

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

WILLIAM S. DIBLE,
Petitioner,

vs.

JOHN AULT,
Respondent.

No. C99-4010-MWB

**ORDER REGARDING
MAGISTRATE’S REPORT AND
RECOMMENDATION ON PETITION
FOR WRIT OF HABEAS CORPUS**

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I. INTRODUCTION AND BACKGROUND

Before the court is a petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Petitioner, William S. Dible, is an inmate at the Anamosa State Penitentiary, Anamosa, Iowa. On August 25, 1993, following a bench trial, petitioner Dible was convicted of first-degree burglary, second-degree burglary, second-degree arson, and first-degree criminal mischief. On February 11, 1994, Dible was sentenced to twenty-five years imprisonment.

Petitioner Dible appealed his sentence. The Supreme Court of Iowa affirmed his sentence on September 20, 1995. Dible then filed an application for postconviction relief. Dible's application for postconviction relief was denied by an Iowa district court on July 3, 1997. His appeal of the denial of his application for postconviction relief was denied by the Iowa Court of Appeals on November 30, 1998. On September 17, 1999, Dible filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Dible's petition asserts fifteen grounds for relief:

- “1. GROUND ONE: Trial counsel was ineffective for failing to object to the Iowa Burglary statute as being unconstitutionally vague, unconstitutional because it can be arbitrarily applied, it was unconstitutionally applied ex post facto and/or in the alternative, trial counsel was ineffective for failing to adequately research the Iowa burglary statute and improperly advised the Petitioner regarding the Iowa burglary statute.
2. GROUND TWO: Trial counsel was ineffective for failing to present the theory of self-defense in regards to Petitioner's first degree burglary conviction.
3. GROUND THREE: Trial counsel was ineffective for actually and constructively denying the Petitioner his constitutional right to testify on his own behalf.
4. GROUND FOUR: Trial counsel was ineffective

for failing to object to I.R.E. 404(b) evidence entered at trial by the State as inadmissible and precluded by I.R.E. 403 as unduly prejudicial and not supported by the evidence.

5. GROUND FIVE: Trial counsel was ineffective for displaying a conflict of interest by protecting the third party interests of Sunday Gasket [sic] over the Petitioner's interests by not properly cross-examining Sundy Gaskell, failing to call John Dible as a witness, failing to conduct an investigation of thefts concerning medical supplies and drugs, lying about contacting his wife as an expert witness, and by not pursuing certain defenses.
6. GROUND SIX: Trial counsel was ineffective for displaying a conflict of interest by protecting the third party interest of Karen Frampton over the Petitioner's interests by not properly conducting a direct examination of Frampton, not calling J.C. Nash and others as witnesses, not withdrawing and testifying as a witness, and not pursuing certain defenses.
7. GROUND SEVEN: Trial counsel was ineffective for displaying a conflict of interest by providing evidence from Dible's Suzuki to the prosecution, by failing to withdraw as a witness, by acquiring an interest in Dible's Suzuki, lying to Dible about material facts, by failing to pursue certain defenses as a result of his conflicts and/or trial counsel was ineffective for failing to prove the items seized in Dible's Suzuki were inadmissible due to a broke[n] chain of custody.
8. GROUND EIGHT: Trial counsel was ineffective for being intoxicated during the Petitioner's trial and during numerous pretrial conferences with the Petitioner, constructively denying the Petitioner assistance of counsel.

9. GROUND NINE: The State of Iowa committed prosecutorial misconduct by violating a reciprocal discovery agreement, committing numerous Brady Rule violations, and using false and perjured testimony. Trial counsel was ineffective for failing to discover prosecutorial misconduct.
10. GROUND TEN: Trail [sic] counsel's individual and cumulative errors of ineffectiveness, actually and constructively denied the Petitioner his right to counsel, violated the Petitioner's rights guaranteed under the 5th, 6th, and 14th Amendments to the U.S. Constitution, and but for constitutional errors, no fact-finder would have found the Petitioner guilty of the underlying offenses.
11. GROUND ELEVEN: The Petitioner incorporates Ground One through Ground Ten as though set forth herein and alleges that post-verdict attorney, Jeffery [sic] Neary, was ineffective for failing to prove the allegations set forth in Ground One through Ground Eleven, that the Petitioner demonstrated sufficient reason for failing to allege post-verdict attorney's ineffectiveness on direct appeal, and but for constitutional errors of post-verdict attorney, no fact-finder would have found the Petitioner guilty of the underlying offenses.
12. GROUND TWELVE: The Petitioner incorporates Grounds One through Grounds Eleven as though set forth herein and alleges that the Petitioner's Appellate counsel, Shari Stevens, was ineffective for failing to present or develop adequately the allegations and Grounds One through Ground Eleven on direct appeal and but for appellate counsel's constitutional errors, no fact-finder would have found the Petitioner guilty

of the underlying offenses.

13. GROUND THIRTEEN: The Iowa courts erred in ruling there was sufficient evidence for a First Degree Burglary conviction.
14. GROUND FOURTEEN: The Petitioner, Dible, has exhausted all remedies available to him by the State of Iowa. All rulings regarding all proceedings pursued by Dible in the state courts of Iowa resulted in decisions that are contrary to, or involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States and/or all rulings in the state courts of Iowa resulted in decisions that were based on an unreasonable determination of the facts in light of the evidence presented in the state courts of Iowa violating Dible's rights guaranteed under the 5th, 6th, and 14th Amendments to the United States Constitution.
15. GROUND FIFTEEN: The facts underlying Dible's claims presented to the state courts of Iowa and presented herein, are sufficient to establish by clear and convincing evidence that but for constitutional errors, no reasonable fact-finder would have found the Petitioner guilty of the underlying offenses and the Petitioner's rights guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution.

See Report and Recommendation at pp. 11-15 (quoting Doc. No. 19, pp. 2-4).

This case was referred to United States Magistrate Judge Paul A. Zoss pursuant to 28 U.S.C. § 636(b)(1)(B). On October 20, 2000, Judge Zoss filed an exceptionally thorough and comprehensive Report and Recommendation in which he recommends that Dible's petition be denied. Dible filed objections to Judge Zoss's Report and Recommendation on November 13, 2000. The court, therefore, undertakes the necessary review of Judge Zoss's

recommended disposition of Dible's petition for a writ of habeas corpus.

II. ANALYSIS

A. Standard Of Review

Pursuant to statute, this court's standard of review for a magistrate judge's Report and Recommendation is as follows:

A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's Report and Recommendation on dispositive motions and prisoner petitions, where objections are made, as follows:

The district judge to whom the case is assigned shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). Because objections have been filed in this case, the court must conduct a *de novo* review. With these standards in

mind, the court will briefly review the requirements of the federal habeas corpus statute, 28 U.S.C. § 2254(d)(1) and then turn to consider petitioner Dible’s objections to Judge Zoss’s Report and Recommendation.

B. The Requirements of § 2254(d)(1)

Section 2254(d)(1) of Title 28, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, provides as follows:

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

(1) resulted in a decision that was *contrary to*, or involved *an unreasonable application of*, clearly established Federal law, as determined by the Supreme Court of the United States[.]

28 U.S.C. § 2254(d)(1) (emphasis added). As the United States Supreme Court explained in *Williams v. Taylor*, 529 U.S. 362, 403 (2000), “[F]or [a petitioner] to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1).” *See id.*

In *Williams*, the Supreme Court addressed the question of precisely what the “condition set by § 2254(d)(1)” requires. *See id.* at 374-390 (Part II of the minority decision); *id.* at 402-12 (Part II of the majority decision).¹ In the portion of the majority decision on this point, the majority summarized its conclusions as follows:

¹In *Williams*, the opinion of Justice Stevens obtained a 6-3 majority, except as to Part II, which is the pertinent part of the decision here. *See Williams*, 529 U.S. at 367. Justice O’Connor delivered the opinion of the Court as to Part II, in which she was joined by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia, thereby obtaining a 5-4 majority on this portion of the decision. *See id.*

[Section] 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner’s application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. *Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied*—the state-court adjudication resulted in a decision that (1) “was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,” or (2) “involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.” *Under the “contrary to” clause*, a federal habeas court may grant the writ 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. *Under the “unreasonable application” clause*, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.

Id. at 413 (emphasis added); *see also Whitmore v. Kemna*, 213 F.3d 431, 433 (8th Cir. 2000) (“It seems to us that § 2254(d) as amended by the AEDPA is unambiguous as to the scope of federal court review, limiting such review (at least as compared with past practice) in order to effect the intent of Congress to expedite habeas proceedings with appropriate deference to state court determinations. *See Williams v. Taylor*, 529 U.S. 362, 403 (2000) (noting purposes of AEDPA amendments).”).

The Court also clarified two other important definitions. First, the Court concluded that “unreasonable application” of federal law under § 2254(d)(1) cannot be defined in terms of unanimity of “reasonable jurists”; instead, “the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law.” *Id.* at 4030 S. Ct. at 1522. Consequently, “[u]nder § 2254(d)(1)’s ‘unreasonable application’ clause, . . . 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. Rather, that application must also be [objectively] unreasonable.” *Id.* Second, the Court clarified that “clearly established Federal law, as determined by the Supreme Court of the United States” “refers to the holdings, as opposed to the dicta, of this Court’s decisions as of the time of the relevant state-court decision,” and “the source of clearly established law [is restricted] to this Court’s jurisprudence.” *Id.* at 1523.

C. Discussion

The court will address each of petitioner Dible’s objections to Judge Zoss’s Report and Recommendation *seriatim*.

1. Sufficient Evidence

Initially, petitioner Dible objects to the conclusion in Judge Zoss’s Report and Recommendation that there was sufficient evidence to support petitioner Dible’s First-Degree Burglary conviction. Specifically, Dible asserts that the state was required to prove that he had the intent to commit an assault at the time he entered the residence in order to convict him of first-degree burglary.²

²Under Iowa law, burglary is defined as:

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

IOWA CODE § 713.1. Burglary in the first degree is defined as:

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In a federal habeas corpus case, a federal court is required to presume the state court's factual findings are correct; with the petitioner having the burden of rebutting this presumption by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); *Robinson v. LaFleur*, 225 F.3d 950, 953 (8th Cir. 2000); *Culkin v. Purkett*, 45 F.3d 1229, 1232 (8th Cir. 1995). Here, petitioner Dible has not rebutted this presumption with respect to any factual finding made by the Iowa state courts. Thus, the court presumes the state court's following factual findings are correct:

Defendant William S. Dible and Sundy Gaskell dated for several weeks. Sundy attempted to break off the relationship but Dible was resistant.

On June 10, 1993, Sundy and her daughter, Melissa Gaskell, left their home at about 8:40 p.m. to go to a movie at a theater in a mall in Sioux City. As Dible and Sundy had talked earlier that day, Dible knew of Sundy's movie plans.

When Sundy and Melissa returned to their vehicle after the movie, two of the tires were flat. They got a ride home from someone else and on the way Dible's vehicle pulled up beside them at a red traffic signal.

²(...continued)

1. A person commits burglary in the first degree if, while perpetrating a burglary in or upon an occupied structure in which one or more persons are present, any of the following circumstances apply:

- a. The person has possession of an explosive or incendiary device or material.
- b. The person has possession of a dangerous weapon.
- c. *The person intentionally or recklessly inflicts bodily injury on any person.*
- d. The person performs or participates in a sex act with any person which would constitute sexual abuse under section 709.1.

IOWA CODE § 713.3 (emphasis added).

Dible was seen at Max's, a bar in the same mall as the theater Sundry and Melissa had attended, before 9:00 p.m. on June 10. He left and returned between 10:30 and 11:00 p.m. When he returned he was sweaty and dirty and had a strong odor of diesel fuel.

Police and fire personnel were called to Sundry's at about 11:30 p.m. in response to a fire call. When they entered the house they found diesel fuel on the floor throughout the house. The principal fire originated in the northeast bedroom on the second floor, Sundry's bedroom. A blue plastic container with a small amount of diesel fuel was found outside the house near a window that had been broken.

When Sundry and Melissa arrived home from the movie theater at approximately 12:30 a.m. on June 11, they saw the officials and learned someone had deliberately set a fire in their house.

At about 3:30 a.m., shortly after police and fire personnel left, Dible walked into Sundry's house. Sundry and Melissa were sitting in the nook area off the kitchen. Sundry immediately ordered Dible out of the house. She later recalled his pants had diesel fuel on them.

Melissa also asked Dible to leave and attempted to walk him to the front door. Reluctant to leave, Dible was near the front door when Sundry telephoned 911. Dible saw Sundry on the telephone and returned to the kitchen. He demanded to know who Sundry was calling, and, when she did not respond, he threw her on the table and began hitting her. Dible struck Melissa when she tried to intervene. The two women escaped and ran to a neighbor's house. Dible followed, threatening them. He left the scene before police arrived.

Dible was later found and arrested. He had diesel fuel on his pants at the time. Dible's vehicle was found two or three blocks from Sundry's house. A white glove identical to one found in Sundry's house was found in his vehicle.

State v. Dible, 538 N.W.2d 267, 268-269 (Iowa 1995). Given these presumptively correct factual findings, the court turns to consider Dible's argument that the state was required to prove that he had the intent to commit an assault at the time he entered the residence in

order to convict him of first-degree burglary.

The Iowa Supreme Court has held that:

“[T]he element of intent in burglary is seldom susceptible to proof by direct evidence.” *State v. Olson*, 373 N.W.2d 135, 136 (Iowa 1985). Usually proof of intent will depend upon circumstantial evidence and inferences drawn from such evidence. *Id.* A factfinder may infer an intent to commit an assault from the circumstances of the defendant’s entry into the premises and his acts preceding and following the entry. The requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not that the inference of intent is true. *Id.* at 137.

State v. Finnel, 515 N.W.2d 41, 42 (Iowa 1994). In his state court appeal, Dible argued “that without evidence that his decision to remain over and his formation of an intent to assault occurred contemporaneously, his first-degree burglary conviction cannot stand.” *Dible*, 538 N.W.2d at 270-71. This is precisely the same issue he raises here. The Iowa Supreme Court rejected Dible’s argument:

The statute does not contemplate the defendant's decision to remain as occurring at a specific point in time. See Iowa Code § 713.1. Rather, the statute contemplates the decision as a continuous event, beginning when a defendant determines to unlawfully remain on the premises and ending when the defendant leaves the premises. Cf. *State v. Franklin*, 368 N.W.2d 716, 719-20 (Iowa 1985) (defendant convicted of having requisite intent to commit first-degree burglary by picking up machete after entering an occupied structure); *State v. Riley*, 454 N.W.2d 595, 596 (Iowa App. 1990) (defendant convicted of having requisite intent to commit both burglary in the first degree and sexual abuse after breaking into victim's home carrying a hammer). One commentary indicates the language of Iowa's burglary statute supports the State's argument that "remaining over" occurs over a continuum of time:

[W]ill the [S]tate have to prove that [the defendant] formed the necessary intent at the

time his presence in the place became unlawful, or will it be sufficient to prove that at some time while he was unlawfully present he formed the intent . . . to commit an assault? The [statutory] language suggests the latter.

John L. Yeager & Ronald L. Carlson, 4 Iowa Practice, *Criminal Law & Procedure* § 294 (1979).

Viewed in this manner, Dible's decision to remain may have begun when he refused to comply with Sundry and Melissa's request that he leave, but it remained intact from the time he returned to the kitchen up until the time he left Sundry's home. Because he also formed an intent to assault when he returned to the kitchen, Dible satisfied the statute's contemporaneous intent requirement: he was remaining over and doing so with the intent to commit an assault.

Dible, 538 N.W.2d at 271.

Dible's claim that the Iowa Supreme Court misapplied its own statute is not proper for litigation on federal habeas corpus review. To the extent that Dible relies on purported violations of state law, his claim is not cognizable in this court. *See May v. Iowa*, ___ F.3d ___, 2001 WL 515053 (Iowa May 16, 2001) (" We may not disturb a state court decision interpreting state law on habeas review."); *Barrett v. Acevedo*, 169 F.3d 1155, 1163 (8th Cir.) (*en banc*) ("When the outcome of federal habeas litigation involves a matter of state law, a federal court is bound by a legal interpretation made by the state's highest court."), *cert. denied*, 528 U.S. 846 (1999); *Poole v. Wood*, 45 F.3d 246, 249 (8th Cir. 1995) ("It should be noted that the alleged wrongful interpretation of state criminal statutes cannot be decided in a federal habeas corpus action."). Therefore, this objection is denied.³

³Dible also objects to Judge Zoss's Report and Recommendation on the ground that Judge Zoss allegedly found, contrary to the state court's factual findings, that he possessed
(continued...)

2. Ineffective assistance of trial counsel

Petitioner Dible next objects to Judge Zoss's conclusions that Dible had failed to show that the Iowa courts' decisions that Dible received competent representation were either contrary to clearly established law or unreasonably applied that law to the facts of this case. Although Judge Zoss discussed thirteen of Dible's claims of ineffective assistance of trial counsel in his Report and Recommendation, Dible objects only to Judge Zoss's conclusions with respect to four of his claims: that his trial counsel was ineffective for failing to raise a self-defense claim; that his trial counsel was ineffective for not asserting a defense of actual consent; that his trial counsel was ineffective because he had a conflict of interest, and that his trial counsel was ineffective because he was intoxicated during portions of the trial.

To meet the standard for claims of ineffective assistance of counsel under § 2254, petitioner Dible must show both that "counsel's assistance fell below an objective standard of reasonableness" and that the "deficiencies in counsel's performance [were] prejudicial to the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); see *Johnson v. Norris*, 207 F.3d 515, 517 & 520-21 (8th Cir. 2000); *White v. Helling*, 194 F.3d 937, 940-41 (8th Cir. 1999); *United States v. Craycraft*, 167 F.3d 451, 454 (8th Cir. 1999); *Young v. Bowersox*, 161 F.3d 1159, 1160 (8th Cir. 1998); *Frey v. Schuetzle*, 151 F.3d 893, 899 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 573-74 (8th Cir. 1997); *Nguyen v. United States*, 114 F.3d 699, 703 (8th Cir. 1997); *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir. 1995). Petitioner Dible must also show that his attorney "made errors so serious that counsel was

³(...continued)

intent to commit an assault at the time he first entered Gaskell's residence. Petitioner's Objections at pp. 9-10. The flaw in this objection is that Judge Zoss made no such factual finding. Rather, Judge Zoss noted in dicta that the "the trial court *could* have found Dible actually possessed the intent to commit an assault at the time he entered Gaskell's residence, uninvited." Report and Recommendation at p. 89 n.18.

not functioning as the 'counsel' guaranteed the petitioner by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In viewing a claim of ineffective assistance, a court grants a strong presumption in favor of the counsel:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a petitioner to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id. at 689. In addition to showing that his counsel's assistance was ineffective, the petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; see *Craycraft*, 167 F.3d at 454; *Young*, 161 F.3d at 1160; *Frey*, 151 F.3d at 899; *Cox*, 133 F.3d at 573; *Nguyen*, 114 F.3d at 703; *Goeders*, 59 F.3d at 75. If it is easier to dispose of an "ineffective assistance" claim on the "prejudice" prong of the analysis, the court may do so, without consideration of whether or not counsel's performance met professional standards, because "[t]he object of an ineffectiveness claim is not to grade counsel's performance.'" *Goeders*, 59 F.3d at 75 (quoting *Strickland*, 466 U.S. at 697). Keeping these standards in mind, the court turns to Dible's specific objections concerning his claims of ineffective assistance of trial counsel.

a. Self-defense

Dible argues his trial counsel was ineffective "for failing to present a self-defense strategy in regards to the first degree burglary conviction[.]" Pet'r Br. at p. 47. Dible claims Gaskell attempted to hit him over the head with a large glass vase before he made physical contact with Gaskell, and his actions were to defend himself, not to "intentionally

or recklessly harm Sundy Gaskell or her daughter.” Pet’r Br. at p. 48. Judge Zoss recommended that this claim be denied because Dible cannot demonstrate that he was prejudiced by his trial counsel’s failure to present a claim of self-defense.

As to the second prong of the *Strickland* ineffective assistance analysis, which considers “prejudice” to the petitioner arising from counsel’s unprofessional conduct, Dible “must show that, but for counsel’s deficient performance, there is a reasonable probability that the result of the proceeding would have been different.” *Cox*, 133 F.3d at 573 (citing *Strickland*, 466 U.S. at 694); *Goeders*, 59 F.3d at 75 (also citing *Strickland*). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (citing *Strickland*, 466 U.S. at 694); *Goeders*, 59 F.3d at 75 (quoting this definition from *Strickland*). Defense counsel is not required to present evidence that is “either highly implausible or dramatically impeachable.” See *Thomas v. Bowersox*, 208 F.3d 699, 701-02 (8th Cir. 2000). Reviewing the record, the court concludes that Dible’s self-defense theory was “highly implausible” and he was not prejudiced by his counsel’s decision not to press it. The trial court not only was able to hear a tape recording of the 911 call, but had the opportunity to assess the victims’ credibility. This was crucial here because the victims’ testimony of the events was consistent with the tape recording of the 911 call. Thus, Dible’s claim of ineffective assistance with regard to failure to present a self-defense theory of defense fails on the prejudice prong of the *Strickland* analysis. Therefore, the court will accept Judge Zoss’s recommendation that relief be denied on this ground.

b. Actual consent

Petitioner Dible next asserts that his trial counsel was ineffective for failing to raise the defense of “consent” to the burglary charge.⁴ Reviewing the record, the court concludes

⁴In his Second Amended Petition, Dible does not specifically identify this defense. Rather, Dible asserted that his trial counsel was ineffective for failing to pursue “certain
(continued...) ”

that Dible's claim of ineffective assistance with regard to failure to present a consent defense also fails on the prejudice prong of the *Strickland* analysis. Gaskell testified that she lived at her home with her daughter and that while Dible occasionally spent the night there, this only occurred when he refused her requests that he leave and she did not wish to argue the point with Dible. Appendix A at pp. 138-141, 237-42, 257-59. Moreover, Dible did not have permission to enter or remain in Gaskell's home after the fire:

Q. Despite the fact that front door was open, did the defendant have your permission to enter 201 Cook Drive at that time and place?

A. No.

Q. So he came into the doorway. You said, "What are you doing here? Get out." And he said, "Hey, man, what's going on here?"

A. Yeah.

Appendix, Vol. A, at p. 198. Dible, in fact had his own apartment. Appendix A. at p. 259. Given this set of facts, the court concludes that his trial counsel's failure to pursue a consent defense was not prejudicial to petitioner Dible.

c. Conflict of interest

Dible next challenges Judge Zoss's recommendation that Dible's trial counsel was not ineffective for failing to cross-examine Gaskell regarding her alleged theft of drugs and her treatment of Dible's brother. Dible contends that his trial counsel did not cross-examine Gaskell on this point because of a conflict of interest, namely that he did not want to endanger Gaskell's job or cause her to face criminal prosecution. Dible's claim is set forth

⁴(...continued)
defenses." Second Amended Pet., Ground Six.

in detail in his brief in the direct appeal, as follows:

The most conspicuous conflict stems from trial attorney, Robert Stenander's, failure to cross-examine Sundry [Gaskell] concerning thefts of drugs from the hospital where she worked as a nurse. At the hearing on the motion for new trial, Stenander testified that he did not introduce evidence that Sundry had stolen drugs and equipment from the hospital to treat the defendant's brother. At trial, the State opened the door to this evidence by introducing evidence of arguments between the defendant and Sundry, alleging that the defendant had an unpredictable and uncontrollable temper. This evidence went to the issue of motive. Evidence that the arguments stemmed from Sundry's conduct would have rebutted her testimony that the arguments were due to the defendant's unpredictable temper. [Citations omitted.]

At the hearing, the defendant testified that Sundry's treatment of his brother with the stolen drugs and equipment was the source of several of the arguments because the defendant felt that Sundry was endangering his brother's life. The defendant also introduced affidavits from his brother, John Dible and from Gale Parkhill which state that Sundry stole hospital supplies in order to treat John Dible. [Citations omitted.]

Stenander acknowledged that the defendant had made the allegations of stealing against Sundry prior to trial. Yet, he did not follow up on this information. . . .

Appellant's Br., Iowa S. Ct. No. 94-233, pp. 23-24.

Reviewing the record, the court concludes that this claim of ineffective assistance of counsel fails both prongs of the *Strickland* analysis. First, Dible's trial counsel made a tactical decision not to cross-examine Gaskell about her alleged theft of non-controlled substances used by her to treat Dible's brother. Dible's trial counsel testified that he believed that nurses sometimes took medical supplies to treat people and that cross-examination on this topic would not have seriously damaged her credibility but rather would have made her a more hostile witness. Appendix, Vol. B, at pp. 886-88. In *Strickland*, the

Court warned that counsel's trial tactics should not be subject to "second-guessing" by reviewing courts. *Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."): see *Horton v. Zant*, 941 F.2d 1449, 1460 (11th Cir. 1991) (Reviewing courts "should presume effectiveness and should avoid second-guessing with the benefit of hindsight."). The Iowa Supreme Court found that Dible's trial counsel's performance did not fall outside the wide range of reasonable professional assistance. *Dible*, 538 N.W.2d at 273. From the court's review of the record, the court cannot conclude the Iowa Supreme Court's determination on this issue was an unreasonable application of clearly established Supreme Court precedent.⁵

⁵The court further notes that even if Dible's trial counsel had sought to present evidence of Gaskell's theft of medical supplies, the admissibility of such evidence under Iowa law is questionable. The Iowa Supreme Court has instructed that

Ordinarily a party may contradict and discredit an adverse witness by presenting evidence showing the facts were other than as indicated by the testimony of the witness. . . . The offer of impeachment evidence, however, is not without limits. To be admissible, impeachment evidence must have been admissible for some proper purpose independent of the contradiction. Otherwise the impeachment evidence goes only to a collateral issue and is inadmissible. Evidence of two types is admissible independent of contradiction. First, the evidence may be admitted if relevant to some legitimate issue in the case. Second, the evidence is admissible if it is relevant to establishing or undermining the general credibility of the witness being impeached.

(continued...)

Moreover, even if the court were to assume that Dible's trial counsel's performance fell outside the range of reasonable professional assistance, Dible has completely failed to show prejudice. His trial counsel's failure to cross-examine Gaskell on this point does not create a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 692; see *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (to satisfy *Strickland* test, petitioner must show that "counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair"). Gaskell's testimony regarding Dible's actions on the evening of the crimes was buttressed by the testimony of her daughter, and the 911 tape. Therefore, this objection to the report and recommendation is denied.

d. Intoxication

Dible also asserts that his trial counsel "was ineffective for being intoxicated during [Dible's] trial and during numerous pretrial conferences with [Dible], constructively denying [Dible] assistance of counsel." Second Amended Pet., Ground Eight. Judge Zoss recommended denying this claim, concluding that "[t]he record contains no evidence whatsoever to corroborate this claim beyond Dible's own statements." Report and Recommendation at p. 74. Although Dible raised over forty specifications of ineffective

⁵(...continued)

[*State v. Roth*, 403 N.W.2d 762 (Iowa 1987)] at 767 (citations omitted). Evidence admissible for purposes of establishing or undermining the general credibility of a witness is limited to matters which bear on bias, peculiar skills, or relevant knowledge or which go to a specific testimonial quality. *State v. Gilmore*, 259 N.W.2d 846, 853 (Iowa 1977).

State v. Turecek, 456 N.W.2d 219, 224 (Iowa 1990). Because evidence of Gaskell's theft of medical supplies goes only to a collateral issue, its admissible under Iowa is doubtful. *Id.*

assistance of counsel in either his direct appeal or his state post-conviction petition, his claim of intoxication was not raised in either state proceeding.

Prior to bringing a petition for habeas corpus pursuant to 28 U.S.C. § 2254, a petitioner must exhaust the remedies available in state court or demonstrate that "there is an absence of available State corrective process [or] [that] circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). To have exhausted claims in state court, petitioner must have "fairly presented" each federal claim to the highest state court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). Such procedural default can arise in two ways. First, where the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the petitioner's federal claims are barred, *Sykes* requires the federal court to respect the state court's decision. See *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). Second, if the petitioner simply never raised a claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred due to a state-law procedural default, and the exhaustion requirement and procedural default principles combine to mandate dismissal of the claim. "The rule that certain state-court procedural defaults will bar a petition for federal habeas corpus extends to procedural defaults occurring in the course of state post-conviction proceedings, as well as to procedural defaults occurring at trial or on direct appeal in the state courts.'" *Kilmartin v. Kemna*, ___ F.3d ___, 2001 WL 664109, at *1 (8th Cir. June 14, 2001) (quoting *Williams v. Lockhart*, 873 F.2d 1129, 1130 (8th Cir.1989)). Dible's intoxication claim falls into the later category. His failure to raise this claim until now means that Dible deprived the Iowa state courts of "the first opportunity to hear the claim[s] sought to be vindicated in a federal habeas proceeding." *Picard v.*

Connor, 404 U.S. 270, 276 (1971). As to this claim, the court applies the familiar principle that federal courts may treat unexhausted claims as procedurally defaulted, even absent a state court determination to that effect, if it is clear from state law that any future attempts at exhaustion would be futile. This precept readily disposes of Dible's ineffective assistance of counsel due to intoxication claim. Under Iowa law, a defendant must raise claims of ineffective assistance of trial counsel as part of his direct appeal. A defendant may not wait to raise such claims until a subsequent post-conviction proceeding. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999); *Collins v. State*, 477 N.W.2d 374, 376-77 (Iowa 1991); *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981). Moreover, Iowa law is clear that successive post-conviction petitions are not permitted. See *Rivers v. State*, 615 N.W.2d 688, 689 (Iowa 2000). A habeas petitioner can escape the procedural default doctrine either through showing cause for the default and prejudice, *Murray v. Carrier*, 477 U.S. 478, 488 (1986), or establishing a "fundamental miscarriage of justice," *Schlup v. Delo*, 513 U.S. 298, 324-27 (1995); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Nims v. Ault*, 251 F.3d 698, 701 (8th Cir. 2001); *Burns v. Gammon*, 173 F.3d 1089, 1091 (8th Cir. 1999). This procedural default rule is grounded "not upon principles of jurisdiction but upon 'respect' for state procedural rules." *Ford v. Norris*, 67 F.3d 162, 164 (8th Cir. 1995) (citing *Coleman*, 501 U.S. at 751; see also *Miller v. Lockhart*, 65 F.3d 676, 680 (8th Cir. 1995).

Here, Dible asserts that his "post-verdict" counsel's own ineffectiveness was the reason that this ineffective assistance of counsel claim was not raised on direct appeal. Reviewing the record, the court concludes that this claim of ineffective assistance of counsel flounders on the prejudice prong of the *Strickland* analysis. Simply put, there is no evidence, other than Dible's belated assertions of his trial counsel's intoxication, which would support a claim that his trial counsel was intoxicated. Most telling on this point is the fact that although Dible asserts that his counsel passed out during several conferences,

the record makes no mention of this occurring nor of any inquiry by the state court as to the physical condition of his trial counsel. Moreover, the court's own review of Dible's trial counsel's performance does not suggest that Dible's trial counsel was impaired during trial. Dible's post-verdict counsel's investigation revealed that while Dible's trial counsel was a recovering alcoholic, he was not currently drinking. Neary Dep. at p. 47. The court, therefore, will accept Judge Zoss's recommendation that relief be denied on this ground.

3. *Ineffective assistance of appellate counsel*

Petitioner Dible next objects to Judge Zoss's conclusion that Dible's appellate counsel was not ineffective for failing to raise his claim that his trial counsel was intoxicated. For the reasons set forth above, the court concludes that if his appellate counsel had raised such a claim there is not a reasonable probability that the result of the appeal would have been different. Therefore, this objection to the report and recommendation is denied.

D. Certificate of Appealability

Dible must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability on these three issues. *See Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U.S. 834 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. With respect to Dible's claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(3).

III. CONCLUSION

For the reasons delineated above, the court **overrules** petitioner Dible's objections to Judge Zoss's Report and Recommendation. Therefore, pursuant to Judge Zoss's recommendation, the petition is **dismissed**. Moreover, the court determines that the petition does not present questions of substance for appellate review. See 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will not issue as to any claim for relief.

IT IS SO ORDERED.

DATED this 12th day of July, 2001.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA