Appendix

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12188-J

SOLOMON V. HESTER,

Petitioner-Appellant,

versus

KEVIN SPRAYBERRY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Before: JORDAN and HULL, Circuit Judges.

BY THE COURT:

Solomon Hester filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's November 20, 2017, order, denying his motions for a certificate of appealability and leave to proceed *in forma pauperis*, from the denial of his 28 U.S.C. § 2254 habeas corpus petition. Upon review, Hester's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Appendix (A)(1)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12188-J

SOLOMON V. HESTER,

Petitioner-Appellant,

versus

KEVIN SPRAYBERRY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

Solomon Hester is a Georgia prisoner serving a life sentence for malice murder, cruelty to a child, and possession of a firearm during the commission of a felony. He moves for a certificate of appealability ("COA"), to appeal the denial of his habeas corpus petition, filed under 28 U.S.C. § 2254. He also seeks leave to proceed *in forma pauperis* ("IFP"), on appeal.

In October of 2016, Hester filed the instant habeas corpus petition, under § 2254, arguing that:

> (1) his rights were violated when he was arrested without probable cause;
>
> (2) counsel failed to object to the denial of a public trial when spectators were forced to leave the courtroom;
>
> (3) he was subject to a structural error when deputies removed two spectators from the courtroom, creating a partial closure of the courtroom;
>
> (4) the prosecutor violated his rights by failing to disclose evidence and by allowing deputies to perjure themselves;

Appendix (A)(2)

> (5) the state intentionally intimidated a central witness, Tonya Kimmons, to prevent her from testifying in his favor; and
>
> (6) his counsel was ineffective at trial and on appeal for failing to argue that the state erred by presenting evidence related to a gunshot residue test, which had been deemed inadmissible by the trial court.

Specifically, Hester argued, in Ground One, that that he gave an inculpatory statement to the police during his arrest, which was admitted at trial. However, he asserted, his arrest was not supported by probable cause, and the arrest warrant failed to meet the requirements of the Fourth Amendment, as it did not explain why the officer's knew, or believed, that he had committed a crime. Hester contended that his counsel was ineffective, both at trial and on appeal, for failing to make "minimal inquires" into the warrant.

In Ground Two, Hester argued that, for "no apparent reason," spectators was forced to leave the courtroom during his trial. He noted that his counsel failed to properly object, although he filed a motion for a new trial on this basis, and appellate counsel was ineffective. Furthermore, in Ground Three, he argued that the partial closure of his courtroom resulted in a structural error, because the court did not properly consider the risks of closing the courtroom, and as a structural error, it was presumed to be prejudicial.

In Ground Four, Hester specifically argued that the state did not reveal blood tests that were performed on the victim, and the prosecutor permitted deputies to perjure themselves. Hester did not explain this claim in detail.[1] He also argued, in Ground Five, that the state intimidated Kimmons, a defense witness, and told her that she could be charged with perjury. He asserted that his counsel raised the issue in a motion for a new trial, but failed to raise it on direct appeal, and Kimmons would have testified that, during the incident, she was on the phone

[1] Although his § 2254 petition did not clearly specify the evidence that the prosecutor withheld, in his state court filings, Hester argued that the State withheld evidence relating to a blood test for marijuana, conducted on the victim's blood.

with Hester, who asked her to pick him up. Hester alleged that this would have contradicted a state witness's testimony. Finally, with respect to Ground Six, Hester argued that, although test results showed that he did not have gunshot residue on him, the prosecutor improperly told the jury that he had elevated levels of lead, barium, and antimony on him, which, "in the good old days," would have been a positive test result. He asserted that his counsel failed to raise this issue on direct appeal, even though the court had ruled that this evidence was inadmissible.

After the State responded, a magistrate judge issued a report and recommendation ("R&R"), recommending that the district court deny Hester's habeas petition. Over Hester's objections, the district court adopted the R&R, denied his habeas petition, and denied a COA. Hester now moves for a COA in this Court and leave to proceed IFP on appeal.

BACKGROUND:

Pre-Trial Proceedings:

In October of 2007, deputies obtained a search warrant, stating that Hester had called 911 and informed them that Allison Brownell had shot herself and was not breathing. Hester told the call center that he and Brownell had been arguing, and there were children in the residence. Deputy Kevin Snyder arrived and entered the house, where he saw the storm door off its hinges, and found Hester and Brownell. The Deputy escorted Hester out of the house, and returned to determine whether Brownell had a pulse. Deputy Snyder could see that Brownell had a firearm in one hand, and Hester informed Snyder that he and Brownell had been arguing all evening.

Prior to trial, counsel moved to suppress all of Hester's statements to the police, and physical evidence from his clothing, detention, the house where he had been living, results of hand-swabbing, and evidence derived from the body of the deceased. At a pre-trial hearing, Scott Wiley, an investigator, testified that he brought a search warrant to a magistrate judge, and

told her that another officer had told him that the evidence suggested that Brownell's death was not a suicide, based on a cigarette lighter in Brownell's hand and the way that her body was positioned. Deputy Cameron Durham testified that statements that Hester gave to officers on the scene did not match what the officers saw, with regards to the bullet wound, path, and blood splatter.

Deputy Snyder also testified, stating that the 911 call center had told him that there was a struggle for a gun between a woman and a man, and someone had been shot. He stated that he was the first responder, and, when he arrived, he saw a busted screen door. He checked to make sure that Hester did not have a weapon and had him sit on the front porch, before going back inside the house. He observed the victim on the couch, with a lighter in one hand and a gun in the other. He then went to another part of the house, to find the children. He stated that, while he was in the room with the children, one of the girls told him that Hester "probably shot mamma in the head." Snyder testified that Hester told him that Brownell had shot herself.

Magistrate Judge Tracy Loggins, who issued the warrants, testified that, in her opinion, there was probable cause to issue the search warrant because the storm door had been ripped off, and Hester and Brownell had been arguing.

The state trial court denied the motions to suppress, determining, in relevant part, that the search warrant was supported by probable cause because the screen door was ripped off the hinges, Hester and Brownell had been arguing, Brownell died of a gunshot wound, and Wiley had told the magistrate judge that the blood pattern did not match Hester's account of Brownell's death. Further, there was probable cause to arrest Hester because: (1) there was a 911 call, regarding a struggle; (2) the blood spray and position of Brownell's body were inconsistent with his version of events; (3) one of the minors present told police that Hester probably shot

Brownell in the head; (4) Hester told officers that he would have to deal with this for the rest of his life; and (5) Brownell was holding both a cigarette lighter and a firearm.

Hester also filed a motion regarding witness intimidation, before trial, arguing that the state had intimidated Kimmons. During a pre-trial hearing, the state presented the testimony of Anna Ayers, a victim advocate for the prosecutor's office, who testified that she spoke to Kimmons, but did not threaten her with perjury charges, if her testimony was inconsistent with other witnesses. Ayers stated that she told Kimmons that she could not get on the stand and lie, but did not tell her that she would be charged with a crime. However, she admitted that she told Kimmons that, if she testified in a way that was contrary to the state's proffer, she could be in trouble, and, if she did not tell the truth, it was possible that the judge would put her in jail for lying. The trial court then stated that Ayers's testimony was troubling, and indicated that she had an improper conversation with a witness. However, it does not appear that the court took further action on this matter before trial.

State Court Trial:

D.B., the victim's daughter, testified at trial that, on the night when Brownell died, she and Hester were arguing. She testified that she heard Brownell say "if you put your hands on me I'll call the cops," and then she heard a "really loud noise." When she left her bedroom, and saw her mom on the couch, Hester told her that her mother was sleeping.

Part way through Hester's trial, during a court recess, deputies escorted two individuals out of the courtroom. After the recess, the state informed the court that this had occurred. Nicki Vaughan, an attorney for the defense, informed the court that she went outside and saw one of the men who was asked to leave, and she asked him to stay so that they could clarify the matter. She told the court that the man informed her, before leaving, that he did not want to be where he

was not wanted. A deputy explained that they had asked the men to step outside, to determine who they were and what their involvement with the case was. He explained that the deputies told the men that they were not throwing them out, but they wanted to know their involvement in the case. The deputy stated that one of the men left on his own.[2]

The court noted that it was a county holiday, the courthouse was officially closed, and, even though this case was still being held, the court had less staff than normal. The court explained that anyone was welcome to watch the trial as a spectator. The deputy acknowledged that this was the standing order, but explained that they made contact with this person because he was moving between courtrooms. Defense counsel did not otherwise formally object.

During the trial, Durham, the crime scene investigator, testified on cross-examination that Brownell had three times the legal limit of alcohol in her system, with a blood alcohol level of .27. Leigh Champion, a forensic toxicologist for the Georgia Bureau of Investigation ("GBI"), also testified that Brownell had a blood alcohol level of .27, which would cause exaggerated emotional states, lack of coordination, confusion, and disorientation. On cross-examination, Champion testified that intoxicated individuals lose their judgment, have lower inhibitions, and can exhibit a wide range of exaggerated emotional responses.

Dr. Steven Dunton, a forensic pathologist and medical examiner, testified that it is hard to predict how someone who was drunk would behave. Dr. Emily Ward, a defense witness employed by the department of forensic sciences in Alabama, testified that, in her opinion, the gunshot wound was self-inflicted. Dr. Ward further testified that alcohol impacts reflexes, and everyone reacts differently to it, but Brownell would not have been thinking clearly.

Jesse Brown, a former employee for the GBI, testified that the first test performed on

[2] The record indicates that, although two men were asked to step outside, only one left the courthouse. The other returned to watch the trial.

Hester's hands showed elevated levels of lead, barium, and/or antimony. Accordingly, the first test indicated that Hester's hands potentially had gunshot residue on them. Brown testified that they conducted a second test, and, on further analysis, they "did not find any particles that . . . could be classified as characteristic of gunshot residue," and, therefore, the second, determinative, test for gunshot residue was negative. Thus, in Brown's expert opinion, Hester's hands did not have gunshot residue on them, although he could not rule out the possibility that Hester discharged the firearm. Brown also testified that there was one particle present that is "characteristic of the gunshot primer residue," which supported the possibility that Hester discharged the firearm or came into contact with it. The particle was found on the right sleeve of Hester's shirt. On cross-examination, Brown stated that the first test was not enough to call the gunshot residue results positive, and was no longer performed by the crime lab.

Chris Robinson, another forensic scientist from the GBI, testified that, several years earlier, they did not perform the second test on gunshot residue, but only relied on the first test. He also testified that the gun used in this case was a semiautomatic, .40 caliber pistol, and most of the gunshot residue would emit from the ejection port. The ejection port is the part of the gun where the bullet casing is ejected from, but people typically have their hands on the grip and trigger of the gun. This meant that, in order for a person to get gunshot residue on him, his hands needed to be "very close" to either the muzzle of the gun or the ejection port. Robinson testified that, because of the way that a semiautomatic pistol operates, a person is less likely to get gunshot residue on his hands when compared to a revolver.

At closing, Hester argued, in part, that Brownell had a blood alcohol level of .27 and was drunk when she committed suicide. The prosecutor stated, during the state's closing argument,

that there was:

> gunshot residue on the defendant. The defendant had one particle of gunshot residue on his right sleeve and two particles of—two supporting particles. The gunshot residue expert told you that this type of gun, the semiautomatic .40-caliber gun, ejects just a very small amount of gunshot residue. And this defendant had a little bit of that on his right sleeve. It's hard to get gunshot residue. It's hard to get gunshot residue on hands. People sweat. It comes off. People put their hands in their pockets. It comes off. But this defendant had some on his right sleeve that puts him right in line, right in line with the ejection port of that gun when he's driving that gun into our victim's head, right in line. And then even after the defendant had had [sic] his hands in his pockets, he had elevated levels of lead, barium, and antimony on his hands. He had elevated levels of that. And in the go[o]d ole days at the crime lab, that would have been a positive.

Hester objected.[3] A bench conference was held, off the record, and the court instructed the jury that what the lawyers said in closing was not evidence in the case, and the jury had to rely on the evidence presented. The prosecutor then stated that the first test used on the defendant to determine if there was gunshot residue showed elevated levels, and the expert had testified that, previously, this was the only test used by the crime lab. However, they now use a different test. The prosecutor then stated that "the defendant had gunshot residue on him," and Hester once more objected. The court gave the same instruction regarding evidence. At the conclusion of the trial, the jury found Hester guilty on all counts.

State Court Motion For a New Trial:

After the trial, Hester moved for a new trial, arguing, in part, that the State intimidated and influenced Kimmons to prevent her from testifying. Hester also contended that the prosecutor improperly argued, during closing, that he had elevated levels of lead, barium, and antimony, which would have been a positive test for gunshot residue. Further, he argued that he was denied an open trial, when deputies removed two spectators. He also argued that the state

[3] The specifics of the objection were not included in the record, but were handled in a bench conference off the record.

withheld evidence relating to the presence of marijuana in Brownell's system.

At the hearing regarding Hester's motion for a new trial, Ken Harmon, a deputy sheriff, testified that he was told that there were two people sitting in on Hester's trial that the officers did not recognize, and they were coming in and out of the courtroom. He explained that he decided to approach them and find out what was going on. He asked them to go outside, but when he followed them, only one of them was waiting for him. That person advised him that it was his day off, and he decided to watch the case. Harmon testified that he told the man that this was alright, but he could not come in and out of the courtrooms, which had been causing a distraction. Harmon testified that one of the men went back into the courtroom.

Derek Collins testified that he was watching Hester's trial when, during a recess, a sheriff asked him to leave. Vaughan testified that she saw a man leaving, and he told her that he was not "going to stay where I'm not wanted," indicting that he thought that he had been kicked out of the courtroom. She asked him to wait, to get it straightened out, but he left anyway.

Larry Lewellen, an employee of the GBI Forensic Sciences Department, testified that Brownell's blood sample indicated the presence of marijuana, but that test, standing alone, was insufficient to establish that Brownell had consumed marijuana. The second test had too low an indication result to report it as positive, so it was reported as negative. He testified that the data did not support the conclusion that Brownell ingested marijuana. However, because the presence of marijuana degrades over time in stored blood samples, it was theoretically possible that, had the blood been tested earlier, it would have shown that she had marijuana in her system. Lewellen clarified that it was impossible to know whether the result actually showed marijuana.

Dr. Marland Dulaney also testified for the defense, as an export in toxicology, that marijuana degrades in a blood sample, and, in his opinion, Brownell's test was positive.

Furthermore, her blood contained more marijuana when it was collected because the sample was older and degraded by the time it was tested. Additionally, even a small amount of marijuana would have added to Brownell's intoxication because her blood alcohol level also was .27. Denise Childers, a forensic toxicologist, testified that the blood sample did not show marijuana. Finally, Belinda Lewis, a friend of Brownell's, testified that Brownell frequently smoked marijuana, and she would become forgetful.

The trial court denied the motion for a new trial, determining that the record showed that the deputies had merely asked to speak to the spectators, even though one decided to leave. Further, this occurred during a court recess, and Vaughan asked the man who had left to return. The court determined that it took no part in asking anyone to leave, and the only person who claims to have been kept from observing was asked to return, but refused. Furthermore, the closure was temporary, and the court did not intentionally close the court.

The trial court also determined that no *Brady*[4] violation occurred because there was no test that actually showed that Brownell had marijuana in her system. Furthermore, the court concluded, the prosecutor's statements, regarding gunshot residue, were supported by un-objected to testimony, and the jury had been instructed that the lawyers' statements did not constitute evidence.

State Court Direct Appeal:

On direct appeal, Hester argued that the State violated *Brady* by failing to provide a copy of the blood test regarding the presence of marijuana in Brownell's bloodstream. The Georgia Supreme Court determined that Hester's defense at trial was that Brownell shot herself while severely intoxicated, and, at trial, defense counsel presented evidence to show that Brownell was

[4] *Brady v. Maryland*, 373 U.S. 1194 (1963).

intoxicated. Accordingly, the Georgia Supreme Court determined, the undisclosed evidence was consistent with the evidence submitted at trial, and Hester failed to show a reasonable probability that it would have altered the outcome of the trial. *Hester v. State*, 736 S.E.2d 404 (Ga. 2013).

State Post-Conviction Proceedings:

Hester then filed a state post-conviction motion, raising the same claims as brought in the instant habeas petition. The state court held an evidentiary hearing, where Brett Willis, Hester's trial counsel, testified that he had wanted to call Kimmons as a witness, as Kimmons had told him that she had been on the phone with Hester, and overheard Brownell yelling and thought that Brownell was very upset. He stated that Kimmons had been on the phone with Hester moments before Brownell shot herself. However, Kimmons had relocated to Florida, and she no longer got along with Hester. He stated that the district attorney's office called her and threatened her with perjury charges if she testified in a certain way because her testimony conflicted with what a major witness was going to say.

The state post-conviction court denied Hester's motion. First, the state court determined that counsel's failure to argue that the arrest warrant lacked probable cause was meritless because Hester was tried and convicted, and, therefore, could not show prejudice. Moreover, the state court determined, although deputies mistakenly informed someone that the courthouse was closed, neither counsel, nor the court, were aware of the error until after it had occurred, and counsel made an unsuccessful effort to inform the person that the deputies were incorrect. The state post-conviction court determined that prejudice was not presumed in this circumstance, and Hester had not shown prejudice. Further, because Hester had not shown cause and prejudice, his substantive argument that he was denied a public trial was procedurally defaulted.

The state post-conviction court denied Hester's claim that Kimmons was intimidated into

not testifying because: (1) he did not present the substance of the alleged conversation between Kimmons and the assistant district attorney; and (2) neither Kimmons, nor the district attorney, testified at the hearing. The state post-conviction court stated that "[n]o evidence establishes that the prosecution intended to deter Kimmons from testifying freely, fully and truthfully," and Hester failed to demonstrate prosecutorial misconduct.

Finally, the state post-conviction court determined, Hester did not show that his appellate counsel was ineffective for failing to argue that the prosecution erred by discussing the gunshot residue, as counsel reasonably could have concluded that this alleged error was likely to fail on direct appeal. Accordingly, the state court denied Hester's post-conviction motion, and the Georgia Supreme Court denied a certificate of probable cause.

Federal Habeas Petition:

Hester then filed the instant habeas petition in the district court, as discussed above, and the magistrate judge issued an R&R, recommending that the district court deny the petition. First, the magistrate judge concluded, the state habeas court did not address Hester's substantive argument that the search and arrest warrants violated his constitutional rights. Nevertheless, this claim was procedurally defaulted, unless Hester could show cause and prejudice. The magistrate judge determined that Hester did not show ineffective assistance of counsel because: (1) counsel challenged the evidence gathered at the scene of the shooting and from Hester; (2) the state trial court concluded that there was probable cause; and (3) nothing in the record supported the conclusion that the state trial court or habeas court erred in determining that there was probable cause.

Next, the magistrate judge concluded that the state trial court closure was brief and occurred when a deputy sheriff asked two individuals, whose movements had been distracting, to

step outside of the courtroom to converse with them briefly, during a trial recess. These individuals then were permitted to return, although one declined to do so. The magistrate judge determined that there was no reasonable probability that this altered the outcome of Hester's direct appeal because it was unlikely that the appellate court would have found the claim meritorious.

On Ground Four, the magistrate judge determined that Hester's claim that the deputies' testimony was perjurious was procedurally defaulted,[5] and he had otherwise failed to show that the state court's ruling regarding his *Brady* claim was erroneous. The magistrate judge next concluded that Hester had presented no evidence to support his conclusion that Kimmons was intimidated or that her testimony would have assisted him at trial. Next, as to Ground Six, the magistrate judge determined that Hester had not shown that the state post-conviction court erred in determining that appellate counsel may have reasonably concluded that any argument regarding the gunshot residue would fail on appeal, and Hester had not established that raising this issue would have altered the outcome of his appeal. Over Hester's objections, the district court adopted the R&R. The district court denied a COA and denied IFP status on appeal. Hester now moves for a COA and IFP status in this Court.

DISCUSSION:

In order to obtain a COA, a § 2254 applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court denies a § 2254 petition on procedural grounds, the COA petitioner must show that reasonable jurists

[5] As noted above, Hester claimed that the prosecutor allowed the deputies to commit perjury. However, as discussed below, Hester did not explain what testimony was problematic.

would find it debatable (1) whether the district court was correct in its procedural ruling, and (2) whether the § 2254 petition stated "a valid claim of the denial of a constitutional right." *Id.*

If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court: (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). Thus, this Court reviews the district court's decision *de novo*, but reviews the state habeas court's decision with deference. *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1239 (11th Cir. 2010). A state court's decision is "contrary to" federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than th[e] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

Habeas relief is not warranted if the court finds that the state court merely applied federal law incorrectly; rather, relief is warranted only if that application was objectively unreasonable. *See Cullen v. Pinholster*, 563 U.S. 170, 202-03 (2011); *Premo v. Moore*, 562 U.S. 115, 118-21 (2011); *Harrington v. Richter*, 562 U.S. 86, 100-01 (2011); *Renico v. Lett*, 559 U.S. 766, 773 (2010); *Berghuis v. Smith*, 559 U.S. 314, 320 (2010). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101 (quotation omitted). The Supreme Court has stated that unreasonableness is "a substantially higher threshold" than whether the state court's determination was incorrect. *Schriro v. Landrigan*, 550 U.S. 465, 473, (2007).

The Supreme Court decision applicable to ineffective-assistance-of-counsel claims is *Strickland v. Washington*, 466 U.S. 668 (1984). *See Premo*, 562 U.S. at 121. To make a successful claim of ineffective assistance of counsel, a defendant must show both that: (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. Review of counsel's conduct is to be highly deferential; there is a strong presumption that counsel's performance falls within the wide range of professional competence. *Id.* at 689.

Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. To make such a showing, a defendant must demonstrate that "no competent counsel would have taken the action that his counsel did take." *United States v. Freixas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003) (quotation omitted). Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

When analyzing a claim of ineffective assistance under § 2254(d), this Court's review is "doubly" deferential to counsel's performance. *Harrington*, 562 U.S. at 105. Thus, under § 2254(d), "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Strickland's two-part test governs ineffective-assistance-of-appellate-counsel claims as well. *Clark v. Crosby*, 335 F.3d 1303, 1310 (11th Cir. 2003). However, appellate counsel is not required to raise every non-meritorious issue, provided that counsel uses professional judgment in deciding not to raise an issue. *Eagle v. Linahan*, 279 F.3d 926, 940 (11th Cir. 2001).

Ground One:

In Ground One, Hester argued that his rights were violated when he was arrested pursuant to a warrant that was issued without probable cause. He asserted that, due to ineffective assistance of counsel, this issue was not challenged in the trial court, raised in the motion for a new trial, or preserved for appeal. Further, his appellate counsel should have argued that trial counsel was ineffective for failing to preserve this for appeal.[6]

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). To properly exhaust a claim, a petitioner "must fairly present every issue in his federal petition to the state's highest court." *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010). A federal claim is subject to procedural default where the petitioner failed to properly exhaust it in state court, and it is obvious that the unexhausted claim would now be barred under state procedural rules. *See Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). A procedural default may be excused, however, if the movant establishes (1) "cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error," or (2) a fundamental miscarriage of justice, which means actual innocence. *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011).

Under the Fourth Amendment, "no [w]arrant[] shall issue, but upon probable cause." U.S. Const., amend IV. Law enforcement officials have probable cause to arrest when they have "facts and circumstances within their knowledge sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime." *United States v. Gonzalez*, 969 F.2d 999, 1002 (11th Cir. 1992). Probable cause determinations have been guided by reviewing the totality of the circumstances. *Id.*

[6] Hester also raised this claim in Ground Two. However, for the sake of conciseness, those arguments will be addressed with Ground One.

As an initial matter, the district court correctly noted that the state habeas court failed to address Hester's substantive claim that the search and arrest warrants violated his rights. The district court also correctly determined that, because this issue was not raised on direct appeal, it was procedurally defaulted, and could only be considered if Hester showed cause and prejudice. *Todd v. Turpin*, 493 S.E.2d 900, 905 (Ga. 1997) (under Georgia law, a petitioner is procedurally barred from raising a claim that he failed to raise at trial or on appeal, absent a showing of cause and prejudice). Hester alleged cause and prejudice, by arguing that his counsel was ineffective for failing to raise this claim.

The record shows that counsel objected to the submission of the evidence gathered at the scene of the shooting and from Hester. As the state trial court concluded, however, the evidence presented to the magistrate judge to obtain a warrant was sufficient to show probable cause because the warrant was based on a ripped screen door, an argument between the deceased and Hester, and the fact that Brownell was dead. Additionally, as the trial court determined, there was sufficient evidence to take Hester into custody before the warrant issued because Hester told 911 that there had been a struggle, Brownell was dead, and she shot herself, but the blood spray and position of the body were inconsistent with Hester's statement, and one of the girls present told the officer that Hester probably shot Brownell. Accordingly, considering the totality of the circumstances, reasonable jurists would not debate the district court's conclusion that there was probable cause to arrest Hester and, therefore, that counsel was not ineffective.

Grounds Two and Three:

In Ground Two, Hester argued that his trial court and appellate counsel were ineffective because counsel failed to object to the denial of a public trial. Specifically, during his trial, two people were made to leave the courtroom "for no apparent reason." In Ground Three, Hester

prejudice, either at trial or on appeal.

Furthermore, reasonable jurists would not debate the state court's determination that Hester's substantive claim was procedurally defaulted. If a state court finds that a petitioner's claims are procedurally defaulted after applying an adequate and independent state law, a federal court is obligated to respect the state court's decision. *Bailey*, 172 F.3d at 1302-03. Here, Hester was required to bring his substantive claim—that the courtroom was improperly closed—on direct appeal, which he failed to do. *See* O.C.G.A. § 9-14-48(d) (stating that, to preserve a claim of trial error, a prisoner must raise the claim at trial and on direct appeal). Although Hester could raise this claim by showing cause and prejudice, he has not shown that his counsel was ineffective, as discussed above. Furthermore, he has not shown actual innocence. Therefore, because counsel did not contemporaneously object, and the courtroom closure was brief and inadvertent, Hester has not shown that reasonable jurists would debate the state court's denial of this claim.

Ground Four:

In Ground Four, Hester argued that the prosecutor violated his rights by failing to disclose evidence and by allowing the deputies to perjure themselves. Although Hester did not clearly explain the basis of this claim in his § 2254 petition, he raised a *Brady* claim on direct appeal and before the Georgia Supreme Court, arguing that the state violated *Brady* by not disclosing test results relating to whether Brownell had marijuana in her blood stream.

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. To establish a *Brady* violation, a defendant must prove that: "(1) the evidence at

issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) this favorable evidence was suppressed by the State, either willfully or inadvertently; and (3) the defendant suffered prejudice as a result." *Downs v. Sec'y, Fla. Dep't of Corr.*, 738 F.3d 240, 258 (11th Cir. 2013) (quotations omitted). A movant can establish prejudice by showing "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* (quotations and citation omitted).

As the Georgia Supreme Court determined, the defense theory at trial was that Brownell shot herself while severely intoxicated. In furtherance of that argument, counsel questioned witnesses regarding Brownell's blood alcohol level and the effects of that intoxication. Trial counsel showed that Brownell was severely intoxicated, and argued that this caused her to shoot herself. As the Georgia Supreme Court concluded, to the extent that the test results would support the conclusion that Brownell had marijuana in her system when she died,[7] that evidence was consistent with the evidence already presented that Brownell was severely intoxicated. Therefore, considering the deference afforded to the state court's decision, Hester has not shown that there was a reasonable probability that the undisclosed test results impacted the outcome of the trial. Thus, reasonable jurists would not debate the state court's denial of this claim.

Finally, Hester asserted that the State allowed deputies to testify falsely. Even assuming, *arguendo*, that the district court erred in determining that this claim was procedurally defaulted, because Hester did not explain what testimony was false and perjured, his claim is conclusory and speculative. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (stating that a petitioner's conclusory statements, unsupported by specific facts or by the record, are insufficient

[7] The test results did not conclusively show that Brownell had marijuana in her system.

to state a claim for ineffective assistance of counsel in a collateral proceeding). Therefore, it does not warrant a COA.

Ground Five:

In Ground Five, Hester argued that the State intentionally intimidated Kimmons, to prevent her from testifying in his favor. Hester specifically argued that the State told Kimmons that, if she testified a certain way, she would be charged with perjury. He stated that Kimmons would have testified that she was on the phone with him and that he was asking her to pick him up—which would have revealed that he was calm and would have undermined the victim's daughter's testimony. He noted that, although counsel raised the issue in a motion for a new trial, counsel failed to raise it on direct appeal, and, therefore, appellate counsel was ineffective.

To show that his rights to a fair trial were impacted by the state's actions, Hester must show that "the prosecutor's conduct dissuaded a defense witness from testifying or that the prosecutor induced materially less favorable testimony." *See Terry v. State*, 308 Ga. App. 424, 427 (Ga. App. Ct. 2011); *see also Webb v. Texas*, 409 U.S. 95, 95-97 (1972) (explaining that, when a trial judge admonishes a witness at length about the risks of perjury, and the witness refused to testify, the defendant's due process rights were violated).

Here, the state court determined that Hester did not show that the prosecutor committed any misconduct, noting that Willis had not testified with particularity regarding the conversation between Kimmons and the assistant district attorney, and Hester had not called Kimmons or the district attorney as a witness. The state court concluded that no evidence established that the prosecution intended to deter Kimmons from testifying.

As an initial matter, Hester stated that intimidating the witness violated his due process rights and, therefore, applying a liberal construction to his filings, he raised a federal

constitutional claim. Additionally, he argued that appellate counsel was ineffective for failing to raise this issue on appeal. Nevertheless, the state habeas court only addressed the substantive issue of whether Kimmons was intimidated, without separately addressing ineffective assistance.

As the state habeas court correctly noted, neither Kimmons, nor the unidentified assistant district attorney with whom she allegedly spoke, testified at the evidentiary hearing. Nevertheless, contrary to the state court's conclusion that there was no evidence to support a claim that Kimmons was threatened, there is some evidence in the record to show that a state employee did improperly threaten her.

First, Willis testified, at the evidentiary hearing, that the state threatened Kimmons, before trial. Further, the record clearly shows that an employee of the prosecutor's office had an improper conversation with Kimmons, and, although she denied explicitly threatening Kimmons with criminal charges, Ayers admitted that she told Kimmons that she could have problems for testifying in a way that was contrary to the state's proffer and could be jailed for lying on the stand. Additionally, the trial court determined that this was improper behavior, and Kimmons did not testify, which could support a due process violation. *See Webb*, 409 U.S. at 95-97.

However, no COA is warranted because Hester has not actually shown that Kimmons did not testify because of her conversation with Ayers. First, Ayers's conversation with Kimmons does not appear to have been excessively threatening. Additionally, Kimmons had moved out of state prior to the trial, and, at the evidentiary hearing, Willis testified that Hester and Kimmons had a falling out and were no longer friendly with one another. Accordingly, the record shows that there were other possible reasons for Kimmons to choose not to testify at Hester's trial. Hester has produced no evidence—in the form of either an affidavit or testimony during his evidentiary hearing—to show that Kimmons chose not to testify because of her conversation

with Ayers. Accordingly, he has not actually shown that the prosecution deterred Kimmons from testifying.

Additionally, outside of his self-serving statements, Hester has presented no evidence regarding how Kimmons would have testified. Therefore, his claim that her testimony would have assisted him at trial is, at best, speculative. Thus, considering the deference applied to state court determinations, Hester has not shown that a COA is warranted.

Ground Six:

In Ground Six, Hester argued that his counsel was ineffective, at trial and on appeal, for failing to argue that the state erred in talking about the results of the initial gunshot residue test, even though the trial court ruled this inadmissible and the second, determinative test was negative.[8] Specifically, he asserted, the State argued in closing that he had elevated levels of lead, barium, and antimony on him, which, "in the good old days," would have been a positive result, and by saying that he had gunshot residue on him.

"A prosecutor is granted wide latitude in the conduct of closing argument ... [and] within the scope of such latitude is the prosecutor's ability to argue reasonable inferences from the evidence." *Scott v. State*, 725 S.E.2d 305, 308 (Ga. 2012). However, even if the prosecutor's statements are improper, this Court has held that, "[b]ecause statements and arguments of counsel are not evidence, improper statements can be rectified by [an] instruction to the jury that only the evidence in the case be considered." *United States v. Lopez*, 590 F.3d 1238, 1256 (11th Cir. 2009) (quotations omitted). When such instructions are given, it is "presume[d] that the jury followed the [court's] curative instructions." *Id.*

[8] It is not readily apparent from the face of the record whether any evidence relating to the gunshot residue tests was deemed inadmissible by the trial court. However, for reasons discussed above, even assuming it was deemed inadmissible, Hester's claim is meritless.

Reasonable jurists would not debate the state court's adjudication of this claim. Here, the prosecutor stated, in closing arguments, that Hester had gunshot residue on his clothing, which was supported by un-objected to expert testimony. Furthermore, although the prosecutor stated that, "in the go[od] ole days at the crime lab, that would have been a positive," this statement was technically supported by expert testimony because witnesses testified that the forensics labs previously only used the first test and, in this case, the first test was indicative of gunshot residue. Regardless, even assuming, *arguendo*, that the prosecutor's statements were improper, the court gave a limiting instruction and told the jury that it was required to rely solely on the evidence presented at trial. Because the jury is presumed to have followed this limiting instruction, reasonable jurists would not debate the state court's determination that Hester had not shown that his counsel was ineffective.

Accordingly, for the reasons contained herein, Hester's motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

SOLOMON V. HESTER, GDC ID # 924529, Case # 679869 Petitioner,	:	CIVIL ACTION NO. 2:16-cv-00247-WCO-JCF
v.	:	
KEVIN SPRAYBERRY, Respondent.	:	HABEAS CORPUS 28 U.S.C. § 2254

ORDER

The above-captioned case is before the court for consideration of the magistrate judge's final report and recommendation ("R&R") dated March 28, 2017 [18] as well as petitioner's motion for extension of time to file objections to the R&R [20]. The magistrate judge recommends denying petitioner Solomon Hester's habeas corpus petition on each of the six grounds that he alleged therein. Petitioner has since filed objections.

In that filing, petitioner argues in a conclusory fashion about constitutional rights violations and repeats issues that were sufficiently addressed by the magistrate judge's R&R. The court finds that the magistrate judge correctly applied the proper law to the facts of this case and overrules petitioner's objections. After careful review of the record, the court **APPROVES** and **ADOPTS** the R&R [18] as the order of this court. Accordingly, the petition for a writ of habeas corpus [1] is hereby **DENIED**,

this action is hereby **DISMISSED**, and petitioner is **DENIED** a certificate of appealability.

IT IS SO ORDERED, this 26th day of April, 2017.

s/*William C. O'Kelley*
William C. O'Kelley
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

SOLOMON V. HESTER,	:	CIVIL ACTION NO.
GDC ID # 924529, Case # 679869,	:	2:16-CV-00247-WCO-JCF
Petitioner,	:	
	:	
v.	:	
	:	
KEVIN SPRAYBERRY,	:	HABEAS CORPUS
Respondent.	:	28 U.S.C. § 2254

MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

Petitioner, a Georgia prisoner, has filed a 28 U.S.C. § 2254 habeas corpus petition challenging his 2009 Hall County convictions. (Doc. 1; *see* Doc. 9-1). **IT IS RECOMMENDED** that the petition be **DENIED**.

Petitioner "was convicted of malice murder, two counts of cruelty to a child, and possession of a firearm during the commission of a felony in connection with the shooting death of Allison Brownell." *Hester v. State*, 736 S.E.2d 404, 405 (Ga. 2013) (affirming convictions and rejecting petitioner's sole claim, that "the State violated *Brady v. Maryland*, 373 U. S. 83 (1963), by failing to disclose the results of two toxicology tests").

> Viewed in the light most favorable to the verdict, the jury was authorized to find that on the night of the crimes appellant [Petitioner] was at home with Brownell and her two daughters, then ages nine and ten. Appellant and Brownell were sitting on the couch arguing while the girls were in

> their bedrooms. One daughter heard Brownell yell, "If you put your hands on me, I'll call the cops!" Soon after, the child heard a loud noise. She ran into the living room and saw her mother lying on the couch with a bullet hole in her head. She did not see a gun in her mother's hand.
>
> After appellant called 911, police found Brownell, who was right-handed, with a gun in her left hand and a lighter in her right hand. Although appellant told police Brownell had been sitting up when she shot herself, a crime scene investigator testified blood splatter and the bullet's trajectory demonstrated the victim's head had been pressed against or very close to the seat of the couch when she was shot. Multiple experts testified appellant's assertion that the victim shot herself while sitting up was inconsistent with the blood splatter, the bullet trajectory, the presence of a muzzle stamp on her head, and the position in which she was holding the gun when found. A toxicology report revealed Brownell had a blood-alcohol concentration of 0.27 at the time of her death.

Id. at 405-06 (concluding that the foregoing evidence was sufficient to support the jury's verdicts of guilt). Petitioner filed a state habeas petition, which was denied (*see* Doc. 17-3), and his application to the Supreme Court of Georgia for a certificate of probable cause ("CPC") to appeal that denial was also denied (Doc. 17-4).

Petitioner has raised the same claims in his federal habeas petition that he raised on direct appeal and in his state habeas petition, as discussed in detail below.

I. Merits Review

A. General Standards Of Habeas Corpus Review

A federal court may not grant habeas corpus relief for claims previously decided

on the merits by a state court unless the decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's determination of a factual issue is presumed correct unless the petitioner rebuts that presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

In *Williams v. Taylor*, 529 U.S. 362, 412 (2000), the Supreme Court explained that, in applying 28 U.S.C. § 2254(d), a federal habeas court first ascertains the "clearly established Federal law" based on "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." The federal habeas court then considers whether the state court decision is "contrary to" that clearly established federal law, i.e., whether the state court "applies a rule that contradicts the governing law set forth" in Supreme Court cases, or "confronts a set of facts that are materially indistinguishable from" those in a Supreme Court decision "and nevertheless arrives at a result different from" that decision. *Id.* at 405-06.

If the federal habeas court determines that the state court decision is not contrary to clearly established federal law, it then considers whether the decision is an

"unreasonable application" of that law, i.e., whether "the state court identifies the correct governing legal principle" from the Supreme Court's decisions, "but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "For purposes of § 2254(d)(1), an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotations omitted). "Under § 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[, but r]ather, that application must also be unreasonable." *Williams*, 529 U.S. at 411. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was *an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.*" *Richter*, 562 U.S. at 103 (emphasis added).

Although a federal court is not prohibited from considering the findings and conclusions that support a lower court's ruling on a petitioner's claims, in this Circuit the relevant ruling is the one issued by the last state appellate court to consider the

claims on their merits. *See Hittson v. GDCP Warden*, 759 F.3d 1210, 1231 (11th Cir. 2014) (noting that "the highest state court decision reaching the merits of a habeas petitioner's claim is the relevant state court decision [for a federal habeas court to] review under AEDPA" (internal quotations omitted), which for a Georgia petitioner's state habeas claim is the decision of the Supreme Court of Georgia, even if the Supreme Court "summarily denied" the petitioner's CPC application without offering any rationale for its ruling); *see also Wilson v. Warden*, 834 F.3d 1227, 1230 (11th Cir. 2016) (*en banc*) ("conclud[ing] that federal courts need not 'look through' a summary decision on the merits to review the reasoning of the lower state court"); *id.* at 1235 (noting that when the Supreme Court of Georgia has denied a CPC application without explanation, the petitioner "must establish that there was no reasonable basis" for the denial); *but see Butts v. GDCP Warden*, No. 15-15691, 2017 U.S. App. LEXIS 4161, at *4 (11th Cir. Mar. 9, 2017) ("Because it does not matter to the result, and to avoid any further complications if the United States Supreme Court disagrees with our *Wilson* decision, we have decided this appeal on the same basis that the district court did: by using the more state-trial-court focused approach in applying § 2254(d).").

B. Merits Review Of Ineffective-Assistance-Of-Counsel Claims

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth

the standard for evaluating a claim of ineffective assistance of counsel, which "is an attack on the fundamental fairness of the proceeding whose result is challenged." *Id.* at 697. The analysis involves two components, but a court need not address both if the petitioner "makes an insufficient showing on one." *Id.*

First, a federal habeas court determines "whether, in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance." *Id.* at 690. The court "must be highly deferential" in scrutinizing counsel's performance and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. In other words, the petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (Internal quotations omitted). "Given the strong presumption in favor of competence, the Petitioner's burden of persuasion—though the presumption is not insurmountable—is a heavy one." *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (*en banc*).

Second, a federal habeas court determines whether counsel's challenged acts or omissions prejudiced the petitioner, i.e., whether "there is a reasonable probability" — one "sufficient to undermine confidence in the outcome" — that "but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (noting that "the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case" (internal quotations omitted)).

"Surmounting *Strickland*'s high bar is never an easy task. . . . Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. . . . The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Id.* at 105 (citations and internal quotations omitted).

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. . . . Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. *The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.*

Id. (citations and internal quotations omitted) (emphasis added).

The foregoing analysis also applies to claims of ineffective assistance of

appellate counsel. "A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). "A defendant can establish ineffective assistance of appellate counsel by showing: (1) appellate counsel's performance was deficient, and (2) but for counsel's deficient performance he would have prevailed on appeal." *Shere v. Sec'y, Fla. Dep't of Corr.*, 537 F.3d 1304, 1310 (11th Cir. 2008) (citing *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000)). But appellate counsel "need not advance *every* argument, regardless of merit, urged by the appellant." *Lucey*, 469 U.S. at 394; *see Robbins*, 528 U.S. at 288 (noting that "it is difficult to demonstrate that [appellate] counsel was incompetent" for failing "to raise a particular claim," and "[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome" (internal quotations omitted)). The *Richter* test set forth above, which applies when a state court has adjudicated a claim on the merits, also applies to claims of ineffective assistance of appellate counsel. *See Bourne v. Curtin*, 666 F.3d 411, 414 (6th Cir. 2012) (citing *Richter*, 562 U.S. at 105).

C. Review Of Claims That Are Procedurally Defaulted.

Federal habeas review is generally barred for a claim that was procedurally

defaulted in state court, i.e., a claim "*not* resolved on the merits in the state proceeding" based on "an independent and adequate state procedural ground." *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977).

> [P]rocedural 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. 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, the federal court may foreclose the Petitioner's filing in state court; the exhaustion requirement and procedural default principles combine to mandate dismissal.

Bailey v. Nagle, 172 F.3d 1299, 1302-03 (11th Cir. 1999) (citations omitted); *see Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (noting that if (a) petitioner failed to exhaust state remedies and (b) state courts would now find his claim procedurally barred, "there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented [her] claims"); *Owen v. Sec'y for the Dep't of Corr.*, 568 F.3d 894, 907-08 (11th Cir. 2009) (same).

The procedural bar to federal habeas review may be lifted if the petitioner can demonstrate either (1) cause for the default and actual prejudice from the alleged violation of federal law, or (2) a fundamental miscarriage of justice, i.e., that he will remain incarcerated despite his actual innocence unless the federal court considers his

defaulted claim. *See Coleman*, 501 U.S. at 750; *Murray v. Carrier*, 477 U.S. 478, 488-89, 495-96 (1986). To establish cause for a procedural default, a petitioner must show either that his counsel's assistance was so ineffective that it violated his Sixth Amendment right to counsel or "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray*, 477 U.S. at 488. "To establish 'prejudice,' a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different" had he presented his defaulted claim. *Henderson v. Haley*, 353 F.3d 880, 892 (11th Cir. 2003).

To establish a fundamental miscarriage of justice, i.e., "that constitutional error has resulted in the conviction of one who is actually innocent of the crime," a petitioner must present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," *Schlup v. Delo*, 513 U.S. 298, 324 (1995), and he "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence," *id.* at 327.

If a petitioner has procedurally defaulted a claim in state court and "makes no attempt to demonstrate cause or prejudice" or a fundamental miscarriage of justice, that

"claim is not cognizable in a federal" habeas action. *Gray v. Netherland*, 518 U.S. 152, 162 (1996).

II. Analysis

A. Ground 1: Arrest Based On Invalid Warrants

In ground 1 of his federal habeas petition, Petitioner asserts that he was arrested based on search and arrest warrants that lacked probable cause, in violation of his Fourth and Fourteenth Amendment rights. (Doc. 1 at 4). As noted below, he also claims, in ground 2, that his attorney, who represented him both at trial and on direct appeal, was ineffective for not raising this issue at trial and on appeal. (*See id.* at 27). Petitioner argues that absent the invalid warrants, he would not have given an inculpatory statement to the police that was used against him at trial. (*Id.* at 4). He argues, with multiple cites to federal caselaw, including Supreme Court precedent, that the affidavit supporting the warrants was insufficient to establish probable cause to arrest him. (*Id.* at 5-24).

The state habeas court addressed Petitioner's ineffective-assistance ground 1 claim as follows:

> Petitioner's allegation that counsel was ineffective for failing to raise the issue that the warrants for his arrest did not contain enough information to establish probable cause is without merit. The Court finds that

> Petitioner has not shown any resulting prejudice therefrom because Petitioner was indicted, tried and convicted of the crime for which he was arrested. *McClure v. Hopper*, 234 Ga. 45 (1975) (trial court's failure to conduct a preliminary hearing to determine probable cause harmless when the defendant was indicted, tried and convicted).

(Doc. 17-3 at 7).

The state habeas court did not address Petitioner's substantive ground 1 claim — that the search and arrest warrants violated his constitutional rights — and focused instead on his claim that his counsel was ineffective for not challenging the warrants either at trial or on direct appeal. But the Supreme Court of Georgia case that the state habeas court cited is not relevant to the federal constitutional issue before this Court. *See McClure*, 214 S.E.2d at 505 ("This court has held that the failure to give an accused a commitment hearing is harmless error after he has been indicted, tried and convicted, and is not thereafter ground for the grant of habeas corpus relief."). The issue here is not whether Petitioner received a commitment or preliminary hearing, but rather whether he was arrested without probable cause.

But because Petitioner did not raise his substantive ground 1 claim on direct appeal, he procedurally defaulted that claim, and he may not raise it here without first establishing cause and prejudice to overcome the default. And there is only one basis that Petitioner has suggested to do so — ineffective assistance of counsel. Petitioner's

ground 1 claims both hinge, therefore, on whether counsel's performance was constitutionally deficient with respect to the evidence gathered on the night of the shooting and the following day, and on whether Petitioner was prejudiced by his counsel's performance in that regard.

Prior to trial, counsel moved to suppress all of the statements Petitioner gave to the police and all of the evidence gathered from him and from the scene of the shooting. (*See* Doc. 13-2 at 31 (noting that Petitioner had filed multiple motions "to suppress [his] clothing, the fruits of his detention and arrest, [evidence gathered from] the house where he had been living, statements that he made, the results of a hand-swabbing, and any evidence derived from the body of the deceased")). In ruling on Petitioner's motions, the trial court made the following findings of fact:

> On October 1, 2007, Deputy Kevin Snyder of the Hall County Sheriff's Office responded to 4103 Belvedere Drive [the scene of the shooting] at approximately 10:17 p.m. in response to a report from the Sheriff Department's 911 center. . . . that they had received a 911 call, later determined to be from the Defendant [Petitioner], reporting a domestic disturbance involving a struggle for a gun between a male and a female, that someone had been shot, and that the caller had witnessed the shooting. . . .
>
> . . . .
>
> On the couch was the body of Ms. Brownell, the deceased in this case. She was lying . . . on her right side with her feet on the floor. She had a cigarette lighter gripped in her right hand and a pistol in her left hand. She had an apparent gunshot wound to the left side of her head.

. . . .
Investigator Cameron Durham, a crime scene investigator for Hall County, arrived at the scene at 10:38 p.m. and entered the residence at 10:55 p.m. He testified that the statement he was given upon arriving, which had come from the Defendant, was that Ms. Brownell had shot herself while sitting up on the sofa. Once inside, however, he did not see a blood pattern on the side of the sofa which would be consistent with someone shooting [herself] while sitting up. Furthermore, the trajectory of the bullet itself was inconsistent with a bullet fired while the victim was sitting up.

Instead, both the blood pattern and the bullet trajectory indicated that Ms. Brownell had been on her side on the couch when she was shot. Investigator Durham's conclusion was that the scene did not match up with the Defendant's explanation of Ms. Brownell's death and so he decided to acquire a search warrant.

Investigator Durham also noticed a suspect stain on the Defendant's pants leg and he determined that the Defendant's clothes would probably need to be collected so as to preserve the evidence. Lieutenant Couch testified that a decision was made to secure a warrant for the clothes based on the suspicion that the stain was blood spatter.

Soon thereafter, Deputy Davidson and Corporal Choate were instructed by Lieutenant Bagwell to have the Defendant sit in the back of a patrol car. He was put in the back seat of one of the patrol cars with the back window down and was not handcuffed. He remained there for about an hour.
. . . .
At approximately 12:10 a.m. on October 2, 2007, Deputy Davidson drove the Defendant to the Law Enforcement Center and brought him to an interview room. He was left there alone for a period of time. . . .

At 1:45 a.m. on October 2, 2008, an alco-sensor test was conducted on the Defendant and he registered a blood alcohol concentration of .115.

Lieutenant Couch determined that the Defendant was too intoxicated for questioning at that time.

. . . .

Detective Scott Wiley obtained the search warrant for the house, for the Defendant's clothes and for the Defendant's arrest at approximately 2:30 a.m. on October 2, 2008. As a basis for requesting the warrants, he provided Magistrate Judge Loggins with affidavits and also related to her what he had been told by Sergeant Evans: that the position of the body and the cigarette lighter in Ms. Brownell's right hand did not support a theory of suicide.

After acquiring the search warrant, and at around 3:00 a.m., the residence was searched and the body was examined by investigators. Investigator Durham used a dowel rod to track the trajectory of the bullet that had gone into Ms. Brownell's head. He testified that this was a common procedure and that it does not involve making any cuts or other alterations to the victim's body which would interfere with an autopsy.

By 6:10 a.m., the Defendant's blood alcohol concentration was down to .05. A decision was made that [he] was no longer too intoxicated to be interviewed. At 6:54 a.m. on October 2, 2008, Detective Wiley and Investigator Klein interviewed [him] at the Law Enforcement Center. Prior to the interview, the Defendant was read his *Miranda*[1] rights and signed a *Miranda* waiver form. This process was both video and audio-taped.

The interview itself lasted almost two hours. [(*See* Doc. 17-2 at 35-87)]. Another interview was conducted at around 10:30 a.m. of October 2, 2008 by Investigator Couch. [(*See id.* at 88-96)]. It lasted about 20 minutes, Investigator Klein was present, and the Defendant was reminded of his *Miranda* rights, having already been given them earlier that

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966), provides that a law enforcement officer may not interrogate a suspect in custody without first advising him of his right to remain silent and his right to an attorney.

> morning. The Defendant was polite and appeared to understand all the questions that were asked him. He was offered food, drink, and the opportunity to use the bathroom. At the conclusion of the interview, at about 10:50 a.m., the Defendant was served with the arrest warrant which had been procured earlier that morning.

(*Id.* at 31, 32, 34-35, 36-37 (citations omitted)). The trial court then reached the following conclusions of law:

> . . . . At issue is the point in time where Ms. Brownell had been determined to be deceased and the deputies had left the house. The Defendant was outside, first on the porch and then in the patrol car. The Detectives arrived and entered the house "to take a look at what was present." It was at this point that the investigators noticed that the blood spatter was inconsistent with the description of the shooting that had been supplied by the Defendant and decided to get a search warrant for the house.
>
> . . . .
>
> . . . . Because the Investigators were legally inside the house and did no more than walk into the front room which would have been the only way to reach the girls' room, any evidence which was in plain view, in this case blood spatter, could be legally seized, in this case by being photographed and used as a basis for obtaining warrants.
>
> . . . .
>
> The Honorable Judge Tracy Loggins, who issued the search warrant in this case [(*see* Doc. 10-3 at 347-50)], testified that she believed that there was probable cause to issue a search warrant based solely on the information in the affidavit, that being that the storm door on the house was ripped off its hinges, there was a dead body in the house, and that the deceased and the Defendant had been arguing "all evening." This determination by the Magistrate is entitled to substantial deference, but even considering the affidavit anew, it is clear that there was probable cause to issue a search warrant based solely on the affidavit. The scene painted by the affidavit, contrary to the Defendant's assertions, is not one

that would beg the question "what crime?" The warrant was issued based on the ripped screen door, the arguing "all night" between the deceased and the Defendant, and the fact that one of the participants in the argument was found shot and dead at the conclusion of the argument. *The Court therefore finds that the affidavit was sufficient to allow the Magistrate to find the probable cause necessary to issue a warrant.*

Even if this were not the case, however, Investigator Scott Wiley supplied additional oral testimony to the Magistrate. [(Emphasis added)]. This testimony had to do with the blood pattern not matching the Defendant's version of how the shooting took place as well as the fact that the deceased had a cigarette lighter in her hand at the time she died. Both of these facts were explained by Investigator Wiley as indicating that it was unlikely that Ms. Brownell had shot herself. . . .

. . . .

The Defendant would ask the Court to assume that Investigator Wiley met the Magistrate at approximately 2:30 a.m. specifically in order to swear out a warrant and that he gave the oral testimony before being given the oath and furthermore that after the oath he never repeated any of the details regarding the position of the body or the presence of the cigarette lighter despite the fact that the magistrate was asking questions about the evidence. . . . The Court therefore finds that the affidavit was sufficient on its own to establish probable cause and that the oral evidence was properly considered by the Magistrate which only bolsters the finding of probable cause.

Defendant further contends that the State failed to prove that the Magistrate relied on the oral evidence, despite the fact that the warrant states that it has been issued based on "all other evidence given to me under oath or affirmation." This claim is unsupported by case law and would essentially mean that in any case involving a warrant supported by oral testimony the magistrate must appear in court and affirmatively state that [she] "relied" on the oral testimony. Because there is no such requirement, and because the wording on the warrant is unambiguous, this argument fails as well. Based on the above, the portion of

Defendant's Motion to Suppress #45 that deals with the search warrant for the home is DENIED in its entirety.

. . . .

Defendant claims in his Motion #43 that all evidence of any kind which was collected as a result of his detention and arrest should be suppressed. The Defendant was served with an arrest warrant at 10:45 a.m. on October 2, 2007. His claim is that he had actually already been arrested at that point and that the police lacked probable cause to make such an arrest. As such, he has moved to suppress the fruits of that arrest, although the only actual evidence he refers to in his motion are the statements he made while at the law enforcement center after having been given his *Miranda* warning . . . . [T]he questions before the Court are at what time the Defendant should be considered to have been under arrest and whether law enforcement had probable cause to arrest the Defendant at that time.

. . . .

. . . [W]hen the Defendant was taken from the scene in the back of the patrol car, this [] amounted to the placing of the Defendant under arrest. There is no evidence that the Defendant was told why he was being taken to the law enforcement center and there is no evidence that he consented to being taken there. No evidence was presented that he was told that he was not under arrest or that his detention would be brief. Based on the evidence presented, a reasonable person in the Defendant's position would have felt that [he was] being placed under arrest once [he was] driven away from [his] residence to the law enforcement center in the back of a patrol car.

It is clear from the evidence, however, that there was probable cause to justify the Defendant being taken into custody. The Court has already determined that the evidence collected by Investigator Durham prior to acquiring a search warrant is admissible. Because of that, the evidence in the hands of law enforcement at the time the Defendant was driven away from his residence consisted of the following: The Defendant told 911 that there had been a struggle between himself and the deceased and that the struggle had ended with her shooting herself while sitting up on the

> couch; the blood spray and the position of the body were inconsistent with this version of how the shooting took place; one of the two young girls who were present in the house in a room with a glass-paneled door told police that the Defendant "probably shot momma in the head"; the Defendant told one of the responding officers that he was going to have to deal with this for the rest of his life;[2] Ms. Brownell was clutching a cigarette lighter in one hand and a pistol in the other when she was found; and the screen door of the residence was ripped off its hinges.
>
> This is actually more evidence than was presented to the magistrate when the police went to get an arrest warrant (there is no indication that the Defendant's statements were repeated to the magistrate) and yet the Magistrate concluded that there was probable cause to arrest. Based on the same evidence, this court also finds that there was probable cause to arrest the Defendant. It follows that the fruits of that arrest, in this case any statements made by the Defendant at the law enforcement center, need not be suppressed as a result of an illegal arrest and Defendant's Motion to Suppress Fruits of illegal Detention and Arrest (#43) is DENIED.

(*Id.* at 37-38, 39, 40-42, 48-49 (citations omitted)).

The foregoing demonstrates that Petitioner's counsel did challenge every bit of the evidence gathered at the scene of the shooting and from Petitioner, by statement or otherwise, between the time of the shooting late on the evening of October 1, 2007 and Petitioner's indictment on October 4, 2007 (*see* Doc. 12-2 at 252-55 (indictment)).

---

[2]The trial court also found that Petitioner's pre-*Miranda* statement — "I am going to have to deal with this the rest of my life" — was admissible as a voluntary utterance made not while he was in custody, but rather while he was detained as a material witness who had initiated the investigation into a fatal gunshot wound he had witnessed. (Doc. 13-2 at 42-46).

In denying Petitioner's motions to suppress, the trial court explained in detail that there was sufficient evidence of probable cause to support the search and arrest warrants issued in the early morning hours of October 2, 2007.

Petitioner cites *Garmon v. Lumpkin County*, 878 F.2d 1406 (11th Cir. 1989), at length, to support his claim. But in *Garmon*, a civil suit claiming false arrest, the Eleventh Circuit stated:

> From the face of the arrest warrant it is evident that it was issued without probable cause. The incorporated affidavit supporting the warrant, completed at the direction of Sheriff Seabolt by one of his investigators who had relatively little involvement in the case, states only that the affiant swears that "to the best of (his or her) knowledge and belief Teresa Ann Garmon did . . . commit the offense of false report of a crime."

Id. at 1408. The scant affidavit at issue in *Garmon* is a far cry from the affidavit and other evidence supporting the warrants issued in Petitioner's case, as set forth in detail above. Indeed, the trial court concluded that there was sufficient evidence to support Petitioner's arrest at the scene of the shooting, even before any warrant had issued.

Petitioner's reliance on *Whiteley v. Warden*, 401 U.S. 560 (1971), is also unavailing. The *Whitely* Court stated:

> [T]he sole support for the arrest warrant issued at Sheriff Ogburn's request was [a] complaint . . . . [that] consists of nothing more than the complainant's conclusion that the individuals named therein perpetrated

> the offense described in the complaint. The actual basis for Sheriff Ogburn's conclusion was an informer's tip, but that fact, as well as every other operative fact, is omitted from the complaint. Under the cases just cited, that document alone could not support the independent judgment of a disinterested magistrate.

Id. at 565. But, again, the evidence supporting Petitioner's arrest, and the affidavit and other evidence supporting the search and arrest warrants issued in his case, were much more extensive than a simple allegation that Petitioner had committed a crime.

The Court finds, therefore, no basis to rule that the trial court's and the state habeas court's conclusions regarding the claims Petitioner has raised in grounds 1 and 2 regarding the existence or not of probable cause for his arrest were "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 103. Not only does Petitioner's ineffective-assistance ground 1 claim fail, but because he has offered no basis other than ineffective assistance to excuse the default of his substantive ground 1 claim, that claim also fails.[3]

B. Ground 2: Ineffective Assistance Of Counsel – Partial Trial Closure

In ground 2 of his federal habeas petition, Petitioner asserts that his trial and

[3]And, as the trial court's discussion of Petitioner's motions to suppress reveals, Petitioner is simply incorrect when he asserts that counsel failed "to make minimal inquiries" regarding whether probable cause existed for his arrest. (*See* Doc. 1 at 11-12, 19).

appellate counsel provided ineffective assistance by failing to (i) object to the invalid arrest warrants and (ii) bring to the court's attention that "at least two people" had been banished from the courtroom during his trial. (Doc. 1 at 27-28).

The Court has reviewed part (i) of ground 2, above, and finds it wanting. As to part (ii), the state habeas court addressed Petitioner's claim as follows:

> In Ground Two, Petitioner alleges that appellate counsel was ineffective for failing to raise the issue that courthouse deputies denied access to Petitioner's trial to a member of the public. The Court finds that counsel and the trial court committed no error. Mr. Willis [Petitioner's counsel] testified that courthouse deputies mistakenly told someone who came to observe Petitioner's trial that the courthouse was closed when in fact the trial was still occurring. Trial counsel and the court did not know about the alleged error until after the fact, and counsel made an unsuccessful effort to inform the person who wanted to attend that the courthouse deputies were incorrect. The Court finds this case distinguishable from *Purvis v. State*, 288 Ga. 865 (2011). In *Purvis*, the trial court directed that the trial be held at the courthouse jail, thereby relinquishing control of who could attend the trial entirely to jail personnel. Here, the Court made no change to where the trial was held and took no action to restrict access to the trial. Also in *Purvis*, the defendant's brother was denied access to the entire trial. Here, the closure of the courtroom was brief and trivial and the trial court did not order the closure. *Cf. United States v. Perry*, 479 F.3d 885 (D.C. Cir. 2007) (exclusion of defendant's eight-year-old son did not violate Sixth Amendment right to public trial where trial remained open to defendant's wife and general public); *Carson v. Fisher*, 421 F3d 83, 93 (2nd Cir. 2005) (no Sixth Amendment violation when defendant's ex-mother-in-law was excluded during span of a single witness's testimony, when other family members and general public were present).

> Petitioner's argument that prejudice is presumed is without merit. This case is similar to *Reid v. State*, 286 Ga. 486, 487 (2010), wherein trial counsel did not object to the closing of the courtroom. In *Reid*, the Georgia Supreme Court held that Petitioner must show that he was prejudiced by counsel's decision not to object. Thus because trial counsel did not object to the closing of the courtroom until it was too late for the trial court to take any action on the matter, prejudice is not presumed. Moreover, Petitioner has not argued or demonstrated that any prejudice resulted from the alleged error. Accordingly, the Court finds that Petitioner has not established the requisite cause and prejudice to overcome the procedural default as to the underlying merits of this ground.

(Doc. 17-3 at 7-8). The Court discusses Petitioner's grounds 2 and 3 trial closure claims together, below.

C. Ground 3: Structural Error – Partial Trial Closure

In ground 3 of his federal habeas petition, Petitioner asserts "a structural error when deputies removed two spectators from the courtroom, creating a partial closure of the courtroom." (Doc. 1 at 31).

In denying Petitioner's motion for new trial, the trial court addressed Petitioner's ground 3 claim as follows:

> The Defendant [] alleges that he was deprived of his right to a public trial. Due to furloughs, county administrative offices were closed on Monday, March 16, 2009, which was a day in the middle of the trial. The front doors to the courthouse were open, however, and court was in session in two different courtrooms on the fourth floor.

Mr. Harmon was the Sheriff's deputy in charge of security for the two courtrooms and was informed by other law enforcement that a man was creating a distraction by going from courtroom to courtroom. The deputy monitored both courtrooms via security camera and saw two men sitting in the back of the courtroom where this Defendant was on trial. Deputy Harmon came to the Courtroom and approached those men and asked them to step out into the hallway "for just a second" so he could ask them a couple of questions.

Once in the hallway, one of the men began to walk away and Attorney Nicki Vaughan of the Defense team attempted to stop the man and asked him to wait so that they could sort out whatever was happening but the man said he was not going to stay where he was not wanted. Then he left. The other man spoke to the deputy and then went back into the courtroom and sat down.

Derek Collins testified at the Motion for New Trial hearing and claimed that he was the man who had left and that he did so 'for the simple fact that he had been told to leave.' He could not identify the year that the trial had taken place, what type of testimony had been taking place before he left (he claimed it was an expert when in fact it was video of the Defendant's interview) and although he was not related to the Defendant, paradoxically claimed that he was related to someone who was related to the Defendant. Mr. Collins' testimony was that the Sheriff and another lady, who was not Ms. Vaughan, came up to him during a recess and in open court consulted with the Judge and then told him to leave. This occurrence is not reflected in the record in any way. Mr. Collins also admitted that Ms. Vaughan had asked him to stay but that he left anyway.

At no time was anyone prevented from watching the trial of this case by the Court. And it is clear from the evidence that the deputies did nothing more than ask to speak to two spectators, one of whom decided he would rather leave than speak. Even if the deputy had told one of the men to leave, this would not warrant a new trial as

> [t]he temporary closure of the courtroom during juror voir dire, unknown to the trial judge, the attorneys. or the defendant, which was corrected by the trial judge upon first detection, is too trivial to require that [a] conviction be vacated.

> In this case, unlike in *Garey* [quoted above], the contested time period wasn't even during voir dire, it was during a recess. The man was asked to return by Ms. Vaughan, he simply chose not to. There was no violation of the Defendant's right to a public trial, the Court took no part in asking anyone to even step outside of the Courtroom, and the only person who claims to have been kept from observing was specifically asked to come back in but refused. The Motion is DENIED as to this claim.

(Doc. 13-2 at 134-36 (citations omitted) (quoting *Garey v. U.S.*, 2010 WL. 2507834 (M.D. Ga. 2010)).

The state habeas court addressed Petitioner's ground 3 claim in this fashion:

> In Ground Three, Petitioner alleges that his constitutional rights were violated when he was denied a public trial. Because the procedural default analysis is coextensive with the analysis for ineffective assistance of counsel, the Court finds that this Ground is procedurally defaulted and without merit for the same reasons set forth in Ground Two, *supra*. The Court finds that Petitioner has not established the requisite cause and prejudice to overcome the procedural default.

(Doc. 17-3 at 9).

The opinion of the United States District Court for the Middle District of Georgia in *Garey* is instructive in this regard, and the Court quotes it at length:

> The most definitive statement that the United States Supreme Court has

issued on the scope of a defendant's right to a public trial came in the case of *Waller v. Georgia*, 467 U.S. 39 (1984). . . .[, in which the Court] determined that closure of the courtroom for [a] suppression hearing did violate the defendant's Sixth Amendment right to a public trial. The Court . . . establish[ed] a procedure to be followed for permissible temporary closure of courtrooms in criminal trials. . . . Most recently, the [] Court applied the *Waller* mandate to a closure of another Georgia courtroom . . . . *Presley v. Georgia*, 130 S. Ct. 721, 721-24 (2010).

The thrust of none of the foregoing precedent can be applied here to the facts or the legal circumstances of Petitioner Garey's case. There was no party seeking closure of the courtroom; neither the trial judge nor any of the parties were aware of the unauthorized closure of the courtroom during juror *voir dire* by an unnamed Court Security Officer; the trial court took curative action as soon as the closure was brought to his attention; no evidence had been presented; and no objection was made by the defendant.

In *United States v. Ivester*, 316 F.3d 955 (9th Cir. 2003), the Circuit Court observed:

> Though some courts and treatises boldly declare that the Sixth Amendment right to a public trial applies to the entire trial, this position has been rejected by recent decisions which demonstrate that the right to a public trial does not extend to every moment of trial. *See, e.g., United States v. Edwards*, 303 F.3d 606, 616 (5th Cir. 2002) ("We must first determine whether *Waller* applies to" the court's decision to empanel an anonymous jury); *Peterson v. Williams*, 85 F.3d 39, 42-43 (2nd Cir. 1996) (unjustified closure is too trivial to violate the Sixth Amendment where closure does not undermine the values furthered by the public trial guarantee), *cert. denied*, 519 U.S. 878 (1996) . . . . Thus, we must determine whether the proceedings in question implicate the Sixth Amendment.

Id. at 958-59 [(citations omitted)]. The *Ivester* Court went on to say, "Many of our sister circuits have relied on *Peterson* to determine whether a closure implicates the accused's Sixth Amendment right to a public trial." *Id.* at 960. The Tenth Circuit Court of Appeals, in *United States v. Al-Smadi*, 15 F.3d 153, 154-155 (10th Cir. 1994), applied *Peterson* to hold that [a] brief and inadvertent closure of the courtroom did not implicate the Sixth Amendment.... Also, the Ninth Circuit Court of Appeals in *United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003), quoting *Al-Smadi*, 15 F.3d at 155 [—] which held, "The denial of defendant's Sixth Amendment right to a public trial requires some affirmative action by the court meant to exclude persons from the courtroom" [—] further observed that, "some closures are too trivial to implicate the Sixth Amendment right to a public trial." (citing *Ivester*, 316 F.3d at 959-60).

So many courts have relied on *Peterson*, . . . that one more *Peterson* observation is in order, to wit:

> Other courts have made analogous distinctions. They too have held that a temporary closure may, at times, not violate the Sixth Amendment. In *Snyder v. Coiner*, 365 F. Supp. 321 (N.D.W. Va. 1973), *aff'd*, 510 F.2d 224 (4th Cir. 1975), for example, a deputy sheriff closed the courtroom doors during summation because he had misunderstood a state trial judge's order to keep the courtroom quiet. The district court, reviewing the defendant's petition for writ of habeas corpus, found no violation because the closure was only for a "relatively small portion of the trial" and because "[n]either the judge nor the parties were aware of any exclusion of the public taking place." *Id.* at 324. On appeal the Fourth Circuit affirmed the district court's decision. It stated: "Such condition existed for but a short time and was quickly changed by the Court, when advised of the action of the bailiff... The incident was entirely too trivial to amount to a constitutional deprivation." *Snyder*, 510 F.3d at 230....

> [85 F.3d] at 42-43. These cases are so closely analogous to the closure in Petition[er] Garey's case that they cannot be ignored, nor can the finding that the closures were too trivial to violate the defendant's public trial right. The closure in Garey's case was even more trivial than most of these authorities.

Garey v. United States, 5:08-CV-90024-CDL, 2010 U.S. Dist. LEXIS 59239, at *36-43 (Mar. 29), *adopted by* 2010 U.S. Dist. LEXIS 59237 (M.D. Ga. June 15, 2010).

The *Garey* court also quoted *Gibbons v. Savage*, 555 F.3d 112, 119-21 (2nd Cir. 2009), to the effect that although the denial of a public trial is a structural error, "[i]t does not follow[] that every deprivation in a category considered to be 'structural' constitutes a violation of the Constitution or requires reversal of a conviction, no matter how brief that deprivation or how trivial the proceedings that occurred during the period of the deprivation." 2010 U.S. Dist. LEXIS 59239, at *45. The *Garey* court deemed *Gibbons* and *Peterson*, "and the United States Supreme Court's denial of *certiorari* to both, [to] have carved out a *triviality rule* to structural error closure of public trials": "The temporary closure of the courtroom during juror *voir dire*, unknown to the trial judge, the attorneys, or the defendant, which was corrected by the trial judge upon first detection, is too trivial to require that [a defendant's] conviction be vacated." *Id.* at *47; *see also Capshaw v. United States*, 1:12cv541-MEF (WO), 2014 U.S. Dist. LEXIS 84302, at *83-84 (M.D. Ala. May 12) (citing *Gibbons*, 555

F.3d at 120, to the effect that: "Courts have applied the 'triviality exception' to the deprivation of the public trial right, despite that error's 'structural' nature, reasoning that it would be 'unimaginable' to assume that 'every temporary instance of unjustified exclusion of the public — no matter how brief or trivial, and no matter how inconsequential the proceedings that occurred during an unjustified closure — would require that a conviction be overturned.' "); *id.* at 86 (citing *United States v. Greene*, 431 Fed. Appx. 191, 195-96 (3d Cir. 2011), to the effect that "courts have placed considerable emphasis on the role of the trial judge in assessing whether a closure is of constitutional magnitude and have resisted ascribing to judges the unauthorized actions of courthouse personnel"), *adopted by* 2014 U.S. Dist. LEXIS 83399 (M.D. Ala., June 19 2014).

The trial "closure" at issue here — when a deputy sheriff in charge of courtroom security asked two individuals whose movements had been creating a distraction to step outside of the courtroom so as to converse with them briefly, during a trial recess, and then allowed them to return to the courtroom, although one declined to do so — is even more trivial than those discussed above. There is no reasonable likelihood that a claim based on this "closure" would have altered the outcome of Petitioner's direct appeal. *See Shere*, 537 F.3d at 1310. Petitioner has not shown that the rulings of the

trial court and the state habeas court with respect to his trial closure claims were "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 103. Petitioner's ground 2 and 3 trial closure claims fail.

D. Ground 4: Prosecutorial Misconduct – Brady Violation

In ground 4 of his federal habeas petition, Petitioner asserts that the prosecution withheld *Brady* material from the defense and allowed Sheriff's deputies to perjure themselves without correcting the record. (Doc. 1 at 37-38).

The Supreme Court of Georgia addressed the *Brady* claim as follows:

> Just before trial, appellant [Petitioner] moved to compel the State to test Brownell's blood sample for the presence of marijuana metabolites, or THC, the psychoactive compound found in marijuana. The trial court granted the motion and the GBI lab performed an immunoassay (IA) test, a procedure used by the GBI to screen for the possible presence of several different metabolites. Because the blood sample registered at the exact cutoff level to warrant further testing, the lab conducted a gas chromatograph/mass spectrometer (GC/MS) test, a more precise test used to either confirm or rule out the presence of marijuana metabolites in the sample. The need for further testing was reported in open court during voir dire in the presence of appellant and his counsel. The results of the GC/MS test, which were reported to be negative, [were] posted on the State's secure web system on March 17, 2009, and made available to the prosecutor two days later. It is undisputed defense counsel was not made aware of the GC/MS test results until after the conclusion of trial.
>
> Appellant contends the trial court erred by denying his motion for new

trial based on the State's failure to disclose the result of the IA test indicating the possible presence of marijuana in the victim's blood, which he argues he could have used to bolster his argument that she shot herself because of her exaggerated emotions and severe intoxication. He further asserts as error the State's failure to disclose the results of the GC/MS test during trial.

To prevail on a *Brady* claim, a defendant must show: (1) the State possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial would have been different. *See Kyles v. Whitley*, 514 U. S. 419, 433-434 (115 SC 1555, 131 LE2d 490) (1995); *Mize v. State*, 269 Ga. 646, 648-649 (2) (501 SE2d 219) (1998); *Burgeson v. State*, 267 Ga. 102, 104 (2) (475 SE2d 580) (1996). Pretermitting the issue of whether appellant met his burden with regard to the first three prongs of his *Brady* claim, we find no reversible error because appellant has failed to show a reasonable probability that disclosure of the evidence would have caused a different outcome in the trial. *See Watkins v. State*, 276 Ga. 578, 583 (4) (581 SE2d 23) (2003); *Rogers v. State*, 257 Ga. 590, 592 (3) (361 SE2d 814) (1987).

The defense theory at trial was that Brownell shot herself while severely intoxicated. Consistent with his theory of severe intoxication, appellant recounted in his statement to police, which was admitted at trial, that Brownell had been drinking beer and doing liquor shots during the evening of the crimes and was exhibiting exaggerated emotional and physical behavior. The defense questioned expert witnesses, both for the State and defense, regarding the effects of intoxication on a person's emotions, perception of events, and physical abilities, and more specifically with regard to a person who had a blood-alcohol concentration of 0.27. Defense counsel highlighted this evidence in closing arguments by arguing that Brownell was "drunk," "out of her mind," with a blood-alcohol level of 0.27, when she reached for the gun,

> leaned back, hit the back of the couch and shot herself. To the extent appellant could have argued that the test results showed the possibility that Brownell was also under the influence of marijuana, the undisclosed evidence was consistent with the intoxication evidence he presented to the jury. Because appellant made no showing that the undisclosed test results would have made his defense theory more credible or revealed anything other than what he already had presented to the jury, he has failed to meet his burden of proving a reasonable probability that the outcome of his trial would have been different. *See Morris v. State*, 284 Ga. 1 (2) (662 SE2d 110) (2008) (no *Brady* violation where failure to disclose test showing absence of blood on stairs was consistent with other evidence already presented to jury); *Ferguson v. State*, 280 Ga. 893 (2) (635 SE2d 144) (2006) (speculation that expert might have been able to present opinion contradicting State's evidence insufficient to establish reasonable probability that outcome of trial would have been different).

Hester, 736 S.E.2d at 406-07 (footnotes omitted).

Other than alleging — for the first time, apparently — that "the State did everything in its power to get a conviction in this case" by "allow[ing] the Hall County Sheriff's Deputies to perjure themselves and fail[ing] to correct the perjured testimonies" (Doc. 1 at 38), Petitioner has offered nothing to "show that the [Supreme Court of Georgia's] ruling on . . . [his *Brady* claim] was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 103; (*see also* Doc. 1 at 37-39). And Petitioner has defaulted his perjury claim by not raising it in state court and not demonstrating cause and prejudice or a miscarriage of justice to excuse

the default. *See Coleman*, 501 U.S. at 735 n.1, 750; *Gray*, 518 U.S. at 162.

E. Ground 5: Due Process – State Intimidation Of Defense Witness

In ground 5 of his federal habeas petition, Petitioner asserts that his due process rights were violated when the state intentionally intimidated a defense witness, Tonya Kimmons, and prevented her from testifying at his trial. (Doc. 1 at 39-40).

The state habeas court addressed this claim as follows:

> In Ground Five, Petitioner alleges that the prosecution intimidated Tonya Kimmons into not testifying at trial. The Court finds that Petitioner has not demonstrated that the prosecutor committed any misconduct. Trial counsel did not testify with any particularity as to the substance of the alleged conversation between Kimmons and an assistant district attorney. Moreover, neither Kimmons [n]or the unidentified assistant district attorney with whom she allegedly spoke testified at the habeas corpus hearing. Also, the Court finds that Petitioner has not established that the assistant district attorney's alleged conduct violated the statute upon which Petitioner relies. No evidence establishes that the prosecution intended to deter Kimmons from testifying freely, fully and truthfully. Accordingly, Petitioner fails to demonstrate any prosecutorial misconduct[, and] the Court finds that this Ground is without merit.

(Doc. 17-3 at 9-10).

Petitioner notes that his counsel raised this issue in the motion for new trial, but failed to raise it on direct appeal, where it might have changed the outcome of the appeal. (Doc. 1 at 39-44). Petitioner asserts that the assistant district attorney told Kimmons that she could be prosecuted for perjury if she testified that she talked to

Petitioner on the night of the shooting and that he was calm when he asked her to pick him up — because that testimony would have contradicted the testimony of the victim's daughter that he and the victim had been arguing all night. (*Id.* at 42-43).

But, as noted above, Petitioner provided no evidence at the state habeas hearing to support these assertions.[4] The Court finds, therefore, no basis to rule that the state habeas court's conclusion that there was no due process violation with regard to the alleged intimidation of Kimmons was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 103. Ground 5 fails.

F. Ground 6: Ineffective Assistance Of Counsel – Gunshot Residue

Finally, in ground 6 of his federal habeas petition, Petitioner asserts that trial and appellate counsel was ineffective for failing to object to the prosecutor's reference during her closing argument to a field test showing gunshot residue on Petitioner's hands, even though the trial court had ruled that evidence inadmissible. (Doc. 1 at 44-

[4]He also failed to provide evidence to support these assertions at the hearing on his motion for new trial. (*See* Doc. 13-2 at 137 ("Defendant [] alleges that the State intimidated and influenced one of his witnesses: Ms. Tonya Kimmons. This allegedly led to her deciding not to testify. No evidence was presented in support of this allegation, and while the Defendant has explicitly not abandoned any of his arguments, the Court finds this argument meritless.")).

47).

In his motion for new trial, Petitioner challenged the prosecutor's gunshot residue references, and the trial court addressed that claim as follows:

> The Defendant [claims] that the Prosecutor [argued improperly] during her closing [] by saying that the Defendant had elevated levels of lead, barium and antimony which in the good ole days of the crime lab would have been a 'positive' and also by saying that the Defendant had gunshot residue on him.
>
> As to the first statement, Jesse Brown, a GBI crime lab gunshot residue expert, testified that an Inductively Coupled Plasma Mass Spectrometry ("ICPMS") test had been performed on the Defendant's hands and that levels of lead, barium and/or antimony were found at a level that was above background levels which justified analysis with a scanning electron microscope. That analysis did not reveal particles that could be classified as gunshot residue. Mr. Brown was explicit that he did not report things he had tested as being positive or negative for gunshot residue, although he said he "consider[ed]" an item to be "positive" if it did have a sufficient level of residue to warrant further testing.
>
> Another expert, Mr. Chris Robinson, testified that for the first three years of his tenure at the G.B.I., only the ICPMS test was used, with the obvious implication being that things were either positive or negative for gunshot residue based solely on the results of that one test. He testified that after the initial three years, they moved to the current system in which the ICPMS test is more of a threshold test and is not used to classify [test results] as positive or negative.
>
> None of this testimony was objected to, and there was a foundation in the evidence for the prosecutor to argue that the test done on the Defendant would have been considered positive during the time when the ICPMS was the only test. The statement was appropriate as it was derived from

> evidence properly before the jury and . . . [the reference] to the "good old days" is simply the kind of rhetorical leeway that all lawyers are entitled to in their closing arguments. *Spiller v. State*, 282 Ga. 351 (2007).
>
> As to the second statement, the prosecutor said that "[t]he Defendant had gunshot residue on him." Mr. Brown clearly testified the Defendant's shirt was tested and that a particle of gunshot residue was found on the right sleeve. In both instances, the Prosecutor chose her wording carefully and the statements were accurate and proper. The Prosecutor did not say that the Defendant's hands tested positive for gunshot residue, just that at one time they would have and that there was residue 'on him,' which there was on his shirt. Furthermore, in both instances the Court reminded the jury that what the lawyers said was not evidence and that they would have to remember what the evidence was. The Motion [for new trial] is DENIED as to this claim.

(Doc. 13-2 at 133-34 (citations omitted)).

The state habeas court addressed Petitioner's ground 6 ineffective-assistance claim as follows:

> In Ground Six, Petitioner alleges that appellate counsel was ineffective for failing to raise the issue of the prosecution's discussing gun shot residue during closing argument after the trial court ruled the results inadmissible. Specifically, Petitioner alleges that during closing argument, the prosecution made a remark about Petitioner having gunshot residue on him. The Court finds that Petitioner has not demonstrated that not raising this issue was an unreasonable tactical move that no attorney would make. *Shorter v. Waters*, 275 Ga. 581 (2002). Counsel raised this issue unsuccessfully at the motion for new trial, and appellate counsel may have reasonably concluded that this alleged error was likely to fail on direct appeal. Furthermore, the Court finds that Petitioner failed to establish that the result of Petitioner's appeal would have been different. *Battles v. Chapman*, 296 Ga. 702, 705 (1998). Therefore, this Ground is

without merit.

(Doc. 17-3 at 10).

Here, again, Petitioner has not made a showing sufficient to call into question the state habeas court's conclusion that there was no reasonable likelihood of a different outcome on appeal had counsel raised the gunshot residue issue. *See Shere*, 537 F.3d at 1310. Petitioner has not shown that there is no "reasonable argument," as shown in the trial court's and state habeas court's opinions, "that counsel satisfied *Strickland*'s deferential standard." *See Richter*, 562 U.S. at 105.

III. Certificate Of Appealability

A state prisoner must obtain a certificate of appealability (COA) before appealing the denial of his federal habeas petition. 28 U.S.C. § 2253(c)(1)(A). A COA may issue only when the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard is met when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). A petitioner need not "show he will ultimately succeed on appeal" because "[t]he question is the debatability of the underlying

constitutional claim, not the resolution of that debate." *Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 337, 342 (2003)). Because there is no reasonable argument to support a finding that Petitioner has presented a non-defaulted claim of sufficient merit to warrant federal habeas relief, a certificate of appealability should not issue in this case.

IV. Conclusion

For the foregoing reasons, **IT IS RECOMMENDED** that the Court **DENY** the petition for a writ of habeas corpus (Doc. 1), **DISMISS** this action, and **DENY** Petitioner a certificate of appealability.

The Clerk is **DIRECTED** to terminate the referral to the Magistrate Judge.

SO RECOMMENDED this 28th day of March, 2017.

/s/ *J. CLAY FULLER*
J. CLAY FULLER
United States Magistrate Judge

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