IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13857-E

REGINALD LYNCH,

Petitioner-Appellant,

versus

HILTON HALL, JR.,
GREGORY C. DOZIER,
ATTORNEY GENERAL, STATE OF GEORGIA,

Respondents-Appellees.

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

ORDER:

Reginald Lynch moves for a certificate of appealability ("COA"), in order to appeal the denial of his counseled 28 U.S.C. § 2254 federal habeas corpus petition. To merit a COA, Lynch must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Lynch has not met this standard, and his motion for a COA is DENIED.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

REGINALD LYNCH,

Petitioner,

v.

HILTON HALL, JR. and GREGORY C. DOZIER,

Respondents.

CASE NO. CV416-079

O R D E R

Before the Court is the Magistrate Judge's Report and Recommendation (Doc. 12), to which objections have been filed (Doc. 13). After a careful de novo review of the record, the Court concludes that Petitioner's objections are without merit. Accordingly, the Report and Recommendation is **ADOPTED** as the Court's opinion in this case. As a result, Petitioner's 28 U.S.C. § 2254 Petition is **DENIED**. In addition, Petitioner is not entitled to a Certificate of Appealability, rendering moot any request for in forma pauperis status on appeal. The Clerk of Court is **DIRECTED** to close this case.

In his objections, Petitioner continues to argue that the state habeas court's decision was an unreasonable application of clearly established federal law and an unreasonable determination of the facts. (Doc. 13 at 1.) This Court, however, agrees with the Magistrate Judge that the victim's statements

were non-testimonial because "the circumstances of the encounter as well as the statements and actions of [the victim] and the police objectively indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency.' " Michigan v. Bryant, 562 U.S. 344, 377-78 (2011) (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)). The responding officer arrived on scene to find one individual suffering from a mortal gunshot wound inflicted by an unknown shooter who was then in an unknown location. Moreover, the officer only asked the victim his name, not to identify the shooter for later prosecution. Petitioner seems to argue that Bryant is inapplicable because the responding officers in this case failed to take steps consistent with an ongoing emergency. (Doc. 12 at 8; Doc. 13 at 3.) However, the officer's belief as to the exigency of the situation is a subjective inquiry, not an objective analysis. In any event, this Court agrees with the Magistrate Judge that the state habeas court's decision was neither an unreasonable application of clearly established federal law nor an unreasonable determination of the facts.

SO ORDERED this 28th day of July 2017.

WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

REGINALD LYNCH,	)	
	)	
Petitioner,	)	
	)	
v.	)	CV416-079
	)	
HILTON HALL, Warden, and GREGORY C. DOZIER, Commissioner, Georgia Department of Corrections,	)	
	)	
Respondents.	)	

REPORT AND RECOMMENDATION

Reginald Lynch, currently incarcerated at Coffee Correctional Facility in Nicholls, Georgia, seeks habeas relief from his Chatham County conviction for murder and possession of a firearm during a crime. Doc. 1 at 1-2; *see also Lynch v. State*, 291 S.E.2d 672 (Ga. 2012) (affirming criminal conviction). He has exhausted his state court remedies, having challenged the effectiveness of his appellate counsel through a state habeas petition. Doc. 1 at 3 (after a hearing, the state habeas court denied his petition on the merits); *id.* at 5 & 7 (the Georgia Supreme Court denied his application for a certificate of probable cause to appeal). He now seeks habeas relief from this Court, *id.* at 5, 7, and

the State opposes.[1] Doc. 7.

I. BACKGROUND

"'Reggie Lynch, shot me.'" That's what victim Marcus Givens told Detective Dantzler when Givens was discovered lying mortally wounded in an alley. *Lynch*, 731 S.E.2d at 674. A second officer, Star Corporal Angel Grant, also heard Givens identify his shooter. *Id.* Another witness, Tiffany Davis (a relative of both Lynch and Givens), explained that on the day before, the two men had argued and "Lynch [had] told her that he was going to kill the victim." *Id.* Finally, Givens' cousin Leisha Givens testified that Givens had told her at the scene that Lynch had shot him, and that she had seen Lynch leaving the scene of the

[1] The Georgia Department of Corrections, through the Attorney General, seeks to intervene in this case as a respondent. Doc. 4. Lynch is incarcerated in Coffee Correctional Facility -- a "private prison" operated under a contract with the Georgia Department of Corrections. *Id.* at 2. Rule 2(a) of the Rules Governing § 2254 Cases in the United District Courts provides that applicants in "present custody" seeking habeas relief should name "the state officer having custody of the applicant as respondent." There "is generally only one proper respondent to a given prisoner's habeas petition," and this is "'the person' with the ability to produce the prisoner' body before the habeas court." *Rumsfeld v. Padilla*, 542 U.S. 426, 434, 124 S.Ct. 2711, 159 L.Ed.2d 513 (2004). When a petitioner is incarcerated and challenges his present physical confinement "the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Id.* at 435 (cites omitted). However, because the warden of CCF is not a state officer, the chief officer in charge of the state penal institution (the Commissioner of the Department of Corrections) is the proper named respondent. Rule 2(a); *Sanders v. Bennett*, 148 F.2d 19 (D.C. Cir. 1945). Accordingly, the Commissioner's motion to intervene (doc. 4) is **GRANTED**.

shooting in a white truck. *Id*. Based on that evidence, the Georgia Supreme Court affirmed Lynch's conviction. *Id*.

Lynch argued to the state habeas court that his appellate counsel was deficient for failing to raise on appeal several defects in his trial counsel's performance. Doc. 1 at 3. In particular, appellate counsel should have argued that trial counsel erred in failing to object, on Confrontation Clause grounds, to the testimony that Givens identified Lynch as his shooter. Also, appellate counsel should have challenged trail counsel's failure to object to a detective's testimony that invaded the province of the jury. Doc. 1 at 3. The state habeas court denied relief, and the Georgia Supreme Court denied him a certificate of probable cause. *Id.* (habeas denied); doc. 11-8 (denial of certificate of probable cause).

Lynch retreads those state-habeas grounds in support of his current petition. Doc. 1 at 5, 7. The State opposes, contending that the judgment of the state habeas court[2] is entitled to deference under

[2] Currently pending before the United States Supreme Court is the issue of whether the Court must examine the state habeas court's decision or the Georgia Supreme Court's decision denying the certificate of probable cause, for deference purposes. *See Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016) (holding the Georgia Supreme Court's denial was a decision on the merits for deference purposes), *cert. granted sub nom. Winston v. Sellers*, 137 S.Ct. 1203 (2017). Regardless of the outcome of *Wilson*,

28 U.S.C. § 2254(d). Doc. 7-1 at 4.

II. ANALYSIS

A. Applicable Standards

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) bars federal courts from granting habeas relief to a state petitioner on a claim that was adjudicated on the merits in state court unless the state court's adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"AEDPA's standard is intentionally difficult to meet." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (internal quotes and cites omitted). "[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

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the Court may look to the state habeas court's decision for the purpose of § 2254 deference: "[b]ecause it does not matter to the result, and to avoid any further complications if the United States Supreme Court disagrees with [the] *Wilson* decision," the case will rely on "the more state-trial-court focused approach in applying § 2254(d)." *Butts v. Warden*, 850 F.3d 1201, 1204 (11th Cir. 2017).

any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *id.* at 102-03 (federal habeas review exists as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal."); *see also White v. Woodall*, 572 U.S. __, 134 S. Ct. 1697, 1702 (2014) (the "unreasonable application" of clearly established federal law under § 2254(d)(1) "must be objectively unreasonable, not merely wrong; even clear error will not suffice."); *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003) (same).

As to the "facts" prong, the inquiry focuses not on whether "the state court's determination was incorrect but whether that determination was unreasonable -- a substantially higher threshold." *Shiriro v. Landrigan*, 550 U.S. 465, 473 (2007); *see Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (it is not sufficient that "the federal habeas court would have reached a different conclusion in the first instance." Rather, the state court's decision must be "objectively unreasonable"). State factual findings have been found "unreasonable" under § 2254(d)(2) when the direction of the evidence, viewed cumulatively, was "too powerful to conclude anything but [the petitioner's factual

claim]," *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005), and when a state court's finding was "clearly erroneous," *Wiggins v. Smith*, 539 U.S. 510, 528-29 (2003); *see Landers v. Warden*, 776 F.3d 1288, 1294 (11th Cir. 2015).

AEDPA's requirements reflect a "presumption that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). "When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods*, 135 S. Ct. at 1376. This is especially true for claims of ineffective assistance of counsel,[3] where AEDPA review must be "doubly deferential" in order to afford "both the

[3] To prevail on a claim of ineffective assistance of appellate counsel, a habeas petitioner must establish that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1300 (11th Cir. 2013) ("Claims of ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under *Strickland*.") (quot[es] omitted). Under the deficient performance prong, the petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. *Rambaran v. Sec'y, Dep't of Corr.*, 821 F.3d 1325, 1331 (11th Cir. 2016). Prejudice is shown if "'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Rivers v. United States*, 2016 WL 2646647 at * 1 (S.D. Ga. May 9, 2016) (quoting *Strickland*, 466 U.S. at 687). That requires a "substantial," not just "conceivable," likelihood of a different result. *Harrington*, 131 S. Ct., at 791.

state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. __, 134 S. Ct. 10, 13 (2013) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)).

Finally, sandbagging is prohibited. Petitioners must submit their claims to the state courts first. New claims advanced to a federal habeas court but not to the proper state court face dismissal on exhaustion, if not procedural default, grounds.

B. Appellate Counsel Was Not Ineffective

Lynch contends appellate counsel was ineffective for failing to raise on appeal his claim that (1) trial counsel deficiently failed to object to Confrontation Clause-violating testimony from the lead detective; and (2) trial counsel failed to object when the detective testified that the evidence pointed to Lynch. Doc. 1. These arguments were raised before, and addressed on the merits by, the state habeas court. *See* Doc. 8-2 (petitioner's brief to the state habeas court), 11-7 (state court decision denying habeas corpus relief), & 11-8 (Georgia Supreme Court's denial of application for certificate of probable cause).

1. Confrontation Clause

The police found Marcus Givens lying in an alley suffering from

multiple gunshot wounds. He "appeared to be in serious pain, and his voice sounded gurgled," apparently due to blood in his lungs and throat. *Lynch*, 731 S.E.2d at 674. One of the responding officers asked for his name, and Givens responded "Reggie Lynch." *Id.* He clarified "Reggie Lynch, shot me" and repeated this statement at least three times before succumbing to his injuries. *Id.*, *see also id.* (one responding officer initially thought he said "Reggie Leck" because his voice was so garbled by his injuries). Lynch argued in his state petition that Givens' identification was "made while two police officers were responding to [his] shooting. There was no evidence presented at trial that there were any steps taken that indicate the police believed there was an ongoing emergency . . . [Givens'] statements to the police were therefore testimonial and should not have been admitted." Doc. 11-4 at 6-7; *see also* doc. 1 at 5 ("This statement was testimonial" and thus did not fall under a hearsay exception). That argument fails.

The state habeas court held that:

> [Appellate counsel] did not raise an issue about trial counsel's failure to object to the admission of the victim's dying declaration at the crime scene to two police officers. "At the scene, Detective Dantzler asked the victim for his name. The victim responded, 'Reggie Lynch.' Detective Dantzler initially thought that 'Reggie Lynch' was the victim's name, but the victim corrected, 'Reggie

> Lynch, shot me.'" *Lynch*, *supra*, Division 1. A dying declaration such as the one given by the victim was admissible as an exception to the hearsay rule under the *res gestae* exception under former O.C.G.A. § 24-3-3. *Morgan v. State*, [564 S.E.2d 192, 224-25 (Ga. 2002) (a gunshot victim's deathbed identification of his shooter to a questioning officer, when he believes that he is about to die, falls under *either* the O.C.G.A. § 24-3-6 dying declaration hearsay exception or the former O.C.G.A. § 24-3-3 *res gestae* (spontaneous, contemporaneous statement) hearsay exception)]. Lynch contends, citing *Crawford v. Washington*, 125 S. Ct. 1354 (2004), that trial counsel should have objected on the ground that the dying declaration violated the Confrontation Clause. However, this court agrees with the warden, citing *Sanford v. State*, [695 S.E.2d 579, 583 (Ga. 2010) (inculpatory statements made several hours before death in response to police questioning admissible under both dying declaration and *res gestae* hearsay exceptions, where victim recognized the "dire nature of her injuries" and responded to queries "shortly after the shooting, in the midst of the chaos of the crime scene, and while awaiting emergency treatment.")], that the dying declaration was nontestimonial because the circumstances objectively indicate that the primary purpose of the interrogation by Detective Dantzler was to enable police assistance to meet an ongoing emergency. *Glover v. State*, [678 S.E.2d 476 (Ga. 2009)]. Accordingly, this trial court concludes that trial counsel did not perform deficiently by failing to make a Confrontation Clause objection and that appellate counsel did not perform deficiently by "winnowing out" an argument that there was a violation of the Confrontation Clause.

Doc. 11-7 at 2-3.

The state habeas court's rejection of Lynch's Confrontation Clause claim is perfectly consistent with, not an unreasonable application of, clearly established federal law as determined by the Supreme Court. In *Michigan v. Bryant*, 562 U.S. 344 (2011), the Court applied its

Confrontation Clause precedents to a set of facts almost identical to those presented by this case. There, as here, officers encountered a gun-shot victim in a public setting (there a gas station parking lot, here an alley) who appeared to be in great pain and who spoke only with difficulty. *Id.* at 348-49. The victim in *Bryant*, as in this case, identified the man who had shot him in response to the informal, on-scene questioning by the responding officers. In both *Bryant* and in this case the whereabouts of the armed perpetrator was unknown to the police. The *Bryant* Court concluded that because the circumstances surrounding the police-victim interaction "objectively indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency,'" *id.* at 349, 377-78, *not* to gather evidence for trial, *id.* at 358, the victim's statements did not constitute "testimonial hearsay" that implicates the Sixth Amendment Confrontation Clause. *See id.* at 353-54 (the Sixth Amendment right to confront "the witnesses" against the defendant applies only to "testimonial statements" -- solemn declarations made for the purpose of establishing some fact for later use at trial -- not to "nontestimonial" statements made in response to police questioning whose chief purpose is to discover

"what is happening" during an emergency situation rather than "what happened" on a past occasion) (citations and internal quotations omitted).[4] The concept of "ongoing emergency," the Court held, is not confined to the crime victim but also extends "to a potential threat to the responding police and the public at large." *Id*. at 359, 363-64. The question asked of the victim in *Bryant*, like those asked by the officers in this case, were designed not to elicit "testimony" for later use at trail but to enable the police to assess the situation and discern whether there was a continuing, ongoing danger to the community at large.[5]

But even if this Court were to find the victim's statements to be

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[4] In *Bryant*, the police asked the victim "'what had happened, who had shot him, and where the shooting had occurred.'" 562 U.S. at 349. This questioning, the Michigan Supreme Court concluded, focused on establishing "the facts of an event that had *already* occurred . . . not to enable police assistance to meet an ongoing emergency." *Id.* at 351 (citation omitted). The United States Supreme Court disagreed, finding that the questions asked of the victim "were the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public." 562 U.S. at 376 (cite and quote omitted). In the present case, the police did not have to ask the victim what had happened or who had shot him, for he blurted out his assailant's name when first asked to identify himself. Therefore, this is an even stronger case for finding that the "primary purpose" of the interrogation was to address an ongoing emergency than *Bryant* itself.

[5] The *Bryant* court recognized that both the police and the declarant may have "mixed motives," for the purpose of the interrogation may be "*both* to respond to the emergency situation *and* to gather evidence" for later use at trial. *Id.* at 368 (emphasis in original). But where the *primary* purpose is to meet an ongoing emergency, the out-of-court statements are deemed to be nontestimonial and therefore beyond the scope of the Confrontation Clause.

testimonial in nature, the state habeas court's decision was nevertheless neither contrary to nor an unreasonable application of clearly established federal law. The Supreme Court has never held that dying declarations -- even if testimonial -- are subject to the Confrontation Clause. In fact, the Court has on more than one occasion suggested that dying declarations fall within one of two historical exceptions to the Sixth Amendment's bar against testimonial hearsay. *Bryant*, 562 U.S. at 351 n. 1 (noting that while it had not had the opportunity to rule definitively on the matter, its prior opinions "suggested that dying declarations, even if testimonial, might be admissible as a historical exception to the Confrontation Clause."); *Giles v. California*, 554 U.S. 353, 358-59 (2008) (recognizing as a historical exception to the Confrontation Clause the common law principle allowing the introduction of out-of-court testimonial statements from a witness whose absence the defendant wrongfully procured, and suggesting that the common law's allowance of unconfronted dying declarations constitutes a second such exception); *Crawford v. Washington*, 541 U.S. 36, 56 n. 6 (2004) (referencing the common law practice of allowing the admission of dying declarations as an exception to a defendant's confrontation right, but declining to decide

in that case whether the Sixth Amendment incorporated that historical exception). Many lower courts have also recognized that the Supreme Court has "hinted that dying declarations may fall within an exception to the constitutional bar against testimonial hearsay." *Walker v. Harry*, 462 F. App'x 543, 545-46 (6th Cir. Feb. 13, 2012); *see also Haynes v. Bergh*, 2014 WL 6871263 at * 22 (E.D. Mich. Dec. 5, 2014).

Clearly, the state habeas court was correct in finding that the failure of Lynch's counsel to raise a Confrontation Clause challenge to the victim's dying declaration was not offensive to any "clearly established" law as determined by the Supreme Court. Lynch is therefore not entitled to federal habeas relief on this claim. 28 U.S.C. § 2254(d)(1). Hence, trial counsel had no legal basis for imposing an objection to its admission, *see Jones v. Barnes*, 463 U.S. 745, 751 (1983) (there is no "constitutional right to compel appointed counsel to press nonfrivolous points"), and appellate counsel was not deficient for failing to raise a meritless argument that trial counsel was ineffective. *Strickland*, 466 U.S. at 687.

ii. Detective Tobar's Testimony

On direct examination, the prosecutor asked Detective Tobar:

> Q And based on your investigation -- based on your investigation, when you looked at the case and talked to the witnesses in regards to this case, it led -- who did your -- what did everything lead to, or who did everything lead to?
>
> A Reggie Lynch.
>
> Q And do you see Mr. Lynch here today?
>
> A He's right there, sitting with the blue shirt.

Doc. 11-3 at 91 (Trial Transcript Vol. II at 343). Trial counsel did not object to the question, but during his cross-examination of Tobar he elicited testimony about the two other suspects the State had investigated as potential perpetrators of the shooting. *Id.* at 92-101 (Trial Transcript Vol. II at 344-354).

In his state petition, Lynch argued that this exchange was "tantamount to testifying that [Lynch] is guilty," had "the effect of bolstering the state's witnesses because Tobar testified that the evidence and the witness only implicate Lynch," despite the fact that there was no physical evidence against Lynch and "Tobar had no knowledge of the case other than what he is repeating from other witnesses." Doc. 11-4 at 12-13. At the state habeas evidentiary hearing, appellate counsel conceded that such testimony was a conclusion that should have been left to the jury, and that he had missed the issue. Doc. 8-3 at 21 (State

Habeas Evid. H'g Vol. I at 19). Petitioner seized upon this admission as proof appellate counsel was defective, doc. 11-4 at 13 ("Appellate counsel was deficient for not raising this issue. He did not have [a] strategy because it was an issue he did not consider."), *see also* doc. 1 at 7, contending that the fact that his first trial ended in a hung jury demonstrates the evidence was not overwhelming and Tobar's improper testimony, as the final witness in the State's case-in-chief, was the figurative straw that broke the camel's back. Doc. 11-4 at 13-14. Hence, appellate counsel's failure to harp on Tobar's testimony cost him his appeal, meeting *Strickland*'s prejudice prong. *Id.* at 14.

This argument is without merit. As discussed by the state habeas court:

> Lynch alleges that appellate counsel was ineffective for failing to raise the issue that trial counsel failed to object to Detective Tobar's testimony that all of the evidence in the case led to Lynch being the shooter. Trial counsel did not object to the prosecutor's question or Detective Tobar's response; rather counsel made a strategic decision to deal with the issue on cross examination. On cross, trial counsel pointed out that the police investigated at least two other suspects in the course of their investigation, as well as inconsistencies in witness accounts of the shooting. Without deciding whether counsel performed deficiently by failing to raise an issue about trial counsel's failure to object, this court does not believe that there is a reasonable probability that the outcome of the appeal would have been different had the issue been raised. In other words, this court does not believe that the conviction would

have been reversed on appeal.

Doc. 11-7 at 3 (internal cites omitted).

That court therefore concluded that appellate counsel's performance -- *even if* deficient for failing to raise trial counsel's strategic decision to forgo objecting in lieu of addressing Tobar's testimony on cross-examination -- did not materially alter the outcome of the appeal. That conclusion was not an unreasonable application of the law or an unreasonable determination of the facts in light of the evidence available at trial. 28 U.S.C. §§ 2254(d)(1) & (2); *see also Strickland*, 466 U.S. at 694 (a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); *Matire v. Wainwright*, 811 F.2d 1430, 1434 (11th Cir. 1987) (same).

Indeed, even if appellate counsel should have raised the issue, petitioner cannot demonstrate that the outcome of the appeal would have been any different. Detective Tobar's testimony that the evidence pointed to Lynch -- particularly after trial counsel's attempt on cross-examination to muster the slightest doubt that another shooter could have done the deed -- did not alone tip the scales, given the State's

overwhelming evidence of Lynch's guilt. *See Lynch*, 731 S.E.2d at 674 (statements by the victim that Lynch shot him and by a witness that Lynch told her he planned to kill the victim, the victim told her Lynch shot him, and that she saw Lynch drive away from the scene "was sufficient to enable the jury to find [him] guilty of the crimes for which he was convicted beyond a reasonable doubt.").

Because Lynch has shown no prejudice -- much less "clear and convincing evidence" of it, *see* 28 U.S.C. § 2254(e)(1); *Jones*, 834 F.3d at 1311 -- resulting from appellate counsel's oversight (of an argument that would have changed nothing about the outcome of his appeal), he has not demonstrated counsel was ineffective. *Strickland*, 466 U.S. at 687-88, 694; *see also Butcher v. United States*, 368 F.3d 1290, 1293 (11th Cir. 2004) ("[A]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. That the errors had some *conceivable* effect on the outcome of the proceeding is insufficient to show prejudice.").

III. CONCLUSION

Reginald Lynch has failed to show that the state habeas court's denial of his ineffectiveness claims was contrary to, or unreasonably

applied, controlling United States Supreme Court precedent. *See* 28 U.S.C. § 2254(d). His claim of ineffective assistance of appellate counsel (doc. 1) is without merit and, accordingly, his § 2254 petition (doc. 1) should be **DENIED**. Applying the Certificate of Appealability ("COA") standards, which are set forth in *Brown v. United States*, 2009 WL 307872 at * 1-2 (S.D. Ga. Feb. 9, 2009), the Court discerns no COA-worthy issues at this stage of the litigation, so no COA should issue. 28 U.S.C. § 2253(c)(1); Rule 11(a) of the Rules Governing Section 2555 Proceedings of the United States District Courts; *see Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (approving *sua sponte* denial of COA before movant filed a notice of appeal). And, as there are no non-frivolous issues to raise on appeal, an appeal would not be taken in good faith. Thus, *in forma pauperis* status on appeal should likewise be **DENIED**. 28 U.S.C. § 1915(a)(3).

This Report and Recommendation (R&R) is submitted to the district judge assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 72.3. Within 14 days of service, any party may file written objections to this R&R with the Court and serve a copy on all parties. The document should be captioned

"Objections to Magistrate Judge's Report and Recommendations." Any request for additional time to file objections should be filed with the Clerk for consideration by the assigned district judge.

After the objections period has ended, the Clerk shall submit this R&R together with any objections to the assigned district judge. The district judge will review the magistrate judge's findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to timely file objections will result in the waiver of rights on appeal. 11th Cir. R. 3-1; *see Symonett v. V.A. Leasing Corp.*, 648 F. App'x 787, 790 (11th Cir. 2016); *Mitchell v. U.S.*, 612 F. App'x 542, 545 (11th Cir. 2015).

SO REPORTED AND RECOMMENDED, this 8th day of June, 2017.

UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

APPENDIX D

SUPREME COURT OF GEORGIA
Case No. S15H1175

Atlanta, September 08, 2015

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

REGINALD LYNCH v. STANLEY WILLIAMS, WARDEN

From the Superior Court of Tattnall County.

Upon consideration of the application for certificate of probable cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur.

Trial Court Case No. 2013-SU-HC-35

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sui C. Fulton , Chief Deputy Clerk

EXHIBIT
B

APPENDIX E

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

REGINALD LYNCH,	§	
Petitioner,	§	
V.	§	CIVIL ACTION NO: 2013-HC-35-DC
	§	HABEAS CORPUS
STANLEY WILLIAMS, Warden, Smith State Prison,	§	
Respondent.	§	

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Petitioner Lynch, an inmate at Smith State Prison, was convicted by a jury in Chatham County of malice murder and possession of a firearm during the commission of a felony and sentenced by the court to serve life for murder and 5 years consecutive for the firearm offense. Lynch's convictions and sentences were affirmed in *Lynch v. State,* 291 Ga. 555 (2012), and his petition for a writ of habeas corpus was heard by this court on March 26, 2014.

In Grounds 1 and 3 Lynch alleges he received ineffective assistance of appellate counsel in that such counsel failed to raise the issue of trial counsel ineffectiveness based upon (1) trial counsel's failure to object to an alleged confrontation clause violation and (3) trial counsel's failure to object to the lead detective's testimony that all of the evidence led to Lynch.

To establish ineffective assistance of appellate counsel, Lynch must show that appellate counsel was deficient in failing to raise an issue on appeal and that a reasonable probability exists that the outcome of the appeal would have been different had the issue been raised. (Citations and punctuation omitted). *Trauth v. State,* 295 Ga. 874, 877 (2) (2014). "It is the attorney's decision as to what issues

should be raised on appeal, and that decision, like other strategic decisions of the attorney, is presumptively correct absent a showing to the contrary by the defendant. The process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. Accordingly, it has been recognized that in attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument, for counsel does not have a duty to advance every nonfrivolous argument that could be made. Rather, in determining under the first *Strickland* prong whether an appellate counsel's performance was deficient for failing to raise a claim, the question is not whether an appellate attorney's decision not to raise the issue was correct or wise, but rather whether his decision was an unreasonable one which only an incompetent attorney would adopt." (Citations omitted.) *Arrington v. Collins,* 290 Ga. 603, 604 (2012).

Steven Sparger, an experienced criminal defense attorney, represented Lynch on appeal, and he raised several claims that trial counsel, Christopher Middleton, provided ineffective assistance. Regarding Ground 1, Mr. Sparger did not raise an issue about trial counsel's failure to object to the admission of the victim's dying declaration at the crime scene to two police officers. "At the scene, Detective Dantzler asked the victim for his name. The victim responded, 'Reggie Lynch.' Detective Dantzler initially thought that 'Reggie Lynch' was the victim's name, but the victim corrected, 'Reggie Lynch, shot me.' " *Lynch,* supra, Division 1. A dying declaration such as the one given by the victim was admissible as an exception to the hearsay rule under former OCGA § 24-3-6. Ventura v. State, 284, Ga. 215 (2008). The declaration was also admissible under the *res gestae* exception under former OCGA § 24-3-3. *Morgan v. State,* 275 Ga. 222 (2002). Lynch contends, citing *Crawford v. Washington,* 125 S. Ct. 1354, 158 L. Ed. 177 (2004), that trial counsel should have objected on the ground that the dying declaration violated the Confrontation Clause. However, this court agrees with the warden, citing *Sanford v. State,* 287 Ga. 351

(2010), that the dying declaration was nontestimonial because the circumstances objectively indicate that the primary purpose of the interrogation by Detective Danzler was to enable police assistance to meet an ongoing emergency. *Glover v. State*, 285 Ga. 461 (2009). Accordingly, this trial court concludes that trial counsel did not perform deficiently by failing to make a Confrontation Clause objection and that appellate counsel did not perform deficiently by "winnowing out" an argument that there was a violation of the Confrontation Clause. (This court also believes that it would be a miscarriage of justice for Lynch to be given a new trial because he was not able to confront and cross examine his murder victim. See *Brittain v. State*, 329 Ga. App. 689 (2014), which discusses the forfeiture-by-wrongdoing exception to the hearsay rule.)

In Ground 3 Lynch alleges that appellate counsel was ineffective for failing to raise the issue that trial counsel failed to object to Detective Tobar's testimony that all of the evidence in the case led to Lynch being the shooter. HT-1113. Trial counsel did not object to the prosecutor's question or Detective Tobar's response; rather, counsel made a strategic decision to deal with the issue on cross examination. HT 1114-1122. On cross, trial counsel pointed out that the police investigated at least two other suspects in the course of their investigation, as well as inconsistencies in witness accounts of the shooting. Id. Without deciding whether counsel performed deficiently by failing to raise an issue about trial counsel's failure to object, this court does not believe that there is a reasonable probability that the outcome of the appeal would have been different had the issue been raised. In other words, this court does not believe that the conviction would have been reversed on appeal.

In Ground 2 Lynch alleges ineffective assistance of appellate counsel based on a claim that the State failed to prove venue. However, Detective Tobar testified that the shooting occurred in Chatham County. HT-1114.

Having considered all of Lynch's grounds,[1] this court denies relief.

[1] Ground 4 was withdrawn at the evidentiary hearing.

If Petitioner desires to appeal this order, he must file a written application for a certificate of probable cause to appeal within thirty (30) days from the date of the filing of this order and also file a notice of appeal with the Clerk of the Superior Court of Tattnall County within the same thirty (30) day period. The Clerk of the Superior Court of Tattnall County is hereby directed to mail a copy of this order to Petitioner, Respondent, and the office of the Attorney General of Georgia.

This 13th day of March, 2015.

David L. Cavender

David L. Cavender
Judge Superior Court
Atlantic Judicial Circuit

SUPREME COURT OF GEORGIA
Case No. S15H1175

Atlanta, September 08, 2015

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

REGINALD LYNCH v. STANLEY WILLIAMS, WARDEN

From the Superior Court of Tattnall County.

Upon consideration of the application for certificate of probable cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur.

Trial Court Case No. 2013-SU-HC-35

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sue C. Fulton, Chief Deputy Clerk

EXHIBIT B

Westlaw

731 S.E.2d 672
291 Ga. 555, 731 S.E.2d 672, 12 FCDR 2773
(Cite as: 291 Ga. 555, 731 S.E.2d 672)

C

Supreme Court of Georgia.

LYNCH

v.

The STATE.

No. S12A1140.

Sept. 10, 2012.

Background: Defendant was convicted in the trial court of malice **murder**, felony **murder**, and two counts of possession of a firearm during the commission of a crime. The Superior Court, **Chatham County**, John E. Morse, J. Defendant appealed.

Holdings: The Supreme Court, Melton, J., held that:

(1) evidence was sufficient to support convictions for malice **murder** and felony **murder**;

(2) trial counsel's failure to request a jury charge regarding the credit the jury should give to an impeached witness's testimony did not prejudice defendant; and

(3) trial counsel's failure to object when police detective was called as a rebuttal witness to the alibi witness presented by the defense on the basis that the defense failed to disclose the rebuttal witness as required by statute did not prejudice defendant.

Affirmed.

West Headnotes

[1] Homicide 203 1181

203 Homicide
203IX Evidence
203IX(G) Weight and Sufficiency
203k1176 Commission of or Participation in Act by Accused; Identity
203k1181 k. Eyewitness identification. Most Cited Cases

Evidence was sufficient to support convictions for malice murder and felony murder; the victim identified defendant as the perpetrator who shot him. West's Ga.Code Ann. § 24–1–1(3).

[2] Criminal Law 110 1881

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1881 k. Deficient representation and prejudice in general. Most Cited Cases

In order to succeed on his claim of ineffective assistance, a defendant must prove both that his trial counsel's performance was deficient and that there is a reasonable probability that the trial result would have been different if not for the deficient performance. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 1888

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1888 k. Determination. Most Cited Cases

If an appellant fails to meet his burden of proving either prong of the *Strickland* ineffective assistance of counsel test, the reviewing court does not have to examine the other prong. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 1134.47(3)

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.47 Counsel
110k1134.47(3) k. Effective assistance. Most Cited Cases

Criminal Law 110 1158.28

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.26 Course and Conduct of Trial
110k1158.28 k. Counsel. Most Cited Cases

In reviewing the trial court's decision on an ineffective assistance of counsel claim, the Supreme Court accepts the trial court's factual findings and credibility determinations unless clearly erroneous, but it independently applies the legal principles to the facts. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 ⚿1947

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1945 Instructions
110k1947 k. Offering instructions. Most Cited Cases

Trial counsel's failure to request a jury charge regarding the credit the jury should give to an impeached witness's testimony did not prejudice defendant, and therefore did not constitute ineffective assistance of counsel; the jury was instructed on impeachment and the credibility of witnesses. U.S.C.A. Const.Amend. 6; West's Ga.Code Ann. § 24–9–85(b).

[6] Criminal Law 110 ⚿1929

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1929 k. Hearsay. Most Cited Cases

Trial counsel's failure to object to lead detective's testimony as to out-of-court statement allegedly made by witness that defendant told her he was trying to get the victim into an alley to "take care of him" did not prejudice defendant, during prosecution for malice murder, and therefore did not constitute ineffective assistance of counsel; during direct examination witness testified that defendant had threatened to kill the victim the day before the murder. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 110 ⚿1937

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1937 k. Trial in general; reception of evidence. Most Cited Cases

Trial counsel's failure to object when police detective was called as a rebuttal witness to the alibi witness presented by the defense on the basis that the defense failed to disclose the rebuttal witness as required by statute did not prejudice defendant, during prosecution for malice murder, and therefore did not constitute ineffective assistance of counsel; defendant did not allege the State acted in bad faith, and thus there was no basis to believe the testimony would have been excluded if counsel had made an objection. U.S.C.A. Const.Amend. 6; West's Ga.Code Ann. §§ 17–16–5(b), 17–16–6.

[8] Criminal Law 110 ⚿1947

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1945 Instructions
110k1947 k. Offering instructions. Most Cited Cases

Trial counsel's failure to request a jury charge on eyewitness identification when presenting an alibi defense did not prejudice defendant, and therefore did not constitute ineffective assistance of counsel; the jury was charged on the concepts of presumption of innocence, reasonable doubt, burden of proof, credibility and impeachment of witnesses, and alibi. U.S.C.A. Const.Amend. 6.

[9] Criminal Law 110 ⚿1935

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1935 k. Impeachment or contradiction of witnesses. Most Cited Cases

Trial counsel's failure to impeach the deceased victim with his prior felony conviction for cocaine possession with intent to distribute was reasonable trial strategy, and therefore did not constitute ineffective assistance of counsel; counsel testified that it was his strategy to show that officers misunderstood the victim when he was gurgling and close to death, and that he considered attacking the victim's credibility to be risky. U.S.C.A. Const.Amend. 6.

****673** Steven Lee Sparger, Savannah, Georgia, for Appellant.

Larry Chisolm, Dist. Atty., Office Of The District Attorney, Paula Khristian Smith, Senior Asst. Atty. Gen., Samuel S. Olens, Atty. Gen., Department of Law, **Reginald** Charles Martin, Office of the District Attorney, Savannah, Georgia, Katherine Ruth Thrower, Asst. Atty. Gen., Atlanta, Georgia, for Appellee.

MELTON, Justice.

* Following a jury trial, **Reginald** L. **Lynch** appeals his conviction for malice **murder**, felony **murder**, and two counts of possession of a firearm during the commission of a crime,[FN1] ****674** contending that the evidence was insufficient to support the verdict and that he received ineffective assistance of trial counsel. For the reasons set forth below, we affirm.

FN1. On February 4, 2009, **Lynch** was indicted for malice **murder**, felony **murder**, and two counts of possession of a firearm during the commission of a crime. **Lynch's** first trial that was conducted in August 2010 ended in a mistrial. Following a second jury trial ending on January 26, 2011, **Lynch** was found guilty on all counts. Thereafter, **Lynch** was sentenced to life imprisonment for malice **murder** and five consecutive years for one count of possession of a firearm during commission of a crime. The conviction for felony **murder** was vacated by operation of law, see *Malcolm v. State*, 263 Ga. 369(4), 434 S.E.2d 479 (1993), and the remaining charges were merged for purposes of sentencing. **Lynch's** motion for new trial, filed on February 7, 2011, and amended on September 21, 2011, was denied by the trial court on November 15, 2011. **Lynch's** timely appeal was docketed to the April 2012 Term of this Court and submitted for decision on the briefs.

1. Viewed in the light most favorable to the verdict, the record shows that, on the night of October 22, 2008, police found Marcus Givens (the victim) in an alley suffering from multiple gunshot wounds. At the scene, Detective Dantzler asked the victim for his name. The victim responded, "Reggie Lynch." Detective Dantzler initially thought that "Reggie Lynch" was the victim's name, but the victim corrected, "Reggie Lynch, shot me." The victim repeated this statement at least three times. Star Corporal Angela Grant was with Detective Danztler when she heard Givens say, "Reggie Lynch." At first, she could not determine whether it was "Reggie Leck," but she knew the last name given started with an "L." Both officers testified that the victim appeared to be in serious pain and his voice sounded gurgled. The victim later died from his injuries. The day before the **murder**, on October 21, 2008, **Lynch** argued with the victim and called him derogatory names. Tiffany Davis, who is related to both **Lynch** and the victim, was present during this altercation, and she testified that, afterwards, **Lynch** told her that he was going to kill the victim. ***556** Leisha Givens testified that the victim, who was her cousin, told her at the scene that Reggie **Lynch** shot him. She also testified that she saw

Lynch driving away from the scene in a white truck.

[1] This evidence was sufficient to enable the jury to find **Lynch** guilty of the crimes for which he was convicted beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Nonetheless, **Lynch** argues that the victim's dying declaration naming his assailant must be considered only circumstantial evidence, providing an insufficient basis for conviction. This argument is without merit. Direct evidence is "evidence which immediately points to the question at issue." OCGA § 24–1–1(3). With his final breath, the victim stated that Lynch shot him. This is certainly direct evidence of who killed the victim.

[2][3][4] 2. Lynch contends that he received ineffective assistance of counsel in numerous ways.

> In order to succeed on his claim of ineffective assistance, [Lynch] must prove both that his trial counsel's performance was deficient and that there is a reasonable probability that the trial result would have been different if not for the deficient performance. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If an appellant fails to meet his burden of proving either prong of the *Strickland* test, the reviewing court does not have to examine the other prong. Id. at 697(IV) [104 S.Ct. 2052]; *Fuller v. State,* 277 Ga. 505(3), 591 S.E.2d 782 (2004). In reviewing the trial court's decision, " '[w]e accept the trial court's factual findings and credibility determinations unless clearly erroneous, but we independently apply the legal principles to the facts.' [Cit.]" *Robinson v. State,* 277 Ga. 75, 76, 586 S.E.2d 313 (2003).

Lytle v. State, 290 Ga. 177, 180(4), 718 S.E.2d 296 (2011).

[5] (a) Lynch contends that trial counsel rendered ineffective assistance by failing to request a jury charge based on OCGA § 24–9–85(b) [FN2] as a result of conflicting testimony given by Leisha Givens. Specifically, Lynch contends that Givens gave conflicting testimony****675** regarding whether she spoke with the victim at the scene and whether she saw Lynch driving away. Pretermitting whether trial counsel should have requested a charge based on OCGA § 24–9–85(b), Lynch has ***557** failed to prove prejudice. A review of the charge in its entirety, which included instructions on impeachment and the credibility of witnesses, establishes that any failure by trial counsel to request or the trial court to give a charge based on OCGA § 24–9–85(b) was harmless. *Evans v. State,* 209 Ga.App. 340(2), 433 S.E.2d 426 (1993).

> FN2. OCGA § 24–9–85(b) provides: "If a witness shall wilfully and knowingly swear falsely, his testimony shall be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence."

[6] (b) Lynch contends that trial counsel rendered ineffective assistance by failing to object to the State being allowed to have the lead detective testify as to out-of-court statements allegedly made by Tiffany Davis, when the State failed to lay the proper foundation for such testimony during its questioning of Davis. During trial, Detective Tobars testified that Davis told him that, following an altercation between **Lynch** and the victim the day before the **murder**, **Lynch** told her that he was trying to get the victim into an alley to "take care of him." Although Davis testified earlier at trial, the State did not ask her about this statement, and **Lynch** did not cross-examine her. **Lynch** now maintains that his trial counsel rendered ineffective assistance by not objecting to Detective Tobars's testimony, as Davis's statement was neither a prior consistent nor inconsistent statement. Even if **Lynch** is correct that trial counsel should have objected to this testimony, he has failed to show harm. During her direct examination, Davis had already explicitly testified that **Lynch** had threatened to kill the victim the day before the **murder**.

[7] (c) **Lynch** contends that trial counsel

rendered ineffective assistance by failing to object when Detective Tobars was called as a rebuttal witness to the alibi witness presented by the defense. The record shows that, after **Lynch** called his alibi witness, Nicole Brown, the State announced that it was going to recall Detective Tobars to rebut her testimony. The State, however, had not previously included Detective Tobars on its list of witnesses to be called in response to the alibi witness in accordance with OCGA § 17–16–5(b), which states:

> The prosecuting attorney shall serve upon the defendant within five days of the defendant's written notice but no later than five days before trial, whichever is later, a written notice stating the names, addresses, dates of birth, and telephone numbers of the witnesses, if known to the state, upon whom the state intends to rely to rebut the defendant's evidence of alibi unless previously supplied.

While trial counsel objected to Detective Tobars's testimony as irrelevant, he did not object based on OCGA § 17–16–5(b). Even assuming that trial counsel was ineffective for failing to make this objection, Lynch has failed to show that he was prejudiced, because he has not ***558** supported his claim that the testimony had to have been excluded under OCGA § 17–16–6, which provides:

> If at any time during the course of the proceedings it is brought to the attention of the court that the state has failed to comply with the requirements of this article, the court may order the state to permit the discovery or inspection, interview of the witness, grant a continuance, or, upon a showing of prejudice and bad faith, prohibit the state from introducing the evidence not disclosed or presenting the witness not disclosed, or may enter such other order as it deems just under the circumstances.

Lynch has made no claim that the State acted in bad faith in this matter; therefore, there is no basis on which to conclude that Detective Tobars's testimony would have been excluded if trial counsel made an objection.

[8] (d) Lynch contends that trial counsel rendered ineffective assistance by failing to request a jury charge on eyewitness identification when presenting an alibi defense. A review of the charge as a whole, however, shows that the jury was charged on the concepts of presumption of innocence, reasonable doubt, burden of proof, credibility and impeachment of witnesses, and alibi. Therefore, "the jury was instructed on the general principles of law underlying a defense of misidentification ... [, and there is] ****676** no reasonable probability that if a separate charge on identity had been given, the outcome of the trial would have been different." (Footnote and citations omitted.) *Springs v. Seese*, 274 Ga. 659, 662(3), 558 S.E.2d 710 (2002).

[9] (e) Lynch contends that trial counsel rendered ineffective assistance by failing to impeach the deceased victim with his prior felony conviction for cocaine possession with intent to distribute. Trial counsel testified, however, that it was his strategy to show that officers misunderstood the victim when he was gurgling and close to death. Trial counsel wanted to avoid the strategy of attacking the dying victim's credibility, which he considered risky. This strategy was reasonable, and "[a]s a general rule, matters of reasonable trial strategy and tactics do not amount to ineffective assistance of counsel." *Wright v. State*, 274 Ga. 730, 732(2)(b), 559 S.E.2d 437 (2002). Accordingly, there was no ineffective assistance in this case.

Judgment affirmed.

All the Justices concur.

Ga.,2012.
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