends that Respondent's Motion for Summary Judgment (Document No. 42) be **GRANTED** and Petitioner's Amended Section 2254 Petition (Document No. 40) be **DENIED**. Concerning Petitioner's claim of ineffective assistance of counsel concerning the constructive amendment of the indictment, the undersigned recommends that Respondent's Motion for Summary Judgment (Document No. 42) be **DENIED** and Petitioner's Amended Section 2254 Petition (Document No. 40) be **GRANTED**.

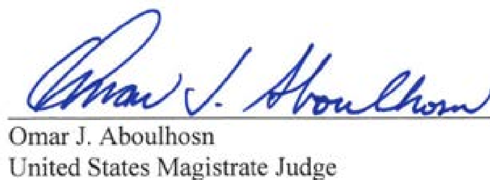
The parties are hereby notified that this "Proposed Findings and Recommendation" is hereby **FILED**, and a copy will be submitted to the Honorable United States District Judge John T. Copenhaver, Jr. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rule 6(d) and 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen days (filing of objections) and three days (if received by mail) from the date of filing of

this Proposed Findings and Recommendation within which to file with the Clerk of this Court specific written objections identifying the portions of the Findings and Recommendation to which objection is made and the basis of such objection. Extension of this time period may be granted for good cause.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 155, 106 S.Ct. 466, 475, 88 L.Ed.2d 435 (1985); Wright v. Collins, 766 F.2d 841, 846 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir.) cert. denied, 467 U.S. 1208, 104 S.Ct. 2395, 81 L.Ed.2d 352 (1984). Copies of such objections shall be served on opposing parties, District Judge Copenhaver, and this Magistrate Judge.

The Clerk of this Court is directed to file this "Proposed Findings and Recommendation" and to send a copy of the same Petitioner and to counsel of record.

Dated: June 2, 2022.



Omar J. Aboulhosn
United States Magistrate Judge