IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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LEE A. KNOWLIN, JR.,

Petitioner,

v.

DANIEL BENIK, Warden,
Stanley Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

03-C-577-C

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This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Lee Knowlin, Jr., currently incarcerated at the Stanley Correctional Institution within this district, challenges his December 2000 conviction in the Circuit Court for Racine County for burglary while armed and carrying a concealed weapon, with an enhancer for habitual criminality. A jury found Knowlin guilty of burglarizing a Kentucky Fried Chicken restaurant on July 21, 1999, in the City of Racine. Knowlin maintains that he was framed by City of Racine police, who he says used his shoes to plant shoe print impressions on the top of a chair that was found inside the restaurant and who lied at trial about this and other matters to obtain the conviction against Knowlin. Knowlin contends that his ability to prove this at trial was stymied by his lawyer's ineffectiveness, the prosecutor's misconduct and the trial court's erroneous evidentiary rulings.

For reasons explained below, I am recommending that this court deny the petition. Having reviewed the transcripts from the suppression hearing, trial and postconviction hearings and the state courts' decisions on Knowlin's claims, I conclude that the state courts did not make any unreasonable findings of fact or misapply any clearly established federal precedent when they concluded that Knowlin was not entitled to relief on any of his claims.

## FACTS

### I. Background

While on routine patrol at 5:00 a.m. on July 21, 1999, Officer Hansen of the Racine Police Department saw evidence of a break-in at a Kentucky Fried Chicken restaurant. He immediately noticed Knowlin walking on a bike trail a short distance away and saw no one else on foot in the area. Matthew Arendt, another officer responding to the scene, also saw Knowlin and saw that he was sweating and looking back over his shoulder at Officer Hansen's vehicle as he hurriedly walked away from the area. Officer Arendt subsequently stopped Knowlin, patted him down, and found a weapon-like object in his pocket. When questioned about where he was going, Knowlin gave vague answers.

Knowlin was arrested, handcuffed, and searched. The object in his pocket was a knife. Police also found a rag in Knowlin's pocket that was similar in size, texture and color to rags found inside the restaurant. Additionally, objects stolen from the restaurant were

discovered near where Knowlin was stopped and a greasy shoe print impression matching Knowlin's shoes was observed on a chair in the restaurant.

The state charged Knowlin with burglary while armed. Knowlin, by counsel, moved to suppress the crime scene evidence as the product of what he argued was an illegal investigatory stop and arrest. The trial court held a suppression hearing at which officers Hansen and Arendt testified. The court denied the motion, finding that the stop was justified by the officers' discovery of a recent burglary, Knowlin's presence in the area at 5 a.m. and Knowlin's furtive gestures and nervousness.

At trial, the state presented the testimony of the officers who were involved in arresting Knowlin and discovering and preserving the evidence from the crime scene. It also presented testimony from a state crime lab expert, Jeffery May, who found that one of the shoe print impressions on the chair in the restaurant matched Knowlin's left shoe to the exclusion of all other shoes.

During trial, one of the state's witnesses produced new property inventory sheets that had not been previously provided to the defense. The trial court adjourned the trial briefly to allow Knowlin and his lawyer to examine the documents and analyze their impact on the defense. The court denied Knowlin's motion for mistrial, but allowed his lawyer to voir dire a successor records custodian before she testified. The court also denied Knowlin's objection to admission of the state's evidence, finding that the state had established sufficiently the chain of custody and that there was no evidence of tampering.

Knowlin's defense consisted of efforts to show that police officers framed him. To that end he pointed out discrepancies and inconsistencies in their testimony and attacked their handling of the evidence. He pointed out that there were no footwear impressions visible on photographs of the chair that had been taken at the crime scene. He also attempted to offer an innocent explanation for his presence in the area at 5:00 a.m. In particular, Knowlin contended that he was walking to a nearby business to visit his father, who he believed worked there. A defense witness, Valeria Christian, testified that Knowlin's father was working at the business during the time the burglary occurred. However, on cross-examination Christian stated that Knowlin's father had stopped working there five days before the burglary.

The jury found Knowlin guilty of the burglary. In postconviction proceedings, Knowlin alleged that trial counsel provided ineffective assistance by: (1) failing to move for reconsideration of the suppression decision after investigation uncovered discrepancies and physical impossibilities in the officers' description of Knowlin's stop and arrest; (2) failing to obtain expert analysis of the shoe-print evidence; (3) permitting witness Christian to testify falsely or inaccurately concerning his father's employment; and (4) making inaccurate and damaging comments about the evidence in closing argument. The trial court held a postconviction hearing at which Knowlin presented numerous witnesses, including his trial lawyer, officers who had testified at trial and May, the state crime lab expert. Knowlin also presented photographs and maps of the area surrounding the restaurant.

With respect to the suppression motion, Knowlin alleged that his attorney erred twice: first, in failing to file a motion for reconsideration *before* trial after receiving dispatch tapes and other evidence that Knowlin says undermined the truth of the police officer's testimony concerning where they had first observed Knowlin; and second, for failing to file the motion *after* trial on the basis of certain aspects of Officer Arendt's trial testimony that differed from his suppression hearing testimony. Knowlin's first claim was based upon dispatch tapes and geographical maps of the area around the Kentucky Fried Chicken restaurant that he contended showed that the officers had to have been lying at the suppression hearing when they testified that they observed him near the restaurant when they first discovered the break-in. At the postconviction hearing, trial counsel acknowledged that there were inconsistencies between the officers' testimony and some of the evidence. Counsel testified that he had considered filing a motion to reconsider the suppression hearing but decided instead to use the evidence and discrepancies in the officers' testimony to impeach them at trial. Counsel testified that he did not feel that he could establish that the officers' testimony was an "outright lie." As for Knowlin's contention that the area's layout and foliage would have made it impossible for Officer Hansen to have observed Knowlin on the bike trail from his location, counsel testified that he and his investigator went to the site and found that not to be the case.

Knowlin attempted to establish through May that there was evidence that the footwear impressions had been planted by police after they removed the chair from the crime

scene. However, May testified at the postconviction hearing that he had examined the crime scene photos and found no evidence of tampering. May testified that before the hearing, he had digitally enhanced and enlarged two photographs that had been taken from the crime scene and compared them to the actual chair seat. May observed that footwear impressions on the digitally enhanced photographs corresponded to the impressions in the same area of the chair on the photographs taken at the crime lab. May explained that although the photographs from the crime scene at first appeared to show no footprints on the chair, May was able to discover the footprints by digitally enhancing and enlarging the photographs. May explained that the flash unit had not been in the correct position when the crime scene photographs were taken, which had washed out the visibility of any of the prints on the photographs.

The trial court found that trial counsel had provided adequate representation and denied Knowlin's motion. Crediting counsel's testimony concerning the issues raised by Knowlin, the court found that none of the mistakes or omissions of which Knowlin complained amounted to deficient performance or made any difference to the outcome of the proceedings. The trial court found that trial counsel had made a reasonable tactical decision in not bringing the motion to reconsider the suppression motion. Further, after hearing the evidence presented by Knowlin, the court found that it was "not satisfied that even if a [motion to reconsider] had been brought, that it would have been granted by the court." Tr. of Post-Conviction Mot. Hearing, dkt. # 16, Vol. 4, exh. 12, at 84.

As for Knowlin's claim that his lawyer should have filed a motion after the trial on the basis of Arendt's testimony, the court found that this was again a situation where counsel had decided to handle the issue by attacking the credibility of the officers. In addition, it found that there was insufficient new evidence brought out at trial that would have caused it to rule differently on the suppression issue. As for Knowlin's claim of evidence tampering, the court found that May's testimony refuted Knowlin's contention that the footwear impressions had been planted on the chair seat after it was removed from the crime scene.

Knowlin appealed his judgment of conviction and the order denying him postconviction relief. On appeal, Knowlin raised the following issues: (1) whether the trial court properly found counsel effective; (2) whether the prosecutor made improper remarks during closing arguments; (3) whether the trial court erroneously denied a postconviction motion for further scientific testing; and (4) whether the evidence was sufficient to support the guilty verdict. In addition, Knowlin argued that he was entitled to a new trial in the interest of justice because of the state's discovery violation and failure to produce witnesses at trial concerning chain of custody, the trial court's erroneous admission into evidence of the chair seat and rag and false testimony by one of the police officers concerning where certain photographs of the chair had been taken.

The Wisconsin Court of Appeals analyzed Knowlin's ineffective assistance of counsel claim under the performance-prejudice test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). It agreed with the trial court that Knowlin had failed to establish that he had

received ineffective assistance of counsel. The court acknowledged that trial counsel could have asked the court to reconsider its suppression ruling because of discrepancies in the officers' versions of events that came out at trial. *State v. Knowlin*, 2003 WI App 188, ¶8, 266 Wis. 2d 1060, 668 N.W. 2d 562 (unpublished opinion). However, the court noted that counsel had testified at the postconviction hearing that he did not believe the discrepancies were sufficiently persuasive to obtain reversal of the court's ruling, and instead chose to use them to attack the officer's credibility before the jury. Like the trial court, the court of appeals concluded that counsel's decision was a reasonable tactical decision. Further, it agreed with the trial court that Knowlin could not show prejudice because the discrepancies discovered at trial would not have changed the outcome of the suppression hearing. *Id*.

Next, the court of appeals found that counsel was not deficient for failing to retain an expert to prove that police officers fabricated the shoe print evidence. The court noted that May said he found nothing in the photographs of the chair that were taken at the crime scene or afterwards to suggest that police had tampered with the evidence. As for Knowlin's claim that testing of the substance that left the shoe print impressions would have revealed evidence of police tampering, the court noted that Knowlin had offered no evidence to support his theory. Accordingly, he had failed to show that the outcome of the proceeding would have been different. *Id*. at ¶ 9.

The court also found that counsel was not deficient for using Christian as a witness. The court noted that counsel testified at the postconviction hearing that he had called her

at Knowlin's urging and that he had expected her to testify correctly on direct examination that Knowlin's father had stopped working at the business in the area of the burglary five days before the burglary occurred. The court noted that counsel had testified that the defense theory was that even though Knowlin's father had stopped working at the business before the burglary, Knowlin did not know that, and therefore still had reason to look for his father at the business. The court found this to be a reasonable tactical decision. *Id*. at ¶ 10.

Next, the court rejected Knowlin's claim that reversal was required because of improper comments made by the prosecutor during closing argument. Knowlin contended that the prosecutor had acted improperly when, after noting defense counsel's arguments suggesting altered or manufactured evidence, the prosecutor stated that "the only way you can acquit the defendant is to find that all the police in this case were lying about what they testified to." The court of appeals found that Knowlin had waived his right on appeal to challenge this comment by failing to object to it at trial. *Id*. at ¶ 11. In any event, noted that court, the prosecutor's comment fairly described Knowlin's theory of defense and was not outside the bounds of proper closing argument. *Id*.

The court of appeals found that the evidence presented at trial was sufficient to support the verdict. It noted that the evidence of guilt, when viewed most favorably to the state, was very strong. The only question was whether the evidence was the product of

inaccurate testimony or attempts to frame Knowlin, a matter that was a credibility determination for the jury. *Id*. at ¶ 14.

Finally, the court found no basis to grant Knowlin a new trial in the interest of justice. It noted that all of the issues that Knowlin had identified had been addressed during the trial and that a second trial was not likely to produce a different result. *Id*. at ¶ 13.

The Wisconsin Supreme Court denied Knowlin's petition for review.

## ANALYSIS

Knowlin's habeas petition is essentially a rehash of his state court appeal, with a few modifications. He has abandoned his claim that the trial court erred in denying his motion for postconviction testing of the substance on the chair. In addition, he recasts his "interest of justice" arguments in constitutional terms, contending that 1) the state's discovery failures violated his right to effective assistance of counsel; 2) the prosecutor suborned perjury and denied Knowlin a fair trial by presenting a witness who lied about where he took photographs of the chair; and 3) the trial court's admission of the rag and chair seat violated his right to a fair trial. As will be explained below, Knowlin is not entitled to habeas relief on any of his claims.

I. Ineffective Assistance of Counsel

Knowlin claims that he was denied the effective assistance of counsel under the Sixth Amendment. To prevail on his ineffective assistance claim, he must demonstrate that: (1) his counsel's performance fell below an objective standard of reasonableness, and (2) caused him prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). In order to satisfy the prejudice requirement, Knowlin must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

Review of the state court's adjudication of Knowlin's ineffective assistance claim is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996, codified at 28 U.S.C. § 2254. Under the AEDPA, a state prisoner who petitions for a writ of habeas corpus must establish that the state court adjudication of his case was "contrary to, or involved an unreasonable application of, clearly- established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (emphasis added). It is clear from the record that the Wisconsin Court of Appeals properly identified and applied *Strickland* as the proper legal standard governing Knowlin's ineffective assistance claim. Thus, unless the state appellate court "unreasonably applie[d] [the *Strickland* standard] to the facts of the case," this court may not grant Knowlin's petition for habeas relief. *Bell v. Cone*, 535 U.S. 685 (2002).

The bar for establishing that a state court's application of the *Strickland* standard was "unreasonable" is a high one. Because *Strickland* "builds in an element of deference to

counsel's choices," and § 2254(d)(1) "adds a layer of respect for a state court's application of the legal standard," only a "clear error" in applying *Strickland* will support a writ of habeas corpus. *Holman v. Gilmore*, 126 F.3d 876, 882 (7th Cir.1997). If the Wisconsin Court of Appeals "t[ook] the [constitutional standard] seriously and produce[d] an answer within the range of defensible positions," the writ must be denied. *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000).

Additionally, in reviewing the state trial and appellate courts' adjudication of an ineffective assistance claim, this court must presume that all factual determinations made by the state courts, including credibility determinations, are correct, unless rebutted by clear and convincing evidence. *See Collier v. Davis*, 301 F.3d 843, 848 (7th Cir. 2002); 28 U.S.C. § 2254(e)(1). Under section 2254(d)(2), relief may be had where the petitioner can show by clear and convincing evidence that the state court's factual determinations were unreasonable. 28 U.S.C. § 2254(e)(1). *Harding v. Walls*, 300 F.3d 824, 828 (7th Cir. 2002).

A. Failure to Request Reconsideration of Suppression Order

Knowlin claims that his attorney was ineffective for failing to request the circuit court to reconsider its denial of Knowlin's motion to suppress the evidence seized from him, which consisted of his shoes, a rag and a knife. Knowlin argues that he is entitled to relief under § 2254(d)(1) and (2) because the state courts unreasonably applied *Strickland* and unreasonably determined the facts. Knowlin is incorrect.

The state trial and appellate courts found that counsel offered a reasonable strategic explanation for his decision not to seek reconsideration of the suppression decision. Knowlin's numerous arguments essentially boil down to a disagreement over his lawyer's assessment that he could not prove that the officers lied at the suppression hearing. This falls far short of establishing that counsel was ineffective, or that the state courts unreasonably applied *Strickland*.

This is not a case like *Rouse v. United States*, 359 F.2d 1014, 1016 (D.C. Cir. 1966), where the court expressed skepticism about the credibility of the officer's testimony at the suppression hearing and one of the officers later admitted at trial that he had been confused about the facts of the arrest when he testified at the suppression hearing. In this case, the officers were consistent about where they had observed Knowlin and their actions on the morning of the arrest. The fact that dispatch logs and tapes do not square precisely with the officers' recollection of the timing of events does not establish that the officers perjured themselves about seeing Knowlin coming off the bike trail. Furthermore, although Knowlin harps on discrepancies in Arendt's trial testimony about his location when he first heard about the break-in at the restaurant, Knowlin fails to mention that Arendt's partner, Officer Nethery's trial testimony matched Arendt's suppresion hearing testimony on this point.

Wishing to delve more deeply into this issue, Knowlin has asked this court to order respondent to submit the dispatch tapes, dispatch log, geographical map and photographs. (Although Knowlin has styled his motion as a "motion to amend return," in reality what he

seeks is expansion of the record under Rule 7 of the Rules Governing 2254 Cases.) He contends that these exhibits establish that the state courts unreasonably determined the facts by failing to "resolve" the discrepancies between this evidence and the officers' testimony at the suppression hearing. However, the task before the state courts was not to resolve the alleged discrepancies but rather to decide whether counsel had provided effective performance in his handling of the discrepancies. The courts essentially accepted Knowlin's contention that discrepancies existed, but concluded that counsel reasonably exercised his professional judgment when he decided to attack the officers' credibility at trial instead of moving to reopen the suppression hearing. Knowlin may think he could "prove" that the officers lied or that the discrepancies were sufficient to warrant revisiting the suppression issue, but his lawyer felt otherwise.

Having reviewed the transcripts from the suppression hearing, trial and postconviction hearing and all of Knowlin's arguments, I conclude that the state courts reasonably applied *Strickland* when they deferred to counsel's judgment. *See Strickland*, 466 U.S. at 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"). Because the exhibits had little bearing on this conclusion, it is not necessary for the state to produce them.[1]

[1] Knowlin has included numerous other exhibits in his motion to amend the return. Having reviewed that list and Knowlin's arguments, I am satisfied that the existing record is sufficient to allow this court to determine the reasonableness of the state courts' decisions and findings. Accordingly, I am denying the motion to amend the return in its entirety. Because a report and recommendation is not the appropriate vehicle in which to address the motion, I have entered a separate order denying the motion.

Even if counsel's failure to file the motion were to amount to deficient performance, Knowlin cannot show that it was objectively unreasonable for the state courts to have found that he was not prejudiced by that omission. To establish prejudice, Knowlin had to prove 1) that if counsel had filed a motion to reconsider the suppression motion, then the court probably would have granted it; *and* 2) that if the court had held a new suppression hearing, then it would have suppressed the evidence. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986). The state trial court heard all the evidence introduced at the suppression hearing, trial and postconviction hearing. At the conclusion of the postconviction hearing, the court indicated that none of the evidence that had come out at trial or at the postconviction hearing would have caused it to change its suppression decision. This court is not in a position to second-guess that conclusion. Accordingly, Knowlin has failed to satisfy the prejudice prong of *Strickland*.

Knowlin also attempts to argue that the state courts denied him the opportunity for a "full and fair" suppression hearing, and therefore this court should independently review his Fourth Amendment claim. *See Stone v. Powell*, 428 U.S. 465, 494 (1976) (where state has provided opportunity for "full and fair" litigation of Fourth Amendment claim, state prisoner may not be granted federal habeas corpus relief on ground that evidence obtained in unconstitutional search or seizure was introduced at trial). Knowlin's *Stone* argument is based on his contentions that the state courts did not properly evaluate the evidence he

presented at the postconviction hearing and that they imposed too high a burden on him to show that the trial court should reconsider its suppression ruling.

However, the question under *Stone* is whether the petitioner was granted a full and fair *suppression* hearing, not whether he was granted a full and fair *postconviction* hearing. In any case, Knowlin was given ample opportunity to litigate his Fourth Amendment claim. The court held a suppression hearing at which Knowlin's lawyer thoroughly cross-examined the officers. At the conclusion of the hearing, the court decided to allow the evidence after considering the proper legal standards governing investigative stops, searches made pursuant to arrest and the admissibility of custodial statements.

If that were not enough, the trial court allowed Knowlin enormous leeway at the postconviction hearing to present evidence in support of his claim that reconsideration of the suppression ruling was warranted. The trial court's conclusion that none of that evidence would have caused it to change its decision to deny suppression defeats Knowlin's contention that the court "ignored" the evidence. There is simply no merit to Knowlin's contention that he was denied a full and fair suppression hearing. *See Cabrera v. Hinsley*, 324 F.3d 527, 532 (7th Cir. 2003) ("In short, 'full and fair' guarantees the right to present one's case, but it does not guarantee a correct result.").

B. Failure to Hire Expert to Examine Chair for Evidence of Tampering

At trial, state crime lab expert Jeffery May testified that he had compared the shoe print impressions that were on a chair seat that police had taken from the Kentucky Fried Chicken restaurant with Knowlin's shoe prints and concluded that one of the impressions matched Knowlin's shoes to the exclusion of any other shoes. Knowlin maintains that the prints were planted by police officers, who took his shoes, applied some special substance to them, and used them to make shoe print impressions on the chair seat. Knowlin contends that his trial lawyer was ineffective for failing to hire an expert to "compare the crime scene photos of the chair seat to the actual seat to uncover evidence tampering."

Knowlin's claim appears to hinge on his contention that no footprint impressions were visible on any of the crime scene photographs. However, May testified at the postconviction hearing that he had examined the crime scene photos and found no evidence of tampering. The state courts found that May's testimony refuted Knowlin's theory that an expert would have discovered photographic evidence of police tampering, and therefore Knowlin had failed to show that his lawyer's omitted investigation probably would have changed the outcome. This conclusion was the only conclusion reasonably supported by the record.

Knowlin now contends that the photographs that May enlarged were *not* from the crime scene, and that therefore the state courts' decision rests upon an unreasonable determination of the facts. However, the transcript from the postconviction hearing does

not support this assertion. May testified that he had surmised from the background of the photographs that the photographs he had enlarged, Exhibits 14 and 31, had been taken at the Kentucky Fried Chicken restaurant. In addition, Officer Yoghourtjian identified Exhibit 14 as having been taken at the crime scene. Furthermore, Knowlin asserts that May analyzed the crime scene photographs pursuant to a joint agreement between the prosecutor and Knowlin whereby they agreed to submit negatives of the chair to the state crime laboratory. *See* Pet. Mot. for Discovery, dkt. # at p. 4. Yet Knowlin did not complain at the hearing that May analyzed the wrong photographs or failed to analyze a photograph from the crime scene. The transcripts demonstrate that Knowlin is a thorough litigator who seeks to leave no stone unturned. Had May truly analyzed the wrong photographs, as Knowlin contends now, I am confident that he would have brought that up to the trial court at the postconviction hearing. He didn't. Knowlin also said nothing about May's alleged error in his brief-in-chief to the court of appeals. The state courts cannot be faulted for failing to consider facts that were not brought to their attention. More importantly, there is simply no support in the record for Knowlin's contention that May did not examine photographs from the crime scene.

For these same reasons, there is no basis to grant Knowlin's request for preservation of evidence and for discovery so that May (or someone else) can examine the photographs of the crime scene for evidence of shoe prints. Knowlin had ample opportunity to pursue this discovery in the state court proceedings. No good cause exists to warrant more

discovery at this juncture. *See Henderson v. Walls*, 296 F.3d 541, 553 (7th Cir. 2002) (habeas petitioner must show "good cause" for discovery). For that same reason, I am denying Knowlin's request that the state be ordered to produce exhibits to support Knowlin's discovery motion. I have entered a separate order to that effect.

Taking a different approach to his evidence tampering theory, Knowlin argues that there is evidence that the shoe prints were altered. Knowlin points out that Officer Hansen testified at the preliminary hearing that he saw the entire word "UpTempo" on the chair seat at the crime scene, but May testified at trial that he observed only the letters "U", "P", and "T" on photographs that were taken of the chair seat at the crime lab. However, even accepting these facts as true, it is unclear how they relate to Knowlin's claim that counsel was defective for failing to hire an expert. Knowlin could have gleaned this information simply by interviewing Hansen and May before trial. Furthermore, the fact that some of the letters in the shoe print may have been obliterated before the chair seat was sent to the crime lab does not support Knowlin's theory that police planted the shoe print impressions on the chair at the crime scene. In sum, the appellate court reasonably concluded that counsel was not ineffective for failing to hire an expert to review the crime scene photographs for evidence of tampering.

C. Failure to Retain Forensic Expert to Determine Nature of Substance on Chair

Next, Knowlin contends that counsel should have retained an expert to determine the nature of the substance that created the shoe print impressions on the chair seat. Knowlin theorizes that police applied some unknown substance to the soles of his shoes in order to plant the impressions on the chair, and that a forensic expert would have been able to detect this. The court of appeals rejected this claim, finding that Knowlin had offered no evidence to support his theory. In addition, the trial court found that trial counsel had provided reasonable strategic reasons for his decision to forego further testing of the chair seat. At the postconviction hearing, counsel explained that the "substance" evidence was already favorable to Knowlin, in that the complaint had stated that there were "greasy shoe prints" on the chair but the crime lab had detected no grease on Knowlin's shoes. Counsel established these facts at trial and argued to the jury that grease should have been found on Knowlin's shoes if he was the perpetrator.

The trial court was correct: this was a reasonable litigation strategy. The Sixth Amendment does not require lawyers to pursue every conceivable avenue of investigation, only reasonable ones. *See Strickland*, 466 U.S. at 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *Earl v. Israel*, 765 F.2d 91, 93 (7th Cir.1985) ("if it is reasonable in the circumstances not to conduct a particular investigation, the lawyer's failure to do so will not establish ineffective representation."). Given the absence of any substance

on Knowlin's shoes, combined with the absence of any evidence to support Knowlin's theory that police have a special "print planting goo" that they used in his case, counsel did not perform deficiently in failing to seek further testing of the substance on the chair seat.

D. Testimony of Christian

Finally, the court of appeals reasonably concluded that counsel was not deficient for calling Christian as a witness. As the court of appeals noted, counsel testified that he had called Christian at Knowlin's urging. The trial court's decision to credit counsel's testimony over Knowlin's is a finding of fact that this court must presume to be correct in the absence of "clear and convincing evidence" to the contrary. *See* 28 U.S.C. § 2254(e)(1). Counsel testified that he expected Christian to testify correctly on direct examination that Knowlin's father had stopped working at the factory near the Kentucky Fried Chicken restaurant on July 16, five days before the burglary. Counsel testified that the defense theory was that Knowlin was not aware of the date on which his father stopped working, so Knowlin still had reason to look for his father at the business. In light of this testimony, the state courts reasonably concluded that counsel did not perform deficiently when he called Christian to testify.

Knowlin argues that his lawyer "suborned perjury" when, after Christian gave this testimony, his lawyer followed up by asking her whether she could "verify that Mr. Edwards did work at this location from that time period?" However, counsel did not ask Christian

to confirm that Knowlin's father had worked at the business "through July." Perhaps counsel could have deflected some of the damage from cross-examination by asking Christian to provide the specific date on which Knowlin's father's employment had terminated, but his failure to do so is not a basis on which to grant Knowlin's petition. Knowlin knew that Christian would testify that his father's employment had terminated five days before the burglary, but he wanted her called anyway. Even if counsel could have elicited Christian to testify precisely on direct examination, it is not reasonably likely that the outcome at trial would have been different given the substance of her testimony. Accordingly, the court of appeals' conclusion that Knowlin's trial counsel was not deficient was not objectively unreasonable.

## II. Denial of Right to Counsel Based on State's Discovery Failures Concerning Chain of Custody

Knowlin claims that the state interfered with his right to the assistance of counsel when it failed to produce all discovery concerning the chain of custody of the evidence before trial and failed to make available at trial an evidence custodian who was part of the chain. The state argues that Knowlin has procedurally defaulted this claim by failing to fairly present it in constitutional terms to the state courts. *See Kurzawa v. Jordan*, 146 F.3d 435, 441 (7th Cir. 1998) (federal courts cannot grant habeas relief to state prisoner on basis of constitutional claim unless state courts have first had fair opportunity to consider constitutional question).

The state is correct. Fair presentment requires a petitioner to put forward operative facts and controlling legal principles. Whether he has done so depends on several factors, including: "(1) whether the petitioner relied on federal cases that engage in constitutional analysis; (2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts; (3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and (4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation." *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001); *see also Verdin v. O'Leary*, 972 F.2d 1467, 1473-74 (7th Cir. 1992). As the state points out, Knowlin raised the prosecutor's alleged discovery violation in his brief to the court of appeals within the context of his claim that he was entitled to a new trial in the interest of justice, which is a state law claim based on Wis. Stat. § 752.35.[2] He did not cite any federal cases or state cases applying a constitutional analysis to similar facts. Although Knowlin points to a sentence from his brief in chief to the court of appeals wherein he asserted that "the State's discovery violation . . . interfered with Knowlin's right to effective assistance of counsel," that conclusory argument, unsupported by any case

[2] Wis. Stat. § 752.35 states:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record . . .

citations or development, can hardly be said to have fairly alerted the state court to the constitutional nature of his claim.

Knowlin also points to his petition for review with the state supreme court, where he more clearly defined his claims in constitutional terms. However, Knowlin's resort to his petition for review does not help him either, for the fair presentment requirement is not satisfied when a claim is presented for the first time in a petition for discretionary review. *Spreitzer v. Schomig*, 219 F.3d 639, 645 (7th Cir. 2000).

That said, even if Knowlin had not procedurally defaulted this claim, it affords no basis for granting his habeas petition. Knowlin is attempting to manufacture a constitutional claim out of facts that do not support it. None of the cases he cites concerning state interference with the right to counsel were concerned with garden-variety discovery omissions by the state. *See, e.g., Geders v. United States*, 425 U.S. 80, 91 (1976)(trial court's order preventing defendant from consulting with lawyer about anything during 17-hour recess between defendant's direct and cross-examination violated defendant's Sixth Amendment rights); *Powell v. Alabama*, 287 U.S. 45 (1932) (court's appointment of lawyer on first day of trial who was not prepared to defend high-publicity case amount to constructive denial of assistance of counsel).

Knowlin does not cite– and I am not aware of–any Supreme Court case that holds that a prosecutor violates the Sixth Amendment right to counsel (or any other constitutional right) by failing to provide non-exculpatory evidence to the defense until trial. Furthermore,

the government need not negate the possibility that there was an opportunity for tampering with an exhibit nor to trace the exhibit's custody by calling each custodian as a witness. *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988); *State v. McCarty*, 47 Wis. 2d 781, 788, 177 N.W.2d 819 (1970). Absent constitutional underpinnings, Knowlin's challenge to the prosecutor's discovery violation and the alleged gap in the chain of custody affords no basis for habeas relief.

III. Admission of Chair and Rag

Knowlin contends that the trial court's decision to admit into evidence the chair seat from the restaurant and the rag seized from him when he was stopped violated his right to a fundamentally fair trial. Knowlin contends that the trial court erred in admitting the chair seat because the shoe print impressions had been altered from their original condition at the crime scene. As proof, Knowlin points out that Officer Hansen testified at the preliminary hearing that the entire word "UpTempo" was visible on the chair seat, but May testified at trial that he was only able to see the letters "U," "P" and "T" on the chair seat when it arrived at the crime lab. Knowlin makes much of May's testimony at the postconviction hearing wherein he stated that if footwear impression evidence is not properly recovered, details in the impressions could be lost and affect the results of the examination. As for the rag, Knowlin contends that it should not have been admitted because it was much larger than how Officer Arendt had described it during his testimony.

The state responds that Knowlin procedurally defaulted this claim because he raised it only as part of his claim that the real controversy had not been fully tried. In this instance, I disagree. In arguing that the real controversy had not been fully tried, Knowlin argued that the admission of the chair seat and May's corresponding testimony "clouded" the issue of guilt because the chair seat was not in its original condition. Knowlin's argument required essentially the same analysis as if he had framed it in "fundamental fairness" terms. *See United States ex. rel Nance v. Fairman*, 707 F.2d 936, 940 (7th Cir. 1983) (mere variation in legal theory that does not present legal claim different from that presented in state court does not run afoul of exhaustion doctrine). Furthermore, Knowlin did state in the alternative that "the trial court's ruling admitting the evidence was so prejudicial that it violated [his] due process right to a fundamentally fair trial." These contentions satisfy the fair presentment requirement.

But Knowlin is not entitled to relief. At trial, Knowlin went to great lengths to keep the chair out of evidence by attacking the chain of custody, but ultimately the court found that the chain had been sufficiently established to allow the chair into evidence. Whether to allow the chair into evidence was a matter within the court's discretion, *see Lott*, 854 F.2d at 250, and Knowlin has not presented anything to suggest that the court abused its discretion when it found that the items tested by the crime lab were the same as the items initially placed into evidence. At the postconviction hearing, the trial court noted Knowlin's proposition that the shoe print impressions had been altered, but found that there was

insufficient evidence adduced at trial or postconviction to support it. Under § 2254(e)(1), the trial court's finding that the shoe print impressions had not been altered is a finding of fact to which this court must defer unless Knowlin presents clear and convincing evidence to the contrary. He has failed to present such evidence.

Furthermore, even assuming part of one of the footwear impressions was removed from the chair seat before it was transferred to the crime lab, Knowlin's arguments go to the weight of May's testimony, not the admissibility of the chair. Knowlin suggests that part of the footwear impression that was allegedly removed would have proved his innocence, but May testified only that it was *possible* that lost details from the impression could have excluded Knowlin's shoes. Government destruction of evidence that has only the *potential* to be exculpatory does not require the exclusion of testimony based on that evidence. *See Arizona v. Youngblood*, 488 U.S. 51, 56-57 (1988). Furthermore, Knowlin cannot establish a constitutional violation because he has not demonstrated that the police altered the impressions in bad faith. *Id*. Knowlin was free to argue at trial that the jury should disregard May's testimony because May did not analyze the original footwear impressions, but that alleged omission would not have been a basis for excluding the chair seat or May's testimony. There was nothing fundamentally unfair about the admission of the chair.

Knowlin's objection to the trial court's admission of the rag stands on even weaker ground. He argues that the rag that the court admitted into evidence could not have been the one seized from him by Arendt because Arendt described a much smaller rag. Again,

however, this argument goes to the weight of the evidence, not its admissibility. As I have just noted, the trial court properly exercised its discretion in concluding that the state had adequately established the chain of custody to support admission of the evidence. Knowlin's theory that police exchanged the rag Arendt had seized from him for a rag that more closely matched one found in the restaurant is pure speculation.

IV. Prosecutor's Use of False Testimony

Knowlin contends the prosecutor suborned perjury and denied Knowlin a fair trial by calling as a witness a police officer who lied about where he took photographs of the chair. The introduction of perjured testimony, without more, does not rise to the level of a constitutional violation warranting habeas relief. *Tayborn v. Scott*, 251 F.3d 1125, 1130 (7th Cir. 2001). A habeas petitioner seeking a new trial on the ground that the prosecutor used perjured testimony must establish "(1) that the prosecution indeed presented perjured testimony, (2) that the prosecution knew or should have known of the perjury, and (3) that there is some likelihood that the false testimony impacted the jury's verdict." *Id*. (quoting *United States v. Thompson*, 117 F.3d 1033, 1035 (7th Cir.1997)).

Knowlin's claim is based upon Officer Yoghourtjian's conflicting testimony at trial and the postconviction hearing about where he had taken photographs of the chair seat. At trial, Officer Yoghourtjian reviewed a set of photographs of the chair and testified that he had taken some of the photographs in his office at the police department and had taken

others at the crime scene. However, at the postconviction hearing Yoghourtjian testified that he did not recall taking any photographs at the crime scene, and that all of the photographs he had previously identified as having been taken at the scene had actually been taken in his office.

Knowlin presented these facts to the state court, arguing that Yoghourtjian's "false" testimony at trial prevent the real controversy from being fully tried. Knowlin did not argue that the prosecutor "suborned" perjury, but he did point out that she endorsed Yoghourtjian's testimony during her closing argument. Knowlin argued that Yoghourtjian's testimony impacted the jury's verdict because it led the jury falsely to believe that footwear impressions were visible on photographs of the seat taken at the restaurant. Because the substance of Knowlin's claim before the state court is the same as that presented in his habeas petition, he has not procedurally defaulted it. *Sweeney v. Carter*, 361 F.3d 327, 333 (7th Cir. 2004) (petitioner may reformulate claims so long as substance remains same).

Assuming Yoghourtjian's testimony was false and the prosecutor knew it, I conclude that it did not affect the outcome of the trial. The accuracy of Yoghourtjian's testimony concerning where the photographs had been taken was successfully attacked by defense counsel at trial. Defense counsel challenged Yoghourtjian's testimony on cross-examination, suggesting that the difference in the floor color on some of the pictures indicated that the officer was mistaken about which photographs were taken at the crime scene. In his closing, counsel argued that the shoe prints did not start appearing until the chair arrived at the

police department, and that Officer Yoghourtjian was mistaken when he testified that some of the photos on which shoe prints appeared were taken at the restaurant. Counsel pointed out that the floor at the restaurant was brown, which the jury had seen during a jury view of the scene, and that no footwear impressions appeared on the photographs with the brown background. Given defense counsel's arguments and the jury's ability to discern for themselves where the photographs had been taken based on their personal recollection of the flooring they had observed at the restaurant on the jury view, it is not likely that Yoghourtjian's mistaken testimony impacted the verdict.

Moreover, the only reason Knowlin had for distinguishing between photographs taken at the crime scene and those taken later at the police department was to prove that police planted the shoe print impressions after the chair was taken to the police department. However, Knowlin conveniently ignores the fact that his own expert at the postconviction hearing testified that footwear impressions *were* on the seat at the restaurant, but they did not show up on the photographs because they were whited out by the flash. Thus, while Yoghourtjian's mistaken testimony may have had a negative impact on Knowlin's "police tampering" theory of defense, it had no bearing on Knowlin's actual innocence.

Finally, Knowlin's obsession with the shoe print evidence ignores the other evidence of guilt that was presented to the jury. In addition to the shoe print evidence, the jury heard about Knowlin's presence in the area shortly after the burglary was discovered, his furtive movements and vague answers when questioned, the discovery of stolen items near the area

where officers first observed Knowlin, and Knowlin's possession of a rag similar to rags found in the restaurant. Although not overwhelming, this evidence was sufficient to support the jury's verdict even without Yoghourtjian's erroneous testimony. Accordingly, the state court of appeals reasonably concluded that a new trial was not warranted on the basis of Yoghourtjian's testimony.

V. Prosecutor's Closing Argument

Knowlin contends that the prosecutor made improper remarks during closing argument that prejudiced his right to a fair trial. The state court of appeals rejected this claim on dual grounds: first, Knowlin had waived it by failing to object to the remarks during trial; and second, the remarks were not improper. Although the state court's procedural ruling probably amounts to a default that bars this court from considering the merits of the claim, Knowlin loses even on the merits. The prosecutor's remarks were in response to Knowlin's counsel's request of the jurors that they "not believe in our police." In light of this, it was not improper for the prosecutor to argue to the juror that in order to acquit Knowlin, they had to "find that all the police in this case were lying about what they testified to." As the court of appeals noted, the prosecutor's remark was an accurate characterization of the theory of the defense. Accordingly, it was not improper.

VI. Sufficiency of Evidence

Finally, Knowlin argues that the evidence presented at trial was insufficient to support his conviction for burglary while armed. In *Jackson v. Virginia*, 443 U.S. 307, 324 (2003), the Supreme Court held that a petitioner is "entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." The Wisconsin Court of Appeals properly identified this rule as the standard governing Knowlin's insufficiency of evidence claim. The only question for this court is whether its application of that standard was objectively reasonable. It was. Knowlin's claim that the evidence was insufficient to support his conviction rests on his contention that May's testimony matching the shoe print impression to his shoes was not probative in light of evidence suggesting that the impressions might have been altered from their original condition. However, reasonable jurors could conclude otherwise. Furthermore, as noted previously, even without the shoe print impressions, the record contained several other pieces of evidence that pointed to Knowlin as the perpetrator. All of this evidence provides ample support for the court of appeals' conclusion that the evidence was sufficient to support the conviction.

## RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny Lee Knowlin's petition for a writ of habeas corpus.

Dated this 3rd day of June, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge