

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14475-C

JOHN C. CARTER,

Petitioner-Appellant,

versus

GLENN JOHNSON,

Respondent-Appellee,

HOMER BRYSON,
Georgia Department of Corrections,

Respondent.

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

ORDER:

John C. Carter is a Georgia prisoner, currently serving a ten-year sentence after a jury convicted him of aggravated assault and obstruction of a law enforcement officer. He seeks a certificate of appealability (“COA”) and leave to proceed *in forma pauperis* (“IFP”), in order to appeal the denial of his *pro se* 28 U.S.C. § 2254 petition. He also has filed motions to correct the name of the respondent on appeal and for leave to amend his § 2254 petition to add a claim of “deprivation of counsel.”

In September 2016, Carter filed the instant *pro se* federal habeas petition, ostensibly raising four grounds for relief. However, three of these claims simply read as follows: “Legal

papers taken at Smith S.P. 06/06/2016.” Liberally construing Carter’s petition, it appears that he wished to raise additional substantive claims, but asserted that he was unable to do so because he was unable to access his legal materials. As the district court determined, to the extent that these allegations state any claims at all, they are not amenable to federal habeas review, as they do not involve Carter’s underlying trial and appeal. Carter’s remaining ground claimed ineffective assistance of counsel. Specifically, he alleged that his attorney erroneously treated his *pro se* notice of appeal as being properly filed and pursued the appeal. Carter appears to claim that appellate counsel, after being appointed, should have argued that Carter’s previously filed *pro se* notice of appeal was not properly filed and sought to have the appeal dismissed, so that he could pursue a motion for new trial.

Carter also filed an “Affidavit Supporting Ground One,” which purported to more fully explain his ineffective-assistance claim. However, Carter also appeared to raise several additional claims of ineffective assistance of appellate and trial counsel, which the district court construed as follows:

- (1) trial counsel failed to file a skeletal motion for new trial, which prohibited Carter from having a motion for new trial hearing;
- (2) trial counsel failed to object to the admission of an audio recording at trial on grounds of improper bolstering, as said recording was a prior consistent statement;
- (3) appellate counsel failed to raise claims of ineffective assistance of trial counsel;
- (4) trial counsel allowed hearsay evidence to be admitted;
- (5) appellate counsel failed to move to correct the transcript and for a hearing under O.C.G.A. § 5-6-41(f);
- (6) appellate counsel failed to review audio recordings; and

(7) trial counsel was ineffective for allowing the jury to listen to an audio recording again during the deliberation process.

In order to obtain a COA, the petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Where the district court has denied a habeas petition on procedural grounds, a petitioner must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Before bringing a habeas action in federal court, a petitioner must exhaust all state court remedies that are available for challenging his conviction, either on direct appeal or in a state post-conviction motion. 28 U.S.C. § 2254(b), (c); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). A federal claim is subject to procedural default where: (1) 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; or (2) the “state court correctly applies a procedural default principle of state law,” and the federal court must respect the state court’s decision. *See Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). The Supreme Court has held that, where state law requires a petitioner to raise a claim of ineffective assistance of trial counsel in collateral proceedings—or where the state procedural framework makes it unlikely that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal—the ineffective assistance of counsel, or lack of counsel, in the initial-review collateral proceeding may establish cause for a prisoner’s procedural default of a substantial claim of ineffective assistance of trial counsel. *Trevino v. Thaler*, 569 U.S. 413 (2013); *Martinez v. Ryan*, 566 U.S. 1, 13-17 (2012).

The Supreme Court decision applicable in ineffective-assistance claims is *Strickland v. Washington*, 466 U.S. 668 (1984). *See Premo v. Moore*, 562 U.S. 115, 121 (2011). To succeed

on an ineffective-assistance claim, a petitioner must show that (1) his attorney's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. "Claims of ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under *Strickland*." *Philmore v. McNeil*, 575 F.3d 1251, 1264 (11th Cir. 2009). Where counsel has made a strategic decision, the petitioner must show that the decision was "so patently unreasonable that no competent attorney would have chosen it." *Dingle v. Sec'y for Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (quotation omitted). To demonstrate prejudice, the petitioner must show that 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.

Claims of Ineffective Assistance of Appellate Counsel

As to Carter's claims of ineffective assistance of appellate counsel, the only claim that Carter appears to have raised in state court is appellate counsel's failure to raise claims of ineffective assistance of trial counsel. The state habeas court conducted an evidentiary hearing, at which Carter's appellate counsel testified that she always considers raising ineffective-assistance claims, but did not believe there to be any basis for raising such a claim in Carter's case. Reasonable jurists would not debate the district court's determination that the state court's rejection of this claim was not contrary to, nor did it involve an unreasonable application of, *Strickland*. See 28 U.S.C. § 2254(d). Counsel's strategic decision not to pursue ineffective-assistance counsel claims on appeal and instead to focus on the few issues that she believed to be most meritorious was not "so patently unreasonable that no competent attorney would have chosen it." See *Dingle*, 480 F.3d at 1099.

Regarding Carter's remaining ineffective assistance-of-appellate-counsel claims, reasonable jurists would not debate the district court's determination that these claims were procedurally barred. Carter failed to raise any of the remaining claims in his state habeas petition, and he would be barred from pursuing those claims in state court now by Georgia's prohibition against second or successive habeas petitions. *See* O.C.G.A. § 9-14-51. To the extent that Carter would rely on *Martinez* to excuse his failure to raise these claims in the state court, he is unable to do so, as the Supreme Court's holding in *Martinez* does not extend to unexhausted claims for ineffective assistance of appellate counsel. *See Davila v. Davis*, 137 S. Ct. 2058, 2062-63 (2017).

Claims of Ineffective Assistance of Trial Counsel

As to Carter's claims of ineffective assistance of trial counsel, reasonable jurists would not debate the district court's determination that these claims were procedurally barred, as he failed to raise these claims in either of his state habeas petitions, and he would be barred, under Georgia law, from raising these claims in a successive petition. *See* O.C.G.A. § 9-14-51. Additionally, the district court correctly determined that Carter cannot rely on *Martinez* to excuse his failure to exhaust these claims. Even assuming that there was no meaningful opportunity to litigate ineffectiveness on direct appeal, Carter failed to demonstrate that his underlying claims are substantial, as required under *Martinez*.

His claim regarding counsel's failure to file a skeletal motion for new trial ignores the fact that his inability to pursue a motion for new trial resulted from his own filing of a *pro se* notice of appeal. The remaining claims—all of which arise out of the introduction into evidence of a recorded police interview—similarly lack merit. Specifically, Carter failed to demonstrate prejudice from the admission of this evidence. *See Strickland*, 466 U.S. at 694. Given the

assault victim's trial testimony, Carter cannot show that the outcome of the trial would have been altered had the recording been excluded from evidence.

Accordingly, Carter's motion for a COA is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

His motions to amend the petition to add an additional claim to his habeas petition, or, alternatively, to remand this case to allow him to amend the petition in the district court also are DENIED. To the extent that he seeks leave to amend from this Court, that relief is not appropriately sought in this Court, and, as to his request for the Court to remand the case, he would not be permitted to amend his habeas petition in the district court following the entry of judgment. *See* Fed. R. Civ. P. 15.

Carter's motion to change the name of the respondents on appeal is DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14475-C

JOHN C. CARTER,

Petitioner-Appellant,

versus

GLENN JOHNSON,

Respondent-Appellee,

HOMER BRYSON,
Georgia Department of Corrections,

Respondent.

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

Before: JULIE CARNES and NEWSOM, Circuit Judges.

BY THE COURT:

John C. Carter has filed a motion for reconsideration of this Court's order dated April 4, 2018, denying his motions for a certificate of appealability, leave to amend his underlying habeas petition, and leave to change the name of respondents on appeal. Upon review, Carter's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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

JOHN C. CARTER,	:	CIVIL ACTION NO.
GDC ID # 1108530, Case # 709078,	:	2:16-CV-00223-RWS
Petitioner,	:	
	:	
V.	:	
	:	
GLENN JOHNSON, Warden,	:	HABEAS CORPUS
Respondent.	:	28 U.S.C. § 2254

ORDER

This action is before the Court on the Final Report and Recommendation of Magistrate Judge J. Clay Fuller (“R&R”), recommending that Petitioner’s habeas corpus petition be denied. (Doc. 34). Petitioner objects. (Docs. 35, 36).

In reviewing a Magistrate Judge’s R&R, the district court “shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1). “Parties filing objections to a magistrate’s report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court.” *United States v. Schultz*, 565 F.3d 1353, 1361 (11th Cir. 2009) (quoting *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988)) (internal quotation marks omitted). Absent objection, the district court judge

“may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate [judge],” 28 U.S.C. § 636(b)(1), and “need only satisfy itself that there is no clear error on the face of the record” in order to accept the recommendation. Fed. R. Civ. P. 72, advisory committee note, 1983 Addition, Subdivision (b). In accordance with 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, the Court has conducted a *de novo* review of those portions of the R&R to which Petitioner objects and has reviewed the remainder of the R&R for plain error. *See United States v. Slay*, 714 F.2d 1093, 1095 (11th Cir. 1983).

At Petitioner’s second trial, after his first trial ended with a hung jury, Petitioner was convicted of obstruction of a law enforcement officer and of aggravated assault for threatening to rob a convenience store clerk while indicating that he had an object in his pants pocket, which the police later discovered to be a knife with the blade exposed. In his federal habeas petition, Petitioner claims ineffective assistance of trial counsel for not filing a “skeleton” motion for new trial and for not objecting to the introduction into evidence of the victim’s police interview, recorded shortly after the assault, as improper bolstering; trial court error for admitting the recorded interview, which was “pure hearsay” — i.e., a prior

consistent statement introduced *before* cross-examination could call into question the veracity of the victim's direct-examination testimony; and ineffective assistance of appellate counsel for misinterpreting his *pro se* notice of appeal as precluding a challenge to trial counsel's ineffectiveness in a motion for new trial or on direct appeal, for failing to review Petitioner's and the victim's recorded interviews, which were introduced at trial, and for failing to request a hearing to correct errors in the trial transcript. (R&R at 17-19).

The Magistrate Judge reached the following conclusions:

In his federal habeas petition and supporting affidavit, Petitioner has not even attempted to "show that the state court's ruling on . . . [his claims of ineffective assistance of appellate counsel] was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," *see Harrington v. Richter*, 562 U.S. 86, 103 (2011), nor has he shown that there is no "reasonable argument," as set forth in the state habeas court's order, "that counsel satisfied *Strickland*'s deferential standard," *see id.* at 105. To the extent that Petitioner raised his federal claims of ineffective assistance of appellate counsel in state court, they fail; and to the extent that he did not, they are procedurally barred.

Petitioner's remaining federal habeas claims for relief, alleging ineffective assistance of trial counsel or other pre-trial and trial errors, are procedurally defaulted, as the state habeas court concluded. Because Petitioner has not demonstrated cause and prejudice to excuse the procedural default of these claims, they too are procedurally barred from federal habeas review.

(R&R at 23-24 (citations altered or omitted)). The Magistrate Judge also noted the following with respect to the merits of Petitioner's defaulted claims:

[T]he gravamen of Petitioner's federal habeas claims of trial-counsel ineffectiveness concern the introduction into evidence of the aggravated assault victim's recorded police interview, and its being replayed for the jury during their deliberations. But the victim's trial testimony alone — that Petitioner told the victim that Petitioner could rob him and that Petitioner put his hand in his pocket and pointed something at the victim, which "scared" the victim — was enough to convict Petitioner of aggravated assault. And, in fact, trial counsel objected to the replaying of the audio recording during jury deliberations, and moved for a mistrial after it was replayed for the jury. Finally, . . . it is not apparent how the absence of a motion-for-new-trial hearing prejudiced Petitioner, i.e., it does not appear that such a motion would have succeeded or would have led to the overturning of his convictions on direct appeal.

(*Id.* at 25 n.3 (citations omitted)).

And the Magistrate Judge quoted in full the state habeas court's conclusion on the issue that is the keystone of Petitioner's objections — whether appellate counsel provided ineffective assistance by not filing a motion for new trial:

Petitioner's final [trial] disposition was filed on November 5, 2009. On November 16, 2009, Petitioner filed a pro se notice of appeal. An order appointing Mary Erickson as appellate counsel was signed on November 23, 2009, and filed on November 25, 2009.

Petitioner presented no evidence to substantiate his claim that his notice of appeal was fraudulently filed. He asserts that the court fraudulently accepted his notice of appeal while not accepting previous paperwork.

However, he was represented by counsel during trial and thus unable to file *pro se* motions. Once trial counsel withdrew, however, Petitioner's *pro se* motions, such as his notice to appeal, were properly given effect. A notice of appeal "acts as a supersedeas depriving the trial court of the power to affect the judgment appealed." *Wetherington v. State*, 295 Ga. 172, 173, 758 S.E.2d 299 (2014). Thus, Petitioner himself effectively foreclosed having a motion for new trial stage, as well as counsel at that stage, by divesting the trial court of jurisdiction upon the filing of his [notice of appeal]. This ground provides no basis for relief.

(*Id.* at 17).

In his first set of objections (Doc. 35), Petitioner argues that during a critical stage of his criminal proceedings, the motion-for-new-trial stage, he was denied the right to counsel solely because he had filed a *pro se* notice of appeal, even though he had not waived the right to counsel by definitively requesting to proceed *pro se* on appeal. He argues that his notice of appeal should therefore have had no effect, just as his *pro se* filings during the pre-trial period had no effect. In his second set of objections (Doc. 36), Petitioner amplifies this argument by noting that his trial counsel never formally withdrew and therefore still represented him until appellate counsel was appointed — during which time his *pro se* notice of appeal was a nullity and should have been treated as such.

But even if Petitioner is correct that his *pro se* notice of appeal was a nullity,

an ineffective-assistance-of-counsel claim requires a showing of both deficient performance *and* prejudice, and therefore Petitioner must show prejudice arising from the failure of his trial and appellate counsel to file a motion for new trial. Petitioner seeks to avoid this requirement by arguing that he was deprived of counsel altogether during a critical stage of his criminal proceedings and that he need not show prejudice to prevail on his resulting deprivation-of-counsel claim. This argument fails, however, because there was no motion-for-new-trial stage and thus no critical stage of Petitioner's criminal proceedings during which he was deprived of counsel.¹ Petitioner must therefore show prejudice, i.e., that there is a reasonable probability that he would have prevailed in a motion for new trial or on direct appeal based on the defaulted claims that he has raised in his federal habeas petition. But, as the Magistrate Judge has correctly concluded, Petitioner has not shown prejudice arising from the failure of his trial and appellate counsel to raise these claims.

Petitioner objects to the Magistrate Judge's conclusion regarding the effect of the victim's recorded police interview on his trial. Petitioner argues that the issue is not the sufficiency of the victim's trial testimony to support his aggravated assault

¹It also appears that Petitioner did not raise this deprivation-of-counsel claim in his federal habeas petition. (See generally R&R).

conviction, as the Magistrate Judge suggests, but rather the effect on the jury's verdict of the improperly introduced evidence. But, other than ineffective assistance of counsel, the only federal habeas issue raised by the admission of the recorded interview into evidence is that raised by every claim of evidentiary error in state court proceedings — whether the admission of the evidence rendered the trial fundamentally unfair. *See Clark v. Williams*, 1:07-CV-0103-RWS, 2007 U.S. Dist. LEXIS 76365, at *9 (N.D. Ga. Aug. 15) ("Petitioner's claim regarding similar transaction evidence does not state a claim for federal habeas corpus relief because Petitioner has failed to demonstrate how the admission of that evidence rendered his trial fundamentally unfair."), *adopted* by 2007 U.S. Dist. LEXIS 73096 (N.D. Ga. Sept. 28, 2007); *see id.* ("Federal courts do not review whether the admission of evidence in a state criminal trial conformed with state law requirements[.]"); *see also Walker v. Fla. Dep't of Corr.*, 495 Fed. Appx. 13, 18 (11th Cir. 2012) ("The admission of evidence is fundamentally unfair [only] if it is material in the sense of a crucial, critical, highly significant factor." (internal quotations omitted)).

The Magistrate Judge has opined that the victim's trial testimony clearly established Petitioner's guilt, thus suggesting that Petitioner's trial was not rendered unfair by the admission of the victim's recorded interview. If the interview merely

restated the victim's trial testimony — and Petitioner has given the Court no indication that it accomplished anything other than that — it was at most redundant, and thus not a “crucial, critical, highly significant factor” in Petitioner’s conviction. *See Walker*, 495 Fed. Appx. at 18. Petitioner has not persuasively shown otherwise, and thus he has not shown that the admission of the victim’s recorded interview rendered his trial fundamentally unfair.

Petitioner also argues that his appellate counsel performed deficiently by not investigating the victim’s recorded interview and not raising a claim on direct appeal regarding the introduction of that interview into evidence. (Doc. 36). But Petitioner has not shown that he was *prejudiced* by appellate counsel’s allegedly deficient performance in this regard. As the Magistrate Judge has noted:

In rejecting Petitioner’s first claim of error on direct appeal, the Court of Appeals of Georgia [stated] that “[t]he transcript shows that the trial court allowed the jury to rehear the audio-tape for the purpose of determining whether the statements made during the interview were consistent or inconsistent with the witness’s trial testimony, but only allowed the tape to be replayed once in order to avoid any violation of the continuing witness rule.”

(R&R at 18 n.2 (formatting altered)). Simply put, Petitioner has not shown that when the state habeas court rejected the claims that he has raised in his federal habeas petition, it committed “an error well understood and comprehended in

existing law beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 103.

Conclusion

For the foregoing reasons, Petitioner's Objections (Docs. 35, 36) are **OVERRULED**. Finding no error, plain or otherwise, in the remainder of the R&R, the Court **ADOPTS** the Magistrate Judge's Final Report and Recommendation (Doc. 34) as the Order and Opinion of the Court; **DENIES** Petitioner's habeas corpus petition; and **DENIES** Petitioner a certificate of appealability.

IT IS SO ORDERED this 14th day of September, 2017.

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

JOHN C CARTER,	:	CIVIL ACTION NO.
GDC ID # 1108530, Case # 709078,	:	2:16-CV-00223-RWS-JCF
Petitioner,	:	
	:	
v.	:	
	:	
GLENN JOHNSON, Warden,	:	HABEAS CORPUS
Respondent.	:	28 U.S.C. § 2254

**MAGISTRATE JUDGE'S ORDER AND
FINAL REPORT AND RECOMMENDATION**

Petitioner, a Georgia prisoner, has filed a 28 U.S.C. § 2254 habeas corpus petition challenging his October 28, 2009 Forsyth County convictions. (Doc. 1; *see* Docs. 17-1, 25-1). **IT IS RECOMMENDED** that the petition be **DENIED**.

A jury convicted Petitioner of “aggravated assault and obstruction of a law enforcement officer.” (Doc. 28-2 at 6 (*Carter v. State*, A10A1315 (Ga. Ct. App. Sept. 2, 2010))).¹ In his direct appeal, he “contend[ed] that a mistrial should have been granted after the jury was allowed to rehear certain evidence and that the trial court erred in charging the jury.” *Id.* The Court of Appeals of Georgia rejected these contentions, noting the following evidence presented at trial against Petitioner:

¹He was acquitted of the charge of attempted armed robbery. (Doc. 27-3 at 1-2). His first trial on these charges ended in a mistrial due to a hung jury. (*Id.* at 2 n.2).

Abul Alam, an employee of the Country Cupboard on Antioch Road in Forsyth County, testified that Carter came into the store one evening to buy lottery tickets. After Carter played the tickets, he told Alam he needed more tickets and demanded that Alam give him a book of tickets, which had an approximate value of \$300. Alam refused, and Carter then demanded that Alam give him beer. Alam explained he could not give away anything, and Carter put his hand in his pocket, indicating he had an object there, and told Alam two or three times that he was going to rob him. Alam told Carter that he would have to speak to his boss about giving Carter free merchandise, and he called his boss, told him that Carter wanted free merchandise and that he said he could rob the store, and then put Carter on the phone to speak with his boss. Carter went to the back of the store and got a case of beer, placed it on the counter, and gave Alam the phone back. Deputy Sheriff Mason, who had been dispatched to the store after a 911 call, had entered the store, and she told Carter to come over to talk to her. Carter ignored her, even though she gave him between five and ten verbal commands, except at one point he did comment to her that he was "strung out." When Carter turned his back to her after he put the beer on the counter, she was able to handcuff his hands behind his back and take him outside. By that time Deputy Pittman had also arrived at the scene, and Pittman conducted a pat-down search of Carter for weapons, during which an open knife was found in the side pocket of Carter's cargo pants. After the knife was found, the officers pressed Carter over the hood of the police vehicle so they could exercise more control over him during the search, in accordance with standard practice once a weapon is discovered during a search. At that time Carter began to resist, yelling obscenities and threats, kicking and twisting and turning so the deputies could not get a good grip on him to finish the search, and then spitting in the face of Deputy Pittman after he was finally subdued and placed in the patrol car. Both officers testified that they smelled alcohol and suspected from their observations that Carter was under the influence. During a subsequent interview, Carter told investigators that he had been drinking all day and that he almost robbed the store.

Carter also testified at trial. He testified that the day of the incident he had been drinking liquor and beer and was “severely intoxicated.” He said he was so intoxicated he only remembered bits and pieces of the incident, but he did remember thinking “maybe I can rob somebody” and then decided he could not do it, and told Alam that he was not really going to rob anybody. Both Carter and Alam’s interviews with investigators were also played for the jury.

Id. at 6-8.

Petitioner has raised four claims in his federal habeas petition, the last three of which involve his contention that his legal papers were taken from him at Smith State Prison in June 2016. (Doc. 1 at 5-6; *see* Doc. 17-2). Because these claims do not involve Petitioner’s trial and appeal, they are not amenable to federal habeas review. *See Quince v. Crosby*, 360 F.3d 1259, 1262 (11th Cir. 2004) (“while habeas relief is available to address defects in a criminal defendant’s conviction and sentence, an alleged defect in a collateral proceeding does not state a basis for habeas relief”). Petitioner’s first claim alleges trial court errors and ineffective assistance of trial and appellate counsel (Doc. 1 at 5), as elaborated in his supporting affidavit (Doc. 17-1). These claims are discussed below.

I. Standards Of 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*, 850 F.3d 1201, 1204 (11th Cir. 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. Petitioner’s State Habeas Claims

Petitioner filed an initial and an amended state habeas petition in the Superior Court of Hancock County, challenging his Forsyth County convictions. (Docs. 27-1, 27-2). The Hancock County court denied all of Petitioner’s claims (Doc. 27-3), and the Supreme Court of Georgia summarily affirmed that denial (Doc. 27-4). Petitioner also filed a state habeas petition in the Superior Court of Bibb County, challenging his unrelated convictions in Towns County and seeking to challenge his Forsyth County convictions again. The Bibb County court found “that the petition [was] . . . successive as to the Forsyth County convictions.” (Doc. 27-5 at 1-2).

Petitioner raised four grounds for relief in his original Hancock County petition:

1. ineffective assistance of pre-trial and trial counsel;
2. ineffective assistance of appellate counsel;
3. violation of his right to a fair trial;
4. unlawful interference by the prosecutor and trial court into the jury’s domain.

(Doc. 27-1 at 5-6). He provided copious details to support these general grounds with

more specific allegations of ineffective assistance and other violations. (*Id.* at 9-16).

Petitioner also raised four grounds in his amended Hancock County petition:

1. violation of the right to a fair trial;
2. violation of due process of law;
3. ineffective assistance of counsel at all critical stages;
4. violation of his right of access to the courts.

(Doc. 27-2 at 5-6). And he provided many more specific details to support these general grounds as well. (*Id.* at 13-27).

The state habeas court addressed Petitioner's multifarious claims by summarizing them as follows:

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In ground 2, Petitioner alleges that he received ineffective assistance of appellate counsel in that appellate counsel did not consider issues in the case, filed a brief with inaccuracies, and did not communicate with Petitioner.

In Part III, Petitioner alleges that he received ineffective assistance of appellate counsel when appellate counsel did not raise the issue now asserted in ground[s] one[], three and four.

In amended ground 3b in an attachment, Petitioner alleges that he received ineffective assistance of appellate counsel in that appellate counsel failed to respond to letters from Petitioner and refused to communicate in any other way.

.....
INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In ground 1, Petitioner alleges that he received ineffective assistance of pre-trial and trial counsel. Petitioner specifically alleges that counsel failed to: (a) garner information from witnesses at the scene to diminish the severity of the State's version of events; (b) investigate critical pieces of evidence; (c) file appropriate motions; (d) file written objections to non-compliance with discovery; (e) investigate Petitioner's hospital reports to determine the extent of his diminished capacity; (f) object to the editing of a video recording of Petitioner used at trial or request a limiting instruction; (g) submit objections to the jury charges in writing; (h) object to improper closing argument; and (i) consult with Petitioner regarding trial strategy.

In amended ground 3a, Petitioner also alleges that he received ineffective assistance of trial counsel at all critical stages. Specifically, he alleges that trial counsel failed to: (j) interview crucial witnesses, i.e., "Foppo" and Eric Campbell; (k) examine key pieces of evidence, including hospital reports to show lack of intent and the lottery ticket purchased by Petitioner; (l) file appropriate motions, i.e., a motion to suppress the knife; (m) discuss the case with Petitioner and [] apprise him of his right to be present during the editing and viewing of a video which allegedly occurred prior to the first trial; (n) effectively cross-examine witnesses, including Abul Alum regarding his statement to police; (o) prevent Petitioner being convicted on prejudicial and unreliable evidence; (p) have a reasonable trial strategy despite Petitioner's objections and complaints, including not objecting to the misstatements of the prosecutor; (q) request jury instructions on the right to resist unlawful force; (r) have closing arguments transcribed; (s) object to the court's charge to the jury as alleged in ground two; (t) object to the State providing oral notice of intent to seek recidivist punishment; and (u) investigate Petitioner's prior charges.

.....
[OTHER] DEFAULTED GROUNDS

In ground 3, Petitioner alleges a violation of the right to a fair trial, in that the trial court, prosecutor, appointed counsel, indigent defense administrator, and courthouse security personnel ignored procedures required to discover procedural guilt for criminal defendants and [] Petitioner was not permitted to review tapes prior to trial that were not transcribed.

In ground 4, Petitioner alleges judicial and prosecutorial unlawful interference into the jury's domain in that the trial judge failed to properly charge the jury and gave conflicting charges, and [] the prosecutor argued that Petitioner did not deserve to be convicted of simple assault, which was an option on the verdict form.

In amended ground 1, Petitioner alleges a violation of the right to a fair trial, in that the trial court, prosecutor, appointed counsel, and indigent defense administrator were all aware that Petitioner was not getting a chance to listen to and view the evidence that was being edited and used against him at trial. In the attachment, Petitioner further alleges violations of the right to a fair trial through the admissions of State's exhibits six and eight, the prior consistent statement of a witness and a recording of Petitioner, respectively.

In amended ground 2, Petitioner alleges a violation of due process in that the trial court gave a jury charge on aggravated assault that broadened the scope of how the jury could convict Petitioner in that the jury was charged under O.C.G.A. § 16-5-21(a)(2) instead of (a)(1), and also failed to charge on the lesser included offense of reckless conduct as requested by the defense.

....

NON-COGNIZABLE CLAIM

In amended ground 4, Petitioner alleges a violation of his right to have access to the courts, in that while alleging receiving ineffective assistance of counsel while awaiting trial, Petitioner thought it best to research the law and prepare arguments regarding the methods used to obtain the

convictions, but he was denied access to the law library computer and told to request a court order.

....

SIXTH AMENDMENT RIGHT TO COUNSEL

At the evidentiary hearing, Petitioner orally alleged a violation of his Sixth Amendment right to counsel in that his pro se notice of appeal was fraudulently filed and [] he was denied assistance of counsel at the [motion for] new trial stage.

(Doc. 27-3 at 3 (ineffective assistance of appellate counsel (ground 2, Part III, amended ground 3b)); *id.* at 9-11 (ineffective assistance of trial counsel (ground 1, amended ground 3a)); *id.* at 13-14 (other defaulted grounds (grounds 3, 4; amended grounds 1, 2)); *id.* at 14 (non-cognizable claim (amended ground 4)); *id.* at 15 (Sixth Amendment right to counsel (raised orally at hearing))).

The state habeas court found that Petitioner procedurally defaulted his claims of ineffective assistance of trial counsel and his other defaulted grounds by not raising them at the earliest available opportunity at trial or via a motion for new trial and/or on direct appeal; and that he failed to show ineffective assistance of appellate counsel or any other basis to establish cause and prejudice to excuse this procedural default. (*Id.* at 11-12, 14; *see id.* at 3-9 (discussing ineffective-assistance-of-appellate-counsel claims)). The court also concluded that amended ground 4 did not state a cognizable ground for habeas relief (*id.* at 14-15), and that the ground raised at the evidentiary

hearing failed, for the following reasons:

Petitioner's final [trial] disposition was filed on November 5, 2009. On November 16, 2009, Petitioner filed a pro se notice of appeal. An order appointing Mary Erickson as appellate counsel was signed on November 23, 2009, and filed on November 25, 2009.

Petitioner presented no evidence to substantiate his claim that his notice of appeal was fraudulently filed. He asserts that the court fraudulently accepted his notice of appeal while not accepting previous paperwork. However, he was represented by counsel during trial and thus unable to file pro se motions. Once trial counsel withdrew, however, Petitioner's pro se motions, such as his notice to appeal, were properly given effect. A notice of appeal "acts as a supersedeas depriving the trial court of the power to affect the judgment appealed." *Wetherington v. State*, 295 Ga. 172, 173, 758 S.E.2d 299 (2014). Thus, Petitioner himself effectively foreclosed having a motion for new trial stage, as well as counsel at that stage, by divesting the trial court of jurisdiction upon the filing of his [notice of appeal]. This ground provides no basis for relief.

(*Id.* at 15-16 (citations omitted)).

B. Petitioner's Federal Habeas Claims

As noted above, only Petitioner's federal habeas ground one is cognizable here. In it, he claims that he received ineffective assistance of trial and appellate counsel. But because he has lost his legal papers, he mentions in the petition itself only appellate counsel's "erroneous interpretation" of his request for a full appeal "as a valid pro se notice of appeal," which interpretation deprived him of a motion for new trial hearing. (Doc. 1 at 5). In his supporting affidavit — a running narrative, not

divided into separate claims — Petitioner adds the following assertions:

1. his trial counsel provided ineffective assistance by not filing a “skeleton Motion For A New Trial” before withdrawing (Doc. 17-1 at 3) — and Petitioner asks the Court, in light of *Ryan v. Martinez*, 566 U.S. 1, 132 S. Ct. 1309 (2012), to excuse any procedural errors he may have made previously in presenting the issue of his inability to file a motion for new trial and obtain a hearing on the motion (Doc. 17-1 at 4);
2. trial counsel was ineffective for failing to object to the introduction into evidence of an audio recording of the alleged victim describing the events at issue, which was “improper bolstering evidence,” i.e., “a prior consistent statement” introduced during the witness’s direct examination (*id.* at 5-6);
3. appellate counsel’s misinterpretation of his *pro se* notice of appeal “precluded review of [the foregoing] egregious trial attorney error” (*id.* at 5);
4. the introduction of the audio recording, which is “pure hearsay,” influenced the jury to return a guilty verdict on the aggravated assault charge, especially after the jury was allowed to listen to it again during its deliberations (*id.* at 5-6);²
5. appellate counsel refused to file a motion to correct transcripts and for a hearing under O.C.G.A. § 5-6-41(f) regarding a dispute over the accuracy of the trial

²In rejecting Petitioner’s first claim of error on direct appeal, the Court of Appeals of Georgia noted that “[t]he transcript shows that *the trial court allowed the jury to rehear the audio-tape for the purpose of determining whether the statements made during the interview were consistent or inconsistent with the witness’s trial testimony*, but only allowed the tape to be replayed once in order to avoid any violation of the continuing witness rule.” (Doc. 28-2 at 8 (emphasis added); *see id.* at 9-10 (noting that “defense counsel objected prior to the tape being replayed and moved for a mistrial after the jury heard the replay, [and although] he did not request that the trial court instruct the jury as to the weight to be given to that evidence versus the other evidence presented at trial,” the Court of Appeals noted that it has never held “that such an instruction, with or without a request, is required to be given,” and that “well established precedent [places] it [] within the discretion of the trial court to allow the jury to rehear parts of the evidence upon request”)).

transcripts (Doc. 17-1 at 6); and

6. appellate counsel refused to review State's Exhibits Six and Eight and ignored Petitioner's communications regarding the importance of those exhibits (audiotapes of the police interviews of Alam and Petitioner, respectively, made shortly after the events at issue) (*id.* at 6).

Respondent summarizes Petitioner's federal habeas claims a bit differently, listing the following sub-parts of Petitioner's ground 1:

- (i) appellate counsel erroneously interpreted Petitioner's pro se notice of appeal as being properly filed;
- (ii) trial counsel failed to file a skeletal motion for new trial, which prohibited Petitioner from having a motion for new trial hearing;
- (iii) trial counsel failed to object to the admission of an audio recording at trial on grounds of improper bolstering, as said recording was a prior consistent statement;
- (iv) appellate counsel failed to raise the [foregoing] claim of trial counsel ineffectiveness . . .;
- (v) trial counsel allowed hearsay evidence to be admitted;
- (vi) appellate counsel failed to move to correct the transcript and for a hearing under O.C.G.A. § 5-6-41(f);
- (vii) appellate counsel failed to review audio recordings; and
- (viii) trial counsel was ineffective for allowing the jury to listen to an audio recording again during the deliberation process.

(Doc. 25-1 at 4-5).

Respondent argues that Petitioner has procedurally defaulted all but ground 1(i) of his federal habeas petition because he “did not raise the specific allegations of ineffective assistance of counsel now raised in ground 1 (ii), (iii), (iv), (v), (vi), (vii), and (viii) in his state habeas corpus cases.” (*Id.* at 10). And Respondent argues that Petitioner has not established cause and prejudice for this default. (*Id.* at 11-14). Respondent argues further that Petitioner’s reliance on *Ryan v. Martinez* is misplaced because the holding in that case “is limited to claims of ineffective assistance of trial counsel that are otherwise procedurally barred due to the ineffective assistance of post-conviction counsel.’ ” (*Id.* at 13 (quoting *Gore v. Crews*, 720 F.3d 811, 816 (11th Cir. 2013)), and noting (1) Petitioner did not have post-conviction counsel, so that the procedural bar to his defaulted claims cannot be blamed on the ineffective assistance of post-conviction counsel, and (2) but for the filing of his *pro se* notice of appeal, which divested the trial court of jurisdiction over his case, Petitioner had the right under Georgia law to raise his defaulted claims in a motion for new trial and then, if denied, on direct appeal).

C. Petitioner’s Claims Of Ineffective Assistance Of Appellate Counsel

In denying Petitioner’s claims of ineffective assistance of appellate counsel, the state habeas court made the following findings:

Petitioner was represented on appeal by Mary Erickson[, who] was admitted to the Georgia Bar in 1989, and at the time she represented Petitioner[] had handled approximately 150 felony appeals and 300 felony trials.

Ms. Erickson was appointed to represent Petitioner on November 25, 2009. Since Petitioner had filed a prose notice of appeal nine days prior, a motion for new trial was foreclosed. Ms. Erickson thought that the absence of a motion for new trial hearing did not prejudice Petitioner as she found it unlikely he would have obtained relief from the trial court.

In preparing Petitioner's appeal, Ms. Erickson reviewed the trial transcript and identified possible issues. She will consider raising ineffective assistance of trial counsel claims in every case, but did not raise the claim in Petitioner's case as she found no viable instances of trial counsel to raise. Her review did not show that trial counsel failed to investigate evidence, submit jury charge objections in writing, or object to an improper closing.

Ms. Erickson additionally researched the law and facts concerning all possible avenues of arguable merit in Petitioner's case. She reviewed the requested jury charges. She also reviewed the clerk's record.

Ms. Erickson communicated with Petitioner by letter, writing him a total of eleven letters. She recalled Petitioner urging her to raise certain issues on appeal, but she found they did not have "even the remotest relation to reality" and did not raise them. She seriously considered each issue he broached, however. She did not see a viable issue in Petitioner's claim that he did not view video evidence before trial, or in his claim that the prosecutor argued that Petitioner did not deserve to be convicted of simple assault.

Ms. Erickson raised the two most viable and meritorious issues.

(Doc. 27-3 at 3-4 (citations omitted)).

The state habeas court concluded that Petitioner “failed to meet his burden under Strickland to establish that appellate counsel’s performance was deficient” and “also failed to establish the requisite prejudice, in that he has not shown that, but for appellate counsel’s failure to raise these issues on direct appeal, a reasonable probability exists that the outcome of the appeal would have been different.” (*Id.* at 7). The court then reached the following more specific conclusions:

Counsel did not raise the issue asserted in ground 1, a claim that trial counsel was ineffective when counsel did not sufficiently investigate the case, file appropriate motions, file written objections to the purported non-compliance with discovery, investigate hospital reports to assess Petitioner’s “diminished capacity,” object to the editing of the video recording used at trial and request a limiting instruction, submit written objections to jury instructions, [and] object to “improper” closing argument Appellate counsel saw no viable basis on which to raise any of these claims. Petitioner has not shown that decision was unreasonable, particularly when he has not shown that information helpful to the defense exists which trial counsel did not use, nor shown that the jury instructions or closing argument was improper.

Counsel did not raise the claim asserted in ground 3, regarding Petitioner’s inability to review tapes prior to trial, because the tapes were provided to the defense during discovery and it would have been important for Petitioner’s attorney to have access to them, not Petitioner himself.

Counsel did not raise the claim asserted in ground 4, pertaining to the prosecutor arguing that Petitioner did not deserve to be convicted of simple assault in his closing argument, because the law permitted the prosecutor to make such an argument. Moreover, the closing arguments

were not transcribed. Petitioner offers only speculation that the prosecutor's argument was improper.

Finally, appellate counsel did raise the issue, also asserted in ground 4, about the jury charge on sympathy. The appellate court found no error.

In sum, Petitioner has not shown that appellate counsel's performance was deficient, nor has he established the requisite prejudice. The claims of appellate counsel ineffectiveness lack merit.

(*Id.* at 8-9). And, as noted above, the state habeas court found Petitioner's challenge to appellate counsel's interpretation of his *pro se* notice of appeal to be without merit because, in fact, that interpretation was correct. (*Id.* at 15-16).

In his federal habeas petition and supporting affidavit, Petitioner has not even attempted to "show that the state court's ruling on . . . [his claims of ineffective assistance of appellate counsel] 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, nor has he shown that there is no "reasonable argument," as set forth in the state habeas court's order, "that counsel satisfied *Strickland*'s deferential standard," *see id.* at 105. To the extent that Petitioner raised his federal claims of ineffective assistance of appellate counsel in state court, they fail; and to the extent that he did not, they are procedurally barred. *See Netherland*, 518 U.S. at 162.

D. Petitioner's Remaining Claims

Petitioner's remaining federal habeas claims for relief, alleging ineffective assistance of trial counsel or other pre-trial and trial errors, are procedurally defaulted, as the state habeas court concluded. (*See* Doc. 27-3 at 11-12, 14). Because Petitioner has not demonstrated cause and prejudice to excuse the procedural default of these claims, they too are procedurally barred from federal habeas review. *See Netherland*, 518 U.S. at 162.

And the narrow rule established in *Martinez*, and later expanded in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), does not save Petitioner's ineffective-assistance-of-trial-counsel claims. *See Hitson v. GDCP Warden*, 759 F.3d 1210, 1261 (11th Cir. 2014) (noting that "*Trevino* expanded *Martinez*'s exception to states that *effectively* prohibit defendants from raising ineffective-assistance claims on direct appeal"); *but see id.* at 1262 (accepting that it "may be true" that "under Georgia law, there is no meaningful opportunity to litigate ineffectiveness on direct appeal" (citation and internal quotations omitted), but "leav[ing] that question for another day because [petitioner] has failed to establish either of the other two elements of the *Martinez* exception—that 'appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland*'";

or that ‘the underlying ineffective-assistance-of-trial-counsel claim is a substantial one’ ” (quoting *Martinez*, 132 S. Ct. at 1318)). Likewise, here, Petitioner has not established that appellate counsel was ineffective for not raising his federal habeas claims of trial-counsel ineffectiveness, nor has he shown that these claims are substantial.³

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

³Indeed, the gravamen of Petitioner’s federal habeas claims of trial-counsel ineffectiveness concern the introduction into evidence of the aggravated assault victim’s recorded police interview, and its being replayed for the jury during their deliberations. But the victim’s trial testimony alone — that Petitioner told the victim that Petitioner could rob him and that Petitioner put his hand in his pocket and pointed something at the victim, which “scared” the victim (*see* Doc. 29-2 at 29 *et seq.*) — was enough to convict Petitioner of aggravated assault. (*See* Doc. 29-3 at 76 (jury instruction describing elements of aggravated assault: “Now, a person commits the offense of aggravated assault when that person assaults another person with intent to rob. To constitute such an assault, actual injury to the alleged victim need not be shown. It is only necessary that the evidence show beyond a reasonable doubt that the defendant intentionally committed an act that placed the alleged victim in reasonable fear of immediately receiving a violent injury.”)). And, in fact, trial counsel objected to the replaying of the audio recording during jury deliberations, and moved for a mistrial after it was replayed for the jury. (*See id.* at 90 *et seq.*). Finally, Petitioner’s inability to file a motion for new trial resulted from his own filing of a *pro se* notice of appeal, and, moreover, it is not apparent how the absence of a motion-for-new-trial hearing prejudiced Petitioner, i.e., it does not appear that such a motion would have succeeded or would have led to the overturning of his convictions on direct appeal. In short, Petitioner has not raised in his federal habeas petition viable claims of trial-counsel ineffectiveness, even were the Court to excuse his procedural default of those claims under *Martinez* and *Thaler*.

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, **DENY** Petitioner’s motion for appointment of counsel (Doc. 31) and **DENY** Petitioner a certificate of appealability.

Petitioner's motion for a transfer back to the Coastal Transitional Center, from which he was removed on May 22, 2017 (Doc. 26), is not cognizable in this federal habeas corpus action, and is therefore **DENIED**.

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

SO ORDERED and RECOMMENDED this 2nd day of August, 2017.

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

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