HAKIM MUHAMMAD, Petitioner-Appellant, versus MARTY ALLEN, et al., Respondents, CEDRIC TAYLOR, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2018 U.S. App. LEXIS 26714
No. 18-10734-B
September 19, 2018, Decided

Editorial Information: Prior History

{2018 U.S. App. LEXIS 1}Appeal from the United States District Court for the Northern District of Georgia.Muhammad v. Allen, 2018 U.S. Dist. LEXIS 20693 (N.D. Ga., Feb. 8, 2018)

Counsel Hakim Muhammad, Petitioner - Appellant, Pro se, Hardwick, GA.
For Cedric Taylor, Respondent - Appellee: Matthew Crowder, Christopher Michael Carr, Paula Khristian Smith, Attorney General's Office, Attorney General's Office.

Judges: Jill A. Pryor, UNITED STATES CIRCUIT JUDGE.

Opinion

Opinion by: Jill A. Pryor

Opinion

ORDER:

Hakim Muhammad, a Georgia prisoner serving a life sentence for murder and tampering with evidence, appeals the denial of his 28 U.S.C. § 2254 petition, and seeks a certificate of appealability ("COA") on the issues of whether: (1) there was sufficient evidence; (2) the prosecutor committed misconduct, and trial counsel ineffectively failed to challenge such conduct; (3) appellate counsel ineffectively failed to raise claims of ineffective assistance of trial counsel; and (4) the trial court gave an erroneous jury instruction. He also seeks leave to proceed *in forma pauperis* ("IFP").

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right" by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Where, as here,**{2018 U.S. App. LEXIS 2}** a state court adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established [f]ederal law," or (2) "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1), (2).

Sufficiency of the Evidence

Mr. Muhammad has not demonstrated that the Georgia Supreme Court unreasonably applied federal law in rejecting his sufficiency challenge. The evidence showed that he was with the victim before she was killed, was found at the crime scene shortly after her time of death, his DNA was on the murder weapon, and he had a history of violence. Thus, the court reasonably concluded that a jury could have

found him guilty of murder beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 314, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (stating that the evidence is insufficient if, when viewed in a light most favorable to the prosecution, no rational trier of fact could have found proof of guilt beyond a reasonable doubt).

Prosecutorial Misconduct and Ineffective Assistance of Trial Counsel

The state habeas court concluded that Mr. Muhammad's claims of prosecutorial misconduct, and ineffective assistance of trial counsel for failing to raise that issue,**{2018 U.S. App. LEXIS 3}** were procedurally defaulted. *See Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335, 345 (Ga. 2011); *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733, 734 (Ga. 1991). Because these rules are adequate and independent state grounds, the claims are barred from federal habeas review, unless Mr. Muhammad can establish cause and prejudice. *See Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010); *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011). Ineffective assistance of counsel may constitute cause, if the underlying claim is "substantial," meaning that it "has some merit" *Martinez v. Ryan*, 566 U.S. 1, 11-14, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). Because Mr. Muhammad's claims of prosecutorial misconduct are not substantial, he has not established cause under *Martinez* to excuse the procedural default.

Ineffective Assistance of Appellate Counsel

Mr. Muhammad has not demonstrated that the state court's rejection of his claim of ineffective assistance of appellate counsel was unreasonable, as he has not established that any of his claims of ineffective assistance of trial counsel would have been successful. Thus, he cannot show prejudice resulting from appellate counsel's alleged errors in failing to raise those claims. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (stating that prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

Jury Instruction

Mr. Muhammad argued for the first time in his § 2254 petition that the trial court erred**{2018 U.S. App. LEXIS 4}** in instructing the jury that it could, in its discretion, infer that people are presumed to be of sound mind, and people of sound mind intend the natural and probable consequences of their actions. This claim is unexhausted and procedurally defaulted, as Mr. Muhammad did not raise it in state court *See Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010); *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). To the extent that Mr. Muhammad seeks to overcome this default by asserting ineffective assistance of counsel, he cannot do so because the claim is not substantial. *See Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (stating that jury instructions that create permissive inferences do not violate due process).

Accordingly, Mr. Muhammad's motion for a COA is DENIED, and his motion for leave to proceed IFP is DENIED AS MOOT.

/s/ Jill A. Pryor

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10734-B

HAKIM MUHAMMAD,

Petitioner-Appellant,

versus

MARTY ALLEN, et al.,

Respondents,

CEDRIC TAYLOR,

Respondent-Appellee.

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

BEFORE: WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Hakim Muhammad has filed a motion for reconsideration of this Court's order dated September 19, 2018, denying his motions for a certificate of appealability and leave to proceed *in forma pauperis* in his appeal of the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. Upon review, Muhammad's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

HAKIM MUHAMMAD, Petitioner, v. MARTY ALLEN, Warden, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION
2018 U.S. Dist. LEXIS 20693
1:15-cv-4148-WSD
February 8, 2018, Decided
February 8, 2018, Filed

Editorial Information: Subsequent History

Certificate of appealability denied, Motion denied by Muhammad v. Allen, **2018 U.S. App. LEXIS 26714** (11th Cir. Ga., Sept. 19, 2018)

Editorial Information: Prior History

Muhammad v. Allen, 2016 U.S. Dist. LEXIS 192782 (N.D. Ga., Aug. 2, 2016)

Counsel Hakim Muhammad, Petitioner, Pro se, Valdosta, GA.
Judges: WILLIAM S. DUFFEY JR., UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: WILLIAM S. DUFFEY JR.

Opinion

OPINION AND ORDER

This matter is before the Court on Magistrate Judge Alan J. Baverman's Final Report & Recommendation [21] ("Final R&R"). The Final R&R recommends the Court deny Petitioner Hakim Muhammad's ("Petitioner") 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus [1] ("Section 2254 Petition"). Also before the Court are Petitioner's Objections to the Final R&R [24] ("Objections"), First Motion to Substitute Party [28], Second Motion to Substitute Party [29], Motion to Stay and Certificate of Appealability [30], and Supplemental Motion to Stay and Expand the Record and Certificate of Appealability [32].

I. BACKGROUND1

Petitioner, confined in Baldwin State Prison in Hardwick, Georgia, challenges his October 21, 2010, Rockdale County, Georgia convictions. On November 4, 2009, officers responded to a 911 call from a concerned neighbor who reported the sound of breaking glass at or near the home recently rented by Sheila Muhammad. Muhammad v. State, 290 Ga. 880, 725 S.E.2d 302, 304 (Ga. 2012). Officers arrived at the home to find Sheila strangled to death and Petitioner, Sheila's estranged husband, attempting to leave. Id. On February 1, 2010, Petitioner was indicted in Rockdale County for malice murder, two counts of felony murder, two counts of aggravated assault, and one count of tampering with evidence. Id. at 303 n.1. The trial court directed a verdict on one count of felony murder and one count of aggravated assault, and, following a jury trial on October 18, 2010, Muhammad was found guilty on the remaining charges. Id. The trial court sentenced Muhammad to life imprisonment for

malice murder with six concurrent months for tampering with evidence. Id. The conviction for felony murder was vacated by operation of law, and the conviction for aggravated assault merged with the conviction for malice murder. Id.

Muhammad filed a motion for new trial on March 28, 2011, and an amended motion on July 1, 2011. Id. The motion for new trial was denied on August 4, 2011. Id. Muhammad subsequently filed a timely notice of appeal, and on April 14, 2012, the Georgia Supreme Court affirmed the judgment against Petitioner. Id. at 305. Petitioner filed a state habeas corpus petition in the Lowndes County Superior Court, which was denied on July 7, 2015. ([10.1]-[10.4]). On November 2, 2015, the Georgia Supreme Court denied further review. ([10.6]). On November 27, 2015, Petitioner filed his Section 2254 Petition raising the following seven grounds for federal relief: (1) insufficient evidence; (2) a defective indictment; (3) prosecutorial misconduct; (4) ineffective assistance of appellate counsel on similar transaction evidence; (5) ineffective assistance of appellate counsel on ineffective assistance of trial counsel; (6) ineffective assistance of appellate counsel on additional issues; and (7) unconstitutional jury instructions and ineffective assistance of counsel. ([1] at 6; see also [21] at 4).

On August 2, 2016, the Magistrate Judge issued his Final R&R, recommending denial of Petitioner's Section 2254 Petition. The Magistrate Judge concluded that (1) there was sufficient evidence to support Petitioner's conviction; (2) because there was no viable Fifth Amendment claim, neither trial nor appellate counsel were ineffective for failing to challenge the indictment on Fifth Amendment grounds; (3) Petitioner's prosecutorial misconduct, ineffective assistance of trial counsel, and erroneous jury instruction claims fail because they are procedurally defaulted; and (4) Petitioner fails to show any viable claim of ineffective assistance of appellate counsel for failing to raise ineffective assistance of trial counsel on prosecutorial misconduct. ([21] at 10-52). The Magistrate Judge also recommended that this Court deny a Certificate of Appealability ("COA") because Petitioner failed to make a substantial showing of the denial of a constitutional right. (Id. at 55).

On August 18, 2016, Petitioner filed his Objections to the Final R&R. The Objections, which consist of twenty-two hand-written pages, largely restate the arguments Petitioner made in support of his Section 2254 Petition. Petitioner claims that "nothing the Magistrate has suggested is close to being conclusive enough to cancel out the facts cited in the text so completely as to justify summary denial of [P]etitioner['s] claims of insufficient evidence or of his other grounds." (Obj. at 21).

On May 4, 2017, Petitioner filed his First Motion to Substitute Party, and on May 19, 2017, Petitioner filed his Second Motion to Substitute Party seeking the same relief requested in his First Motion. Petitioner seeks to change Respondent's name to the warden of the institution Petitioner was transferred to following the filing of his Section 2254 Petition.2 Also on May 19, 2017, Petitioner filed a Motion to Stay and Certificate of Appealability. On June 22, 2017, Petitioner filed a Supplemental Motion to Stay and Expand the Record and Certificate of Appealability [32].3

II. DISCUSSION

A. Standard of Review of a Magistrate Judge's R&R

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); Williams v. Wainwright, 681 F.2d 732, 732 (11th Cir. 1982) (per curiam). A district judge "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). Where no party has objected to the report and recommendation, the Court conducts only a plain error review of the record. United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983) (per curiam). Because Petitioner objects to the R&R, the Court conducts its review *de novo*.

B. Procedurally Defaulted Claims

Petitioner raises a number of grounds for relief that he did not present at the trial level or on direct appeal, including (1) ineffective assistance of appellate counsel regarding his grand jury indictment; (2) erroneous jury instruction on presumption; and (3) prosecutorial misconduct.

A federal habeas petitioner must first exhaust his state court remedies or show that a state corrective process is unavailable or ineffective to protect his rights. 28 U.S.C. § 2254(b)(1). Exhaustion requires that a state prisoner present his claims, on direct appeal or collateral review, to the highest state court according to that state's appellate procedure. Mason v. Allen, 605 F.3d 1114, 1119 (11th Cir. 2010) (per curiam). "Under Georgia law, a prisoner seeking a writ of habeas corpus vacating his conviction must present all of his grounds for relief in his original petition." Mincey v. Head, 206 F.3d 1106, 1136 (11th Cir. 2000); see O.C.G.A. § 9-14-51 ("All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless . . . [those grounds] could not reasonably have been raised in the original or amended petition."). This procedural rule is designed to bar successive habeas petitions on a single conviction. See Hunter v. Brown, 236 Ga. 168, 223 S.E.2d 145, 146 (Ga. 1976).

The Eleventh Circuit has "repeatedly recognized that not complying with this [Georgia procedural] rule precludes federal habeas review." Mincey, 206 F.3d at 1136; see Chambers v. Thompson, 150 F.3d 1324, 1327 (11th Cir. 1998) (concluding "that a state habeas court would hold [petitioner's] claims to be procedurally defaulted and not decide them on the merits, because they were not presented in his initial state habeas petition" and "that those claims [therefore] are procedurally barred from review in this federal habeas proceeding and exhausted.").

A petitioner may obtain federal habeas review of procedurally defaulted claims by (1) showing cause and actual prejudice, or (2) presenting "proof of actual innocence, not just legal innocence." Ward v. Hall, 592 F.3d 1144, 1157 (11th Cir. 2010). "To show cause, the petitioner must demonstrate 'some objective factor external to the defense' that impeded his [or counsel's] effort to raise the claim properly in state court" or that the matter was not raised because of ineffective assistance counsel. Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). If a petitioner shows cause, he must also show prejudice, which requires a showing of an actual and substantial disadvantage to his defense. Id.

1. Ineffective Assistance of Appellate Counsel Regarding Grand Jury Indictment

In his Section 2254 Petition, Petitioner argues that his Fifth Amendment rights were violated because of a defective indictment. ([1] at 6). Petitioner specifically contends that (1) the indictment cites statutory language but not malicious intent or the elements of the charged crimes in Counts One through Six; (2) the grand jury was never presented evidence to show that Petitioner was present when the crime was committed; (3) the indictment was based on the false testimony of Deputy Huner, which would have been shown to be false if a picture had been taken from Huner's vantage point when entering the victim's home; (4) certain test results were not completed until after the grand jury returned the indictment; (5) the grand jurors were not presented with anything to rebut Petitioner's alibi defense that he was napping during the murder; and (6) there was otherwise insufficient evidence to support the indictment. (Id. at 15-19).

Because Petitioner did not present this claim on direct appeal or collateral review, it is procedurally defaulted. Petitioner, moreover, cannot overcome this procedural default because he cannot show cause or actual prejudice. This is because the Fifth Amendment's grand jury indictment requirement is not applicable to the States under the Fifth Amendment. Heath v. Sec'y, Fla. Dep't of Corr., 717 F.3d 1202, 1204-05 (11th Cir. 2013) ("'The Fifth Amendment's grand jury indictment requirement' is not

applicable to the States.") (quoting McDonald v. City of Chicago, 561 U.S. 742, 130 S. Ct. 3020, 3035 n.13, 177 L. Ed. 2d 894 (2010)). The Court finds that Petitioner's appellate counsel could not have been deficient for failing to raise a claim that was not cognizable.4 Because Petitioner does not provide sufficient argument to show cause or prejudice for his procedural default, the Court denies habeas corpus relief on this claim.

2. Jury Instruction on Presumption

Petitioner asserts that his due process rights were violated by the following jury instruction on presumption:

> Now ladies and gentlemen, every person is presumed to be of sound mind and discretion. But this presumption may be rebutted. You may infer, ladies and gentlemen, if you wish to do so, that the acts of a person of sound mind and discretion are the product of that person's will, and a person of sound mind and discretion intends the natural and probable consequences of those acts. Whether or not you make such inference or inferences is a matter solely within the discretion of the jury.([10.21] at 32). Petitioner argues that the instruction caused him to be convicted without proof beyond a reasonable doubt of intent to kill and asserts that his trial counsel and appellate counsel were ineffective on this issue. ([1] at 43-44). Petitioner did not raise this issue at trial, on appeal, or on collateral review, and thus it is procedurally defaulted.

The Court finds further that Petitioner fails to overcome his procedural default. Even if trial counsel challenged the instruction or appellate counsel raised the issue on appeal, there is no reason to believe that the challenge would have been successful. The presumption instruction, taken directly from the Georgia state court pattern jury instructions,5 has been upheld by the Supreme Court of Georgia as a correct statement of the law. Rivera v. State, 282 Ga. 355, 365, 647 S.E.2d 70(9) (Ga. 2007); see also Pendley v. State, 308 Ga. App. 821, 826, 709 S.E.2d 18 (2011) (rejecting the petitioner's argument that reading the identical charge impermissibly shifted the burden of persuasion to the petition on the element of intent). The Court therefore finds Petitioner cannot show cause or prejudice with respect to his jury instruction claim, and it is dismissed as procedurally defaulted.

3. Prosecutorial Misconduct

Petitioner argues in his Section 2254 Petition that his conviction was obtained by prosecutorial misconduct. That is, Petitioner alleges that the prosecution (1) manipulated his son, Hakeem, and presented false testimony by Hakeem that Petitioner was the driver and the victim the passenger on the morning of the murder when Hakeem previously told the assistant district attorney that Petitioner was the passenger; (2) presented false testimony by Deputy Huner that he saw Petitioner coming down the stairs, turning around, and proceeding back up the stairs because Deputy Huner could not have possibly seen this from his vantage point; (3) presented false testimony of Inez Watson; (4) during closing statements misstated Dr. Smith's testimony and argued Petitioner committed the murder; (5) asserted, without factual support, that Petitioner strangled the victim from behind; (6) asserted eight times, without adequate evidentiary support, that Petitioner killed the victim; (7) vouched for the credibility of the state witnesses; (8) asserted as a divorce motive, which was not substantiated by the record; (9) asserted that Petitioner staged things to look like a burglary; and (10) told the jury there were marks on the victim's neck to match the ribbon that killed the victim. ([1] at 20-30).

Petitioner did not raise the issue of prosecutorial misconduct on direct appeal, but he did raise it as part of his state habeas proceedings. ([10.4] at 11-12). The state habeas court found the prosecutorial misconduct claim failed under O.C.G.A. § 9-14-48(d) because it was procedurally defaulted based on Petitioner's failure to raise it on direct appeal and because Petitioner had not overcome his default by a showing of cause of prejudice. (Id. at 14-15). Under Georgia law, a claim of trial error that is not

raised on direct appeal generally is deemed waived and thus procedurally barred from consideration in a subsequent state proceeding for collateral relief. Chatman v. Mancill, 278 Ga. 488, 489, 604 S.E.2d 154 (2004); Black v. Hardin, 255 Ga. 239, 239-40, 336 S.E.2d 754 (1985) (holding that failure to timely raise an issue at trial "or to pursue the same on appeal" constitutes a procedural default"). Petitioner argues in his Objections that the issue was not raised on direct appeal because of ineffective assistance of appellate counsel. ([24] at 13). Petitioner fails, however, to provide any argument or supporting facts demonstrating why his appellate counsel was ineffective in raising the issue of prosecutorial misconduct on appeal. The Court will not disturb the state habeas court's determination, and also finds Petitioner's prosecutorial misconduct claim was procedurally defaulted. Petitioner's Objections are overruled, and the claim is dismissed.

C. Grounds Adjudicated on the Merits

Petitioner raises the following claims that were adjudicated on the merits on direct appeal or by the state habeas court: (1) sufficiency of the evidence to support conviction; (2) similar transaction evidence improperly admitted; (3) ineffective assistance of appellate counsel.

A federal court may not grant habeas relief for claims previously adjudicated on the merits by a state court unless the state court's 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]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (internal quotation marks omitted) (quoting Williams v. Taylor, 529 U.S. 362, 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). "[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." Id. at 103. The state court's determinations of factual issues are presumed correct, absent "clear and convincing evidence" to the contrary. 28 U.S.C. § 2254(e)(1).

1. Sufficiency of the Evidence

Petitioner first challenges whether the evidence presented at trial was sufficient to convict him. As part of Petitioner's direct appeal, the Georgia Supreme Court summarized the evidence underlying Petitioner's conviction in its April 24, 2012, decision as follows:

> [I]n the fall of 2009, Muhammad and his wife Shelia separated. On October 17, 2009, Shelia rented a house that was in short walking distance from the couple's former marital residence, where Muhammad continued to live. At approximately 7:05 a.m. on November 4, 2009, Muhammad's son, Hakeem, saw Muhammad and Shelia leave the marital residence in Shelia's car while Hakeem was waiting for his school bus. Hakeem observed that Muhammad was driving and that the vehicle turned in the direction of Shelia's new residence.
>
> At about 7:36 a.m., Gbolii Burton, who lived next door to the house Shelia had just rented, heard the sound of breaking glass outside and called 911. Deputy Huner and Deputy Blake responded. Deputy Huner went to the back of the house and saw a broken window with glass lying on the ground below the window, indicating that the window had been broken from the inside. Through the window, Deputy Huner observed Muhammad descending an interior staircase. As soon as Muhammad saw the deputy, he turned and went back up the stairs. Deputy Huner radioed Deputy Blake that Muhammad was coming out the front door, and Deputy Blake confronted Muhammad there. Deputy Blake testified that Muhammad "was scurrying trying to leave the area real fast." After being ordered to stop, Muhammad calmly said, "My wife is inside and I don't think she's breathing."

Inside the home, Shelia's body was found lying on the floor next to a piece of white ribbon, which Shelia's son, Javonte, had previously seen lying on the floor of Muhammad's home. Based on marks on her neck, the State's medical experts determined that the ribbon had been used to strangle Shelia to death. DNA testing showed that Shelia's DNA was on the middle and ends of the ribbon where it had been around her neck, but Muhammad's DNA was only on the ends of the ribbon, where it would have been tied or held during strangulation.

Following a search, Shelia's wedding ring was found in Muhammad's pocket. Later, when asked by Lt. Wolfe in a recorded interview why the situation between Muhammad and Shelia had gone so far and become violent, Muhammad replied that Shelia had actually tried to choke him. Muhammad admitted he removed Shelia's wedding ring from her finger as she lay on the floor and put it in his pocket. He also admitted he broke the rear window. Muhammad denied any intention to harm Shelia, however, and testified that he broke into her rental home from the outside to see if she was okay.

In addition, the evidence showed that, on at least two prior occasions, there had been domestic violence between Muhammad and Shelia. In one such instance, Muhammad grabbed Shelia by the throat prior to pushing her backward. Also, similar transaction evidence was admitted showing that Muhammad had a prior romantic involvement with Alvinice Muhammad (no relation). Alvinice purchased a home in Marietta that she shared with two female housemates. Alvinice allowed Muhammad to stay at that home for a few weeks. Muhammad began acting violently toward Alvinice, however, and Alvinice asked Muhammad to move out. Muhammad refused. Alvinice then decided to obtain a restraining order against Muhammad. On the morning she planned to do so, Alvinice woke to find Muhammad straddling her body and choking her with both hands on her throat. Muhammad released Alvinice only after one of her roommates ran into the room. Thereafter, Alvinice obtained the restraining order. In retaliation, Muhammad burned down Alvinice's house, telling her: "I told you I could get into the house anytime I got ready, and if I can't live in the house, nobody can live in the house."Muhammad, 725 S.E.2d at 304.

Shelia's certificate of death confirms that her cause of death was ligature strangulation, rules her death a homicide, and notes that her approximate time of death was 7 a.m. ([10.29] at 12). During Defendant's June 13, 2013, state habeas corpus evidentiary hearing, John T. Huner, a police officer for the Rockdale County Sheriff's Department, testified:

As I approached the house to the broken window, I stopped just on this side of the broken window to see if I could hear anything coming from inside, at which time, I peered around the window without exposing myself. And shortly thereafter, I observed a couple of legs coming down the stairs, because I could see a stairway coming down. I watched until a person appeared at the bottom of the steps. The person stood there for a moment. I kept my eye on the person because I wanted to see if he might have a weapon or something in his hand . . . . [W]hen I saw that he was not holding anything in his hand such as a weapon, I moved myself in front of the window. He was still standing there and he was kind of looking down. I'm looking at him. He looks up. I look at him. He immediately turns around, starts walking back up the stairs, at which time, I got on the radio and advised Officer Blake that he was coming out the front door.([10.16] at 31-32). Lieutenant Matthew Wolfe of the Rockdale County Sheriff's Department also testified about what he observed after he was called to investigate the crime scene. He stated he observed a normal skin tone "except for the face which was purple." ([10.16] at 73-74). He noted that "[i]t seemed the body was limp" and "[t]here was no rigor or . . . lividity," which signaled the individual was recently deceased. (Id.).

In a November 4, 2016, police report, Lieutenant Wolfe stated that he showed the murder weapon, a

ribbon, to the victim's children, Javonte and Hakeem, and that Javonte stated he had seen the ribbon in the marital residence but that Hakeem had not. ([10.9] at 70-71). In another report, Jennifer L. Perry, also a police officer for the Rockdale County Sherriff's Department, stated that Javonte reported to her that "he ha[d]n't seen a cloth that has a gold design on it." ([10.9] at 78-79). Javonte testified at trial that he had seen the ribbon but later clarified that he had not seen it in at least one of the houses they had recently stayed. ([10.19]).

Dr. Geoffrey Smith, the medical examiner and an expert in forensic pathology, testified that the victim had a ligature mark around her neck, which was a distinct imprint on the victim's neck and about the width of a finger, and that she died as a result of ligature strangulation, *i.e.*, the ligature had been applied around her neck with sufficient force to kill her. ([10.18] at 19). Dr. Smith further testified that the intense congestion of blood in the victim's facial tissue went "a long way" in suggesting the cause of death was strangulation-although such intense congestion, alone, is not "specific for strangulation." ([10.18] at 25). The ligature mark was on the front of the victim's neck, and Dr. Smith testified that this was consistent with the assailant strangling her from behind. (Id. at 30). Dr. Smith testified that the marks on the victim's skin included lines that occurred in a parallel array and were consistent with the pattern on the piece of fabric found near the victim's body. ([10.18] at 41-42). DNA forensic expert Cynthia Wood testified that the ribbon had two DNA profiles on it, that the victim's DNA was in the middle and ends of the ribbon, and that Petitioner's DNA was on only the ends. (Id. at 53, 59). Criminal investigator Amanda Pilgrim-who admitted she failed to conduct follow-up testing on Petitioner's hands-testified that she observed discoloration on the creases of Petitioner's fingers, that, in her experience, potentially could be marks or a burn. ([10.16]).

Petitioner testified that he and his wife left the marital residence at approximately 7:10 a.m., and that, when he remembered he left a new pack of cigarettes at the home, his wife dropped him back off at approximately 7:11 a.m. or 7:12 a.m. ([10.20]). Petitioner then apparently fell asleep and woke up at what he thought was 8:23 a.m. but which later turned out to be earlier. (Id.). Petitioner testified that he woke up, took a walk, and "just happened" to walk towards his wife's new house, and that he was concerned about her because she had recently been suicidal. (Id.). Petitioner testified that when he arrived at the house and no one responded, he broke the rear window, entered the home, and found his wife dead. (Id.). Petitioner stated that he removed the ribbon from her neck and took the ring off her finger. (Id.).

On appeal, Petitioner contended that the evidence was insufficient to support the verdict against him. Muhammad, 725 S.E.2d at 303. The Georgia Supreme Court found, however, under Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), that the evidence was sufficient to convict Defendant. Id. at 304. In his Section 2254 Petition, Petitioner contends the evidence is insufficient because (1) Petitioner's sons provided inconsistent testimony regarding the ribbon used to strangle the victim; (2) the state never presented evidence of the origin of the ribbon; (3) Petitioner's DNA was on only the ends of the ribbon; (4) the state failed to show that Petitioner was present with the victim during the twenty to thirty minutes before her death, when Petitioner testified that he was asleep; (5) the medical examiner's evidence was inconclusive on whether the victim was strangled from the front or back of her person; (6) no DNA evidence from the victim's finger nails was ever presented; and (7) the medical examiner testified that the ligature marks on the victim were not specific to strangulation. ([1] at 12-14). Petitioner, in his Objections to the Final R&R, essentially repeats the arguments in his Section 2254 Petition. He objects to the Magistrate Judge's interpretation of his children's testimony regarding whether they had ever seen or previously identified the murder weapon. ([24] at 2-4). Petitioner also rebuts the Magistrate Judge's consideration of Dr. Smith's testimony regarding how the victim died, the crediting of Amanda Pilgrim's testimony regarding discoloration on Petitioner's hands, the significance of finding only Petitioner's and the victim's DNA profiles on the murder weapon, and Petitioner's statement to Lieutenant Wolfe that the events

escalated because the victim "came at him." (Id. at 4-10).

When reviewing a challenge to the sufficiency of the evidence, a court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319; see also Grimes v. Taylor, No. 1:15-CV-1757-TWT, 2015 U.S. Dist. LEXIS 136105, 2015 WL 5827610, at *6 (N.D. Ga. Oct. 5, 2015). "When the record reflects facts that support conflicting inferences, there is a presumption that the jury resolved those conflicts in favor of the prosecution and against the defendant." Johnson v. Alabama, 256 F.3d 1156, 1172 (11th Cir. 2001). "In other words, federal courts must defer to the judgment of the jury in assigning credibility to the witnesses and in weighing the evidence." Id.

Here, the evidence shows, among other things, that the victim was strangled to death, most likely from behind, that Petitioner's children had likely previously seen the ribbon used to murder the victim, that Petitioner was with the victim and present at the victim's home in very close proximity to the time of the victim's death, that Petitioner's DNA was present on the ends of the ribbon found next to the victim, and that Petitioner had been violent toward the victim previously. Any inconsistency in Petitioner's children's testimony was ferreted out at trial, and it was the jury's responsibility and duty to weigh the children's credibility and their testimony regarding the ribbon. In fact, it was the jury's duty to consider and weigh the credibility of all of the testimony presented.

Petitioner's characterization that Dr. Smith testified that the ligature marks were non-specific to strangulation is a misstatement. Dr. Smith testified that the intense congestion of blood in the victim's facial tissue went "a long way" toward suggesting strangulation, but that congestion, without more, was not specific for strangulation. ([10.18] at 25). Dr. Smith implied that the facts of this case, in addition to the congestion in the victim's face, allowed him to conclusively determine that the victim died from strangulation. (Id.). Petitioner's misrepresentation does not impact whether or not the evidence was sufficient to convict him.

Petitioner also fails to show how or why the lack of his DNA in the middle of the ribbon, the lack of evidence surrounding the ribbon's origin, or the lack of evidence establishing his position during the strangulation of the victim, are matters that render insufficient the evidence against him. The evidence demonstrated that the ribbon had the victim's DNA on it and Petitioner's DNA on the ends, where it would have been held or tied during strangulation. The jury was entitled to determine the Petitioner's credibility and the circumstances surrounding the victim's death. It was also within the jury's province to determine whether to credit Petitioner's testimony regarding the timeline of events in the early morning hours leading up to the victim's death.

In every trial, parties present evidence tending to prove or disprove the guilt of the accused. Some evidence is more credible than other evidence, and it is the jury's duty to weigh the credibility and make a final determination whether to credit it. In this case, there was a substantial amount of evidence presented at trial showing that the Petitioner strangled the victim. Petitioner fails to demonstrate that the Georgia Supreme Court was unreasonable in finding that the evidence presented at trial was sufficient to support his conviction. The Court, upon *de novo* review, thus finds the state courts' decisions-both on direct and collateral review-regarding the sufficiency of the evidence in this case warrant deference pursuant to 28 U.S.C. § 2254(d).

2. Similar Transaction Evidence

Petitioner next challenges whether the trial court erred in allowing similar transaction evidence with regard to his conduct toward another woman, Alvinice Muhammad. ([10.30]). Petitioner's counsel argued at trial that the prior incident should have been excluded because it occurred more than ten

years prior and was arson, not murder. (Id.). In considering the issue on appeal, the Georgia Supreme Court held there was no error. Muhammad, 725 S.E.2d at 305. The court held:

> [S]imilar transaction evidence was admitted showing that [Petitioner] had a prior romantic involvement with Alvinice Muhammad (no relation). Alvinice purchased a home in Marietta that she shared with two female housemates. Alvinice allowed Muhammad to stay at that home for a few weeks. Muhammad began acting violently toward Alvinice, however, and Alvinice asked Muhammad to move out. Muhammad refused. Alvinice then decided to obtain a restraining order against Muhammad. On the morning she planned to do so, Alvinice woke to find Muhammad straddling her body and choking her with both hands on her throat. Muhammad released Alvinice only after one of her roommates ran into the room. Thereafter, Alvinice obtained the restraining order. In retaliation, Muhammad burned down Alvinice's house, telling her: "I told you I could get into the house anytime I got ready, and if I can't live in the house, nobody can live in the house."
>
> . . . .
>
> [T]he State offered the evidence of the prior arson to show [Petitioner's] bent of mind or course of conduct in using escalating degrees of violence toward women. [Petitioner] pushed and shoved both Alvinice and Shelia. [Petitioner] choked both Alvinice and Shelia. With both women, there was the development of a romantic relationship, a separation, and a resulting escalation of domestic violence including choking. The similarities are apparent. As such, the trial court did not err in its determination that [Petitioner's] crime against Alvinice was sufficiently similar to the murder of Shelia to constitute an admissible similar transaction. Muhammad, 725 S.E.2d at 304-05.

In his state habeas corpus proceedings, Petitioner asserted ineffective assistance of trial and appellate counsel for failing to consult with him in regard to the introduction of similar transaction evidence. ([10.4] at 5-6, 12). The state habeas court found that counsel consulted with Petitioner, that, as a general matter, counsel would have consulted Petitioner regarding similar transaction evidence as it was raised on appeal, and that Petitioner had not shown that appellate counsel was deficient. (Id. at 5, 11). The state habeas court found that Petitioner's claims of ineffective assistance of trial counsel failed because he had procedurally defaulted them and had not overcome his default. (Id. at 14-15).

In his Section 2254 Petition, Petitioner argues that appellate counsel provided ineffective assistance of counsel by failing to adequately argue the erroneous admittance of similar transaction evidence on Petitioner's violence toward Alvinice, that the trial court erred in allowing such evidence, and that trial counsel provided ineffective assistance on the issue. ([1] at 31-34). Petitioner contends that appellate counsel should have argued that the transactions were dissimilar because he was not in a romantic relationship with Alvirice at the time he admittedly set fire to her home-although they had been in one previously. (Id. at 32). Petitioner further states that there was no evidence to show that he had assaulted Alvirice. (Id.).

A criminal defendant possesses a Sixth Amendment right to "reasonably effective" legal assistance. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show constitutionally ineffective assistance of counsel, a petitioner must establish that (1) counsel's representation was deficient and (2) counsel's deficient representation prejudiced him. Id. at 690-92. The Court may resolve an ineffective assistance of counsel claim based on either of these two prongs. Pooler v. Sec'y, Fla. Dep't of Corr., 702 F.3d 1252, 1269 (11th Cir. 2012). Claims of ineffective assistance of appellate counsel are also governed by the Strickland test. Owen v. Fla. Dep't of Corr., 686 F.3d 1181, 1202 (11th Cir. 2012). To succeed on a claim of ineffective assistance of appellate counsel, the movant must demonstrate deficient performance by counsel and demonstrate that, if counsel had not performed deficiently, there is a reasonable probability that the appellate outcome

would have been favorable to the movant. See Ferrell v. Hall, 640 F.3d 1199, 1236 (11th Cir. 2011).

Petitioner fails to show that his appellate counsel was ineffective in handling the admission of the similar transaction evidence involving Alvirice. Although Petitioner apparently was not in a romantic relationship with Alvirice at the time of the arson, he admitted he was in one with her previously. The facts underlying the events between Alvirice and Petitioner-including the choking incident and general violence-were sufficient to show similarity to Petitioner's behavior toward the victim here.

Alvirice, moreover, provided the following testimony at Petitioner's June 13, 2013, state habeas corpus evidentiary hearing:

> He began to get violent. He began to shove and push me and just - be violent. We would have arguments with me telling him, he's got to go. He just needs to go. And he said he wasn't going. He was going when he got ready to go. So he started getting violent.([10.18] at 75). As a result, Alvirice decided to obtain a restraining order. The morning that she and her roommates planned to go to the sherriff's office together, she "woke to [Petitioner's] hands at [her] throat telling [her] to get out and go to work." (Id.). Alvirice continued:
>
> He was at my throat like this on me, you know, laying on me. I am in the bed so he was laying straddled to me. Then when Laverne actually came to the door because she heard screaming, I began to struggle. So she stopped him. The fact that she came in actually stopped the incident.(Id. at 76).

First, the Court finds nothing that appellate counsel could have, or should have, raised on appeal that reasonably would have changed the Georgia Supreme Court's decision. The facts underlying the incidents with Alvirice and the victim were similar, and the Court finds appellate counsel could not have done more to distinguish them. Second, with respect to whether the trial court should have admitted the similar transaction evidence in the first instance, the due process clause, absent the involvement of a specific constitutional right, gives a federal court limited authority to review a state court's evidentiary rulings. Hall v. Wainwright, 733 F.2d 766, 770 (11th Cir. 1984). Absent a violation that rises to the level of denying "fundamental fairness," the Court will not review a state court's decision to admit evidence. Id. at 770 (quoting Shaw v. Boney, 695 F.2d 528, 530 (11th Cir. 1983)). "To constitute a denial of fundamental unfairness, the evidence erroneously admitted at trial must be material in the sense of a crucial, critical, highly significant factor." Jameson v. Wainwright, 719 F.2d 1125, 1127 (11th Cir. 1983). The Court finds no fundamental unfairness in the state court's evidentiary decision. The similar transaction evidence was not critical or crucial to Petitioner's case. The evidence against Petitioner, independent of the similar transaction evidence, was sufficiently strong and a jury could have convicted on that basis alone. Upon a *de novo* review, the Court finds that the state courts' decisions, on both direct and collateral review, regarding the admittance of similar transaction evidence warrant deference pursuant to 28 U.S.C. § 2254(d).

3. Ineffective Assistance of Appellate Counsel

Petitioner argues that appellate counsel was ineffective for failing to raise ineffective assistance of trial counsel and that the state habeas court's decision on the issue was contrary to federal law. ([1] at 34). Petitioner argues that appellate counsel should have argued that trial counsel was ineffective because he failed to (1) obtain a photograph of Deputy Huner's vantage point from the window; (2) present expert testimony on whether the downstairs window was broken from inside or outside the residence; (3) discover Alvinice's conviction for crime of deceit, thus making the similar transaction evidence inadmissible; (4) present testimony from his son's on where the victim stayed before her death; (5) challenge the indictment; (6) investigate the origin of the fiber found on the victim and the blood found next to her; (7) present evidence and/or testimony from Valery Drinkard to show why Petitioner and

the victim were separated and that Petitioner had initiated the separation; and (8) object to the evidence that his son Javonte had seen the ribbon in a prior home. ([1] at 34-38).

Strickland requires that Petitioner show that counsel was deficient and that Petitioner was prejudiced by the deficiency. Strickland, 466 U.S. at 690-92. Where a petitioner raises an ineffective assistance of counsel claim already decided by the state court, "the petitioner must do more than satisfy the Strickland standard; the petitioner must also show that the state court applied Strickland in an objectively reasonable manner." Frederick v. Dep't of Corr., 438 Fed. Appx. 801, 803 (11th Cir. Aug. 17, 2011); see also Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009) (finding the standard of review is "doubly deferential" when "a Strickland claim [is] evaluated under the § 2254(d)(1) standard")).

Petitioner fails to present evidence or argument demonstrating that the state habeas court unreasonably applied Strickland. Petitioner also fails to show any viable claim of ineffective assistance of trial counsel or that he had a reasonable chance of succeeding on appeal. Petitioner's claims regarding his counsel's failure to introduce certain testimony or evidence are inadequate because there was no proffer of this evidence or testimony at the outset; and therefore prejudice cannot be shown. The Eleventh Circuit has held that, absent proffer of evidence, a petitioner cannot show prejudice based on counsel's failure to introduce such evidence. See Hill v. Moore, 175 F.3d 915, 923 (11th Cir. 1999); see also Gilreath v. Head, 234 F.3d 547, 552 n. 12 (11th Cir. 2000). The following of Petitioner's claims must be dismissed on this basis alone: (1) Petitioner's claim that photographic evidence of Deputy Huner's view of the stairs would have shown that Deputy Huner did not in fact see Petitioner descend and then ascend the stairs in the victim's home; (2) Petitioner's claim that expert testimony would have shown Petitioner did not break the window; (3) Petitioner's claim that the fiber found on the victim and the blood on the floor next to her would have uncovered exculpatory evidence; and (4) Petitioner's claim that Drinkard would have testified to Petitioner's cause for separation.

Petitioner's claim that Alvinice's alleged conviction for a crime of deceit would have precluded the admittance of similar transaction evidence also fails. There is no evidence in the record, nor could this Court find, evidence confirming Alvinice's conviction. ([21] at 43 n.20). Petitioner also presents no argument or evidence showing that the alleged conviction would have changed the state trial court's decision to admit the similar transaction evidence. Instead, evidence was presented that Petitioner was convicted of arson of Alvinice's home, which was perhaps enough for the jury to corroborate her story. Finally, Petitioner's son Javonte's testimony regarding the ribbon was scrutinized at trial, and it was the jury's duty to weigh the testimony and evidence before it. There is nothing before the Court that persuades it that Petitioner's appellate counsel failed as to Javonte's testimony. The Court, upon *de novo* review, finds the state habeas court's decision regarding Petitioner's ineffective assistance of appellate counsel claim warrants deference pursuant to 28 U.S.C. § 2254(d).

D. Certificate of Appealability

A federal habeas "applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b)(1). "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing Section 2254 Cases in the United States District Courts, Rule 11(a). A court may issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing of the denial of a constitutional right "includes showing that 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, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)).

> When the district court denies a habeas petition on procedural grounds . . ., a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.Slack, 529 U.S. at 484.

The Magistrate Judge found that a COA should be denied because it is not debatable that Petitioner fails to assert claims warranting federal habeas relief. ([21] at 55). The Court agrees, and a COA is denied. Petitioner is advised that he "may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Magistrate Judge Alan J. Baverman's Final Report & Recommendation [21] is **ADOPTED**.

IT IS FURTHER ORDERED that Petitioner's Objections to the R&R [24] are **OVERRULED**.

IT IS FURTHER ORDERED that Petitioner's First Motion to Substitute Party [28] and Second Motion to Substitute Party [29] are **GRANTED**. The Clerk of Court is **DIRECTED** to substitute Warden Cedric Taylor as Respondent.

IT IS FURTHER ORDERED that Petitioner's 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus [1] is **DENIED**. A COA is **DENIED**.

IT IS FURTHER ORDERED that Petitioner's Motion to Stay and Certificate of Appealability [30] and Supplemental Motion to Stay and Expand the Record and Certificate of Appealability [32] are **DENIED**.

IT IS FURTHER ORDERED that this action is **DISMISSED**.

SO ORDERED this 8th day of February, 2018.

/s/ William S. Duffey Jr.

WILLIAM S. DUFFEY JR.

UNITED STATES DISTRICT JUDGE

Footnotes

1

The facts are taken from the Final R&R and the record. The parties have not objected to any specific facts in the Final R&R, and the Court finds no plain error in them. The Court thus adopts the facts set out in the Final R&R. See Garvey v. Vaughn, 993 F.2d 776, 779 n.9 (11th Cir. 1993).

2

Petitioner states he has been transferred to Baldwin State Prison, and he seeks to change Respondent's name to Cedric Taylor, the warden of the prison. "If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has

custody." Rule 2(a), Rules Governing § 2254 Cases in the United States District Courts. The proper respondent is ordinarily the warden of the petitioner's institution. Id., Advisory Committee Notes. Because Petitioner is now in the custody of Warden Taylor, Petitioner's First Motion to Substitute Party and Second Motion to Substitute Party are granted.
3

Petitioner seeks additional time to expand the record "so vital information and testimony" can be obtained from State witnesses Deputy Huner and Hakeem Davis. ([30]). In a habeas corpus proceeding, "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure." Rule 6, Rules Governing Section 2254 Cases in the United States District Court. The party requesting discovery must show good cause that the evidence he seeks would create doubt that is sufficient to undermine confidence in his conviction. Arthur v. Allen, 459 F.3d 1310, 1310 (11th Cir. 2006). Good cause cannot be based on speculation or hypothesis. Id. Under AEDPA, a federal petitioner, moreover, is not entitled to discovery on factual matters that, as a result of lack of diligence, he failed to develop in state court. Crawford v. Head, 311 F.3d 1288, 1329 (11th Cir. 2002).

Petitioner seeks now, five years since his conviction, to obtain an affidavit and/or conduct a deposition of two state witnesses-something that could have been done years ago. Petitioner has not reasonably or diligently pursued the development of this material, and, as indicated in this Order, none of these matters would bring into question other significant evidence against Petitioner. The Court therefore denies Petitioner's Motions.
4

To the extent Petitioner intended to argue that the grand jury indictment violated his Sixth Amendment rights, which requires that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ," the Court finds that this claim was presented on collateral review and that the state habeas court's decision demonstrates a reasonable application of the law. The state habeas court found:

Petitioner has not shown that appellate counsel acted unreasonably when, after reviewing the indictment, counsel did not raise any issues as to the indictment. Despite Petitioner's claims that three counts of murder in the indictment were incorrect, Petitioner was only convicted and sentenced for one of those counts - i.e., malice murder; the court directed a verdict of acquittal on the count two felony murder and merged the count three felony murder, of which Petitioner was found guilty, into the malice murder. The Court's review of count one, malice murder, shows that it tracks the statutory language of O.C.G.A. § 16-5-1. Accordingly, counsel acted reasonably when he saw no basis on which to allege that trial counsel was ineffective when trial counsel did not challenge counts one, two and three of the indictment. Petitioner also failed to establish the requisite prejudice in this regard.([10.4] at 9). On *de novo* review, the Court finds the state habeas court's consideration of whether the grand jury indictment violated Petitioner's Sixth Amendment rights warrant deference pursuant to 28 U.S.C. § 2254(d).
5

See Council of Superior Court Judges, Suggested Pattern Jury Instructions, Fourth Ed., Vol. II, § 1.41.12 (2008).

HAKIM MUHAMMAD, Petitioner, v. MARTY ALLEN, Warden, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION
2016 U.S. Dist. LEXIS 192782
CIVIL ACTION NO. 1:15-CV-4148-WSD-AJB
August 2, 2016, Decided
August 2, 2016, Filed

Editorial Information: Subsequent History

Adopted by, Writ of habeas corpus denied, Objection overruled by, Certificate of appealability denied, Stay denied by, Dismissed by, Motion granted by Muhammad v. Allen, **2018 U.S. Dist. LEXIS 20693** (N.D. Ga., Feb. 8, 2018)

Editorial Information: Prior History

Muhammad v. State, 290 Ga. 880, 725 S.E.2d 302, 2012 Ga. LEXIS 349 (Apr. 24, 2012)

Counsel Hakim Muhammad, Petitioner, Pro se, Valdosta, GA.
For Marty Allen, Warden, Respondent: Matthew Blackwell Crowder, Georgia Department of Law, Office of the Attorney General, Atlanta, GA; Paula K. Smith, Office of State Attorney General, Atlanta, GA.

Judges: ALAN J. BAVERMAN, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: ALAN J. BAVERMAN

Opinion

HABEAS CORPUS 28 U.S.C. § 2254

UNITED STATES MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

Petitioner, Hakim Muhammad, challenges via 28 U.S.C. § 2254 the constitutionality of his October 2010 Rockdale County convictions for murder, aggravated assault, and tampering with the evidence. The matter is before the Court for consideration of (1) the petition, [Doc. 1], Respondent's answer-response, [Doc. 9], and Petitioner's reply, [Doc. 14], and (2) Petitioner's motions for discovery and to expand the record, [Docs. 16, 17], Respondent's responses to those motions, [Docs. 18, 19], and Petitioner's reply, [Doc. 20]. For the reasons stated below, the undersigned **RECOMMENDS** that the petition be denied, the motions and a certificate of appealability be denied, and this action be dismissed.

I. Background

On November 4, 2009, officers responded to a 911 call from a concerned neighbor who reported the sound of breaking glass at or near the home recently rented by Sheila Muhammad. Officers arrived at the home and found Sheila, who had been strangled to death, and Petitioner, Sheila's estranged husband who was attempting to leave. *See Muhammad v. State*, 290 Ga. 880, 881, 725 S.E.2d 302,

304 (2012). On February 1, 2010, the Rockdale County grand jury indicted Petitioner for malice murder, two counts of felony murder, two counts of aggravated assault, and one count of tampering with evidence, Rockdale County criminal action number 2010-CR-1105N. *See id.*, 290 Ga. at 881, n.1, 725 S.E.2d at 303 n.1; (Resp't Ex. 7b-part 1 at 134-40, ECF No. 10-9.)1 Petitioner proceeded to trial represented by Steven Purvis and Owen Humphries; the Court directed a verdict on Counts Two and Four; and the jury found him guilty for malice murder, one count of felony murder, one count of aggravated assault, and one count of tampering with evidence. *See Muhammad*, 290 Ga. at 881, n.1, 725 S.E.2d at 303, n.1; (Resp't Ex. 7b-part 1 at 134-41 [10-9]; Resp't Ex. 7c - part 1 at 624 [10-15].) The court sentenced Petitioner to life imprisonment for malice murder with six concurrent months for tampering with evidence, and the convictions for felony murder and aggravated assault were vacated by operation of law and/or merged with the murder conviction, respectively. *See Muhammad*, 290 Ga. at 881, n.1, 725 S.E.2d at 303, n.1. Petitioner moved for a new trial - represented by new counsel Charles M. Evans - and the trial court denied that motion. (Resp't Ex. 7e-part 11 at 1401, ECF No. 10-30); *see Muhammad*, 290 Ga. at 881, n.1, 725 S.E.2d at 303 n.1. Again represented Evans, Petitioner appealed, and on April 14, 2012, the Georgia Supreme Court affirmed the judgment against Petitioner. *Muhammad*, 290 Ga. at 883, 725 S.E.2d at 305.

Petitioner filed a state habeas corpus petition in the Lowndes County Superior Court, civil action number 2013-CV-397, which that court denied in an order filed on July 7, 2015. (Resp't Exs. 1-4, ECF Nos. 10-1 through -4.) On November 2, 2015, the Georgia Supreme Court denied further review. (Resp't Ex. 6, ECF No. 10-6.)

Petitioner now seeks federal habeas corpus review and raises seven grounds for federal relief: (1) insufficient evidence, (2) a defective indictment, (3) prosecutorial misconduct, (4) ineffective assistance of appellate counsel on similar transaction evidence, (5) ineffective assistance of appellate counsel on ineffective assistance of trial counsel, (6) ineffective assistance of appellate counsel on additional issues, and (7) unconstitutional jury instructions and ineffective assistance of counsel. (Pet. at 6, E-1, F-1, G-1, ECF No. 1; *see also* Pet'r Resp. to Order, ECF No. 13.) Petitioner has plainly stated the basis of each of his seven grounds, as stated above. In discussing each of his grounds for relief, Petitioner also makes numerous passing references to issues that are involved in other grounds. The Court clarifies that, in addressing the claims within each ground presented by Petitioner, the Court adheres to Petitioner's stated ground for relief, and Petitioner's references to issues involved in other grounds are construed only as supporting context for the stated ground for relief. *See French v. Pepe*, No. CIV. A. 94-11482-WGY, 1995 U.S. Dist. LEXIS 4296, 1995 WL 170088, at *3 (D. Mass. Mar. 30, 1995) ("[I]t must be remembered that a petitioner, even one who proceeds *pro se*, is master of his petition.") (citations omitted).

II. Federal Habeas Corpus Standard

A federal court may issue a writ of habeas corpus on behalf of a person held in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). The availability of collateral relief, however, is limited. A habeas petitioner is presumed guilty, not innocent, *Herrera v. Collins*, 506 U.S. 390, 399-400, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), and "in habeas proceedings, unlike direct appeals, the petitioner bears the burden of establishing his right to relief[,]" *Blankenship* v. *Hall*, 542 F.3d 1253, 1274 (11th Cir. 2008). The federal habeas statue requires a petitioner to exhaust his state court remedies and requires federal courts to give deference to state court adjudications. 28 U.S.C. § 2254(b)-(e).

As to exhaustion, a district court may not grant federal habeas corpus relief unless

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.28 U.S.C. § 2254(b)(1). Exhaustion requires a petitioner to "fairly present[] every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Pope v. Sec'y for Dep't of Corr.*, 680 F.3d 1271, 1284 (11th Cir. 2012) (quoting *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010)) (internal quotation marks omitted). If a state prisoner has not properly availed himself of state remedies, federal habeas corpus review of his claims generally is barred (1) if, based on adequate and independent state law, the state court clearly and expressly has found that, because the petitioner failed to follow state rules, state law procedurally bars consideration of a claim, or (2) if a claim has not been raised in state court and it is clear that the state courts would refuse, because of a state procedural bar, to allow any further attempts at exhaustion.2 *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). The federal bar may be overcome if the federal petitioner shows (1) cause for the default and actual prejudice or (2) proof of actual innocence. *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010). "To show cause, the petitioner must demonstrate 'some objective factor external to the defense' that impeded his [or counsel's] effort to raise the claim properly in state court" or that the matter was not raised because of ineffective assistance of counsel. *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). If a petitioner shows cause, he also must show prejudice - an actual and substantial disadvantage to his defense. *Id.* "To overcome procedural default through a showing of actual innocence, the petitioner must present 'reliable evidence . . . not presented at trial' such that 'it is more likely than not that no reasonable juror would have convicted him of the underlying offense.'" *Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1011 (11th Cir. 2012) (quoting *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001)).

For claims that have been exhausted, federal court review under § 2254 of a state court's adjudication of a claim is "greatly circumscribed and is highly deferential[.]" *Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011) (en banc) (quoting *Payne v. Allen*, 539 F.3d 1297, 1312 (11th Cir. 2008)) (internal quotation marks omitted). Federal relief is limited to petitioners who demonstrate that the state court adjudication resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[,]" 28 U.S.C. § 2254(d)(1), or "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)(2). A state court's factual determinations are presumed correct unless the petitioner presents clear and convincing evidence that those determinations were erroneous. 28 U.S.C. § 2254(e)(1).

"A state court's adjudication is contrary to federal law if it 'arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.'" *Wellons v. Warden*, 695 F.3d 1202, 1206 (11th Cir. 2012) (alterations in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). "A state court's adjudication is unreasonable if the state court 'identifies the correct governing legal principle from th[e] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Id.* (alteration in original) (quoting *Williams*, 529 U.S. at 413). To show unreasonableness, "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." *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

Further, even if a federal petitioner meets § 2254(d)'s rigorous standard - "a precondition to the grant of habeas relief . . . , not an entitlement to it[,]" the court must then determine whether the error is harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 631, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). *Fry v. Pliler*, 551 U.S. 112, 119, 121, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007) ("We hold that in § 2254 proceedings a [federal] court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht*[.]").

This Court has reviewed the pleadings and exhibits and finds that the record contains sufficient facts upon which the issues may be resolved. As Petitioner has made no showing as required by 28 U.S.C. § 2254(e)(2), no federal evidentiary hearing is permitted, and the case is now ready for disposition.

III. Discussion

A. Ground One: Sufficiency of the Evidence

1. State Court History

The Georgia Supreme Court summarized the evidence as follows -

> [I]n the fall of 2009, [Petitioner] and his wife Shelia separated. On October 17, 2009, Shelia rented a house that was in short walking distance from the couple's former marital residence, where [Petitioner] continued to live. At approximately 7:05 a.m. on November 4, 2009, [Petitioner's] son, Hakeem3, saw [Petitioner] and Shelia leave the marital residence in Shelia's car while Hakeem was waiting for his school bus. Hakeem observed that [Petitioner] was driving and that the vehicle turned in the direction of Shelia's new residence. At about 7:36 a.m., Gbolii Burton, who lived next door to the house Shelia had just rented, heard the sound of breaking glass outside and called 911. Deputy Huner and Deputy Blake responded. Deputy Huner went to the back of the house and saw a broken window with glass lying on the ground below the window, indicating that the window had been broken from the inside. Through the window, Deputy Huner observed [Petitioner] descending an interior staircase. As soon as [Petitioner] saw the deputy, he turned and went back up the stairs. Deputy Huner radioed Deputy Blake that [Petitioner] was coming out the front door, and Deputy Blake confronted [Petitioner] there. Deputy Blake testified that [Petitioner] "was scurrying trying to leave the area real fast." After being ordered to stop, [Petitioner] calmly said, "My wife is inside and I don't think she's breathing." Inside the home, Shelia's body was found lying on the floor next to a piece of white ribbon, which Shelia's son, Javonte,4 had previously seen lying on the floor of [Petitioner's] home. Based on marks on her neck, the State's medical experts determined that the ribbon had been used to strangle Shelia to death. DNA testing showed that Shelia's DNA was on the middle and ends of the ribbon where it had been around her neck, but [Petitioner's] DNA was only on the ends of the ribbon, where it would have been tied or held during strangulation. Following a search, Shelia's wedding ring was found in [Petitioner's] pocket. Later, when asked by Lt. Wolfe in a recorded interview why the situation between [Petitioner] and Shelia had gone so far and become violent, [Petitioner] replied that Shelia had actually tried to choke him. [Petitioner] admitted he removed Shelia's wedding ring from her finger as she lay on the floor and put it in his pocket. He also admitted he broke the rear window. [Petitioner] denied any intention to harm Shelia, however, and testified that he broke into her rental home from the outside to see if she was okay.
>
> In addition, the evidence showed that, on at least two prior occasions, there had been domestic violence between [Petitioner] and Shelia. In one such instance, [Petitioner] grabbed Shelia by the throat prior to pushing her backward. Also, similar transaction evidence was admitted showing that [Petitioner] had a prior romantic involvement with Alvinice Muhammad (no relation). Alvinice purchased a home in Marietta that she shared with two female housemates. Alvinice allowed

> [Petitioner] to stay at that home for a few weeks. [Petitioner] began acting violently toward Alvinice, however, and Alvinice asked [Petitioner] to move out. [Petitioner] refused. Alvinice then decided to obtain a restraining order against [Petitioner]. On the morning she planned to do so, Alvinice woke to find [Petitioner] straddling her body and choking her with both hands on her throat. [Petitioner] released Alvinice only after one of her roommates ran into the room. Thereafter, Alvinice obtained the restraining order. In retaliation, [Petitioner] burned down Alvinice's house, telling her: "I told you I could get into the house anytime I got ready, and if I can't live in the house, nobody can live in the house."*See Muhammad*, 290 Ga. at 881-82, 725 S.E.2d at 304.

The death certificate shows the victim's time of death as around 7:00 a.m. (Resp't Ex. 7e-part 10 at 1392 [10-29].) Lieutenant Matthew Wolfe testified that when he arrived on the scene, the victim was limp, with no rigor, and appeared to have been recently deceased and that Petitioner was placed under arrest. (Resp't Ex. 7c-part 2 at 763, 769-70 [10-16].)

In a police report, Lieutenant Wolfe stated that on November 4, 2016, he showed the ribbon (Defense Exhibit Ten, sometimes referred to by Petitioner as a strap) to Javonte and Hakeem, that Javonte stated that he had seen the ribbon in the marital residence, and that Hakeem stated that he had never seen the ribbon before. (Resp't Ex. 7b-part 1 at 201-02 [10-9].) In another report, Jennifer L. Perry stated that she interviewed Javonte and reported, "he hasn't seen a cloth that has a gold design on it." (*Id.* at 210.) At trial, Hakeem testified that he had never seen the ribbon before. (Resp't Ex. 7d-part 1 at 978-79 [10-18].) Javonte testified that he had seen the ribbon in the first home in which they had stayed and in the latest house (the marital residence) in which they had stayed. (Resp't Ex. 7d-part 2 at 1081 [10-19].) Javonte was reminded that he initially had stated that he did not remember seeing the ribbon (cloth with a gold design) but that - when he was actually shown the ribbon - he stated that he did remember seeing it. (*Id.* at 1084-85.) Then, when asked whether he had seen the ribbon at the Oak Ridge house, Javonte responded, "No, I didn't see it." (*Id.* at 1085.) Javonte, however, clarified that he saw the ribbon at the first house and the latest house (the marital residence) where they had stayed, but that he had not seen it at the Oak Ridge house, which was the second house at which they had stayed. (*Id.*)

Dr. Geoffrey Smith, Medical Examiner and expert in forensic pathology, testified that the victim had a ligature mark around her neck, which was a distinct imprint on the victim's neck about the width of a finger, and that she died as a result of ligature strangulation, i.e., the ligature had been applied around her neck with sufficient force to kill her. (Resp't Ex. 7d-part 1 at 883, 885, 888-91, 900 [10-18].) Dr. Smith also testified that the intense congestion of blood in the victim's facial tissue went a long way towards suggesting strangulation, although such congestion, without more, was not specific for strangulation. (*Id.* at 895-97). The ligature mark was on the front of the victim's neck, and Dr. Smith testified that the victim's injuries were consistent with her assailant strangling her from behind. (*Id.* at 902; *see also* Resp't Ex. 7e-part 8 at 1373 [10-27].) As to the ligature marks, Dr. Smith testified that the marks on the victim's skin included lines that occurred in a parallel array and were consistent with the pattern on the piece of fabric (the ribbon) found near the victim's body. (Resp't Ex. 7d-part 1 at 905-08, 913-914 [10-18].)

DNA forensic expert Cynthia Wood, when asked whether the ribbon showed more than one DNA profile, testified that the ribbon showed two DNA profiles, that the victim's DNA was in the middle and ends of the ribbon, and that Petitioner's DNA was on only the ends. (*Id.* at 925, 931.) Although there was no expert testimony particularly addressing Petitioner's hands, criminal investigator Amanda Pilgrim - who admitted that she did not follow up on any testing of Petitioner's hands - testified that she observed discoloration in the creases of Petitioner's fingers that, in her experience, potentially could be marks or a burn. (Resp't Ex. 7c-part 2 at 797, ECF No. 10-16.)

Petitioner testified (1) that he and his wife left the marital residence at approximately 7:10 a.m. (his wife to get her headset which she had apparently left at her new house and Petitioner accompanied her ostensibly to stop and buy cigarettes and to talk); (2) that he remembered that he had bought a new pack of cigarettes the night before and his wife dropped him back off at the marital residence at approximately 7:11 or 7:12; and (3) that he fell asleep and woke up at what he thought was 8:23 a.m. (but actually before 7:41 a.m.).5 (Resp't Ex. 7e-part 1 at 1183-93, 1196-97 [10-20].) Petitioner testified that when he woke up he took a walk and "just happened" to walk towards his wife's new house; that he was concerned about her, knowing that she had previously been suicidal, but walked "really slow[ly]"; and that, when he arrived and receiving no response, he broke the rear window to enter and found his wife dead. (Resp't Ex. 7e-part 1 at 1147-48, 1192, 1194, 1200, 1203 [10-20].) Petitioner testified that he removed the ribbon from her neck and took the ring off her finger. (*Id.* at 1205-12.)6

On direct appeal, Petitioner contended that the evidence was insufficient to support the verdict against him. *See Muhammad*, 290 Ga. at 880-81, 725 S.E.2d at 303. The Georgia Supreme Court found that the evidence was sufficient under *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *Muhammad*, 290 Ga. at 882, 725 S.E.2d at 304.

2. Parties' Arguments

Petitioner argues that his due process rights were violated because the evidence is insufficient to support the verdict against him. (Pet. at 6.) Petitioner argues that the evidence is insufficient because (1) Hakeem stated that he had never seen the ribbon and Javonte stated in an interview with an officer that he had seen the ribbon at the family home in 2008 and in the marital residence and then stated in another interview that he had never seen it; (2) the state never presented evidence of the origin of the ribbon; (3) Petitioner's DNA was on only the ends of the ribbon; (4) the state failed to show that Petitioner was present with the victim during the twenty to thirty minutes before her death, when Petitioner testified that he was asleep; (5) the medical examiner's evidence was inconclusive on whether the victim was strangled from the front or back of her person; (6) no DNA evidence from the victim's finger nails was ever presented; and (7) the medical examiner testified that the ligature marks on the victim were not specific to strangulation.7 (*Id.* at A-1 through -3.)

Respondent argues that Petitioner has failed to show reason for not deferring to the Georgia Supreme Court's decision. (Resp't Br. at 9, ECF No. 9-1.) Petitioner has replied, and the Court summarizes Petitioner's reply arguments and explains their failure after the discussion of Petitioner's main argument on the sufficiency of the evidence.

3. Law and Disposition

To review a sufficiency of the evidence argument under federal due process requirements, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. The deference owed to the jury or trier of fact "sharply limit[s the] nature of constitutional sufficiency review." *Wright v. West*, 505 U.S. 277, 296, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992). On direct appeal, "it is the responsibility of the jury - not the court - to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith,* 565 U.S. 1, 2, 132 S. Ct. 2, 4, 181 L. Ed. 2d 311 (2011) (per curiam). "The jury in this case was convinced, and the only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 566 U.S. 650, 132 S. Ct. 2060, 2065, 182 L. Ed. 2d 978 (2012). The jury's decisions regarding the credibility of witnesses and the weight that it wishes to assign to various testimonies are not subject to review, and,

when reviewing the evidence in the light most favorable to the prosecution, "a reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume . . . that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Cavazos*, 132 S. Ct. at 6 (quoting *Jackson*, 443 U.S. at 326).

The above discussion of Javonte's interviews and his testimony does not show any significant equivocation on whether he previously had seen the ribbon. It is apparent that he readily recognized the ribbon when he actually saw it (as opposed to hearing a verbal description of a piece of cloth) and that he testified that he saw the ribbon at the family's first residence and the marital residence. The jury was made aware that Javonte had initially stated that he did not remember seeing what had been called a piece of cloth, and it was up to the jury to weigh Javonte's and Hakeem's testimony on the ribbon.

Petitioner misstates Dr. Smith's testimony. Dr. Smith did not testify that the ligature marks were non-specific to strangulation. Dr. Smith testified that the intense congestion of blood in the victim's facial tissue went a long way towards suggesting strangulation, although such congestion, without more, was not specific for strangulation. Petitioner's misrepresentation of Dr. Smith's testimony does not impact whether or not the evidence was sufficient.

Further, Petitioner does not show how or why the lack of his DNA in the middle of the ribbon, a lack of evidence of the ribbon's origin, a lack of DNA evidence from the victim's fingernails, or the lack of evidence establishing his position (from behind or in front) during the strangulation of his wife, are matters that render insufficient the evidence against him. The evidence showed that the ribbon had the victim's DNA on it and had Petitioner's DNA on the ends, where it would have been held or tied during strangulation. As to the time frame - evidence shows that Petitioner left the marital residence with his wife at 7:05 a.m. and broke the window at her new home at approximately 7:41 a.m. The jury was entitled to find not credible Petitioner's testimony that he returned to the marital residence at approximately 7:12 and took a nap, woke up and walked to the victim's new home, broke a window, and found her dead. Further, even if the jury believed that he returned to the marital residence and took a nap before walking to his wife's new home, the evidence remains sufficient to place Petitioner at the scene of his wife's death, which occurred around seven in the morning of November 4, 2009 (Petitioner points to no evidence that forecloses death occurring as late as 7:45).

Additionally, Petitioner's arguments in reply fail. Petitioner asserts (1) that the evidence was insufficient because Hakeem equivocated between an interview statement and trial testimony on who was driving - Petitioner or the victim - on the morning of the murder;8 (2) that there was a credibility contest between he and Hakeem - Hakeem testified that, on the morning of the murder, Petitioner was the driver and the victim was the passenger and that they turned right (toward the victim's new house) whereas Petitioner testified that the victim drove, he was the passenger, and they turned left (toward a store); and (3) Hakeem later told him that the prosecutors told him what to say. (Pet'r Points at 9-10, ECF No. 14-1.) The Court finds that allegations that the prosecutors instructed Hakeem how to testify fails to impact the sufficiency of the evidence because, as discussed below, *see infra* III.E.3.b., there is no supporting evidence - such as an affidavit by Hakeem - in support of Petitioner's allegations. It was for the jury to weigh the credibility of Hakeem versus Petitioner. Further, even if Hakeem initially stated that they turned right with the victim driving and then testified that they turned right with Petitioner driving, Petitioner does not show that the passenger/driver distinction would have changed the substance of the evidence against Petitioner or that it would have undermined his son Hakeem's testimony in a manner that rendered the remaining evidence insufficient.

Petitioner also replies that forensic expert Woods testified that Petitioner's DNA on the ends of the ribbon was "conclusive" that he took the ribbon off the victim, not that he put it on the victim. (Pet'r Points at 11.) Petitioner misstates Woods's testimony. Woods testified that it was "possible" that

someone untying the ribbon from around someone's neck would leave the same markers left by Petitioner. (Resp't Ex. 7d-part1 at 937 [10-18].) Petitioner's misrepresentation of Woods's testimony does not impact whether or not the evidence was sufficient. Significantly, Woods testified that only two people had DNA markers on the murder weapon - the victim and Petitioner, and there is no viable evidence that the victim committed suicide.

Petitioner also replies in reference to the evidence that he told Lieutenant Wolfe that the victim had actually tried to choke him. Petitioner asserts that he was upset and had been "revisioning" to an earlier episode and had not been talking about the day of the murder. (Pet'r Points at 12.) The Court finds that Petitioner took the stand and explained his revisioning to the jury, (see Resp't Ex. 7e-part 1 at 1160 [10-20]), and it was up to the jury to weigh Petitioner's credibility and revisioning. *See Wright*, 505 U.S. at 296-97.

In reference to the evidence of tampering - taking the ring off the victim's finger and breaking the window - Petitioner also replies that the evidence was insufficient because he broke the window out of concern for the victim and took the ring for sentimental reasons. (Pet'r Points at 12.) The Court finds that Petitioner took the stand and presented to the jury his concern about the victim. *See supra* III.A.1. It was up to the jury to choose whether or not to believe Petitioner's explanations that he acted out of concern for the victim. *See Wright*, 505 U.S. at 296-97.

Petitioner also replies that the evidence was insufficient because counsel failed to obtain a photograph showing that Deputy Huner could not have seen him coming down the stairs. (Pet'r Points at 14-15.) As discussed below, Petitioner fails to show that counsel was ineffective on this issue, and a hypothetical photograph that counsel allegedly should have obtained cannot be used to show that the evidence was insufficient. *See infra* III.E.2.b. Otherwise, in his reply, Petitioner repeats arguments previously raised or mentions matters too briefly to warrant further discussion.

Petitioner fails to demonstrate that the Georgia Supreme Court was unreasonable in finding that the evidence was sufficient to support his convictions.

B. Ground Two: The Indictment

1. State Court History

The Rockdale County grand jury returned a six-count indictment against Petitioner. (Resp't Ex. 7b-part 1 at 134-40 [10-9.]) Count One charged Petitioner with malice murder in that on November 4, 2009, he "did unlawfully then and there with malice aforethought, express and implied, kill, murder, and cause the death of Shelia Muhammad, a human being, by strangling the said Shelia Muhammad."9 (*Id.* at 135.) Count Five charged Petitioner with aggravated assault in that on November 4, 2009, he "did unlawfully then and there assault the person of Shelia Muhammad, with a piece of cloth, an object, which when used offensively against a person is likely to and actually does result in serious bodily injury, by attempting to commit a violent injury to the person of Shelia Muhammad, to wit: said accused did strangle Shelia Muhammad with said object . . . ."10 (*Id.* at 139.) Count Six charged Petitioner with tampering with evidence in that on November 4, 2009, he "did unlawfully then and there with intent to prevent the apprehension of said accused, knowingly make and devise false evidence, to wit: said accused did remove the wedding band from the person of Shelia Muhammad and did break a rear window . . . to give the appearance that a burglary committed by another person had occurred . . . ."11 (*Id.* at 140.)

The Court directed a verdict on Counts Two and Four, and the jury convicted Petitioner on the above counts. (*See id.* at 134-41.) As stated earlier, the jury also convicted Petitioner of felony murder, which conviction was vacated by operation of law, and the aggravated assault conviction merged with the malice murder conviction. *See Muhammad*, 290 Ga. at 880 n.2, 725 S.E.2d at 303 n.1.

In his state habeas proceedings, Petitioner asserted ineffective assistance of appellate counsel in regard to the indictment on Counts One through Three. (*See* Resp't Ex. 4 at 5.) The state habeas court found as follows -

> Petitioner has not shown that appellate counsel acted unreasonably when, after reviewing the indictment, counsel did not raise any issues as to the indictment. Despite Petitioner's claims that three counts of murder in the indictment were incorrect, Petitioner was only convicted and sentenced for one of those counts - i.e., malice murder; the court directed a verdict of acquittal on the count two felony murder and merged the count three felony murder, of which Petitioner was found guilty, into the malice murder. The Court's review of count one, malice murder, shows that it tracks the statutory language of O.C.G.A. § 16-5-1. Accordingly, counsel acted reasonably when he saw no basis on which to allege that trial counsel was ineffective when trial counsel did not challenge counts one, two and three of the indictment. Petitioner has also failed to establish the requisite prejudice in this regard.(*Id.* at 10.)

2. Parties' Arguments

Petitioner argues that his Fifth Amendment rights were violated because of a defective indictment. (Pet. at 6.) Petitioner challenges the indictment because (1) the indictment cites statutory language but not malicious intent or the elements of the charged crimes in Counts One through Six; (2) the grand jury was never presented evidence to show that Petitioner was present when the crime was committed; (3) the indictment was based on false testimony of Deputy Huner, which would have been shown to be false if a picture had been taken from Huner's vantage point - which allegedly would have shown that Huner could not have seen Petitioner coming down the stairs, turning, and running out the front door; (4) certain test results were not completed until after the grand jury returned the indictment, which indicates that the prosecutor used something other than the required elements to convince the grand jury of malicious intent; (5) the grand jurors were not presented with anything to rebut Petitioner's alibi defense (he was napping when his wife was murdered); and (6) there was otherwise insufficient evidence to support the indictment. (*Id.* at B1-B4.) Petitioner asserts that trial counsel was ineffective for failing to have the indictment dismissed and that appellate counsel was ineffective for failing to pursue this matter on appeal. (*Id.* at B-5.)12

Respondent argues that Petitioner did not raise a Fifth Amendment challenge to the indictment in state court, that the challenge is procedurally defaulted under Georgia law, and that the Court should decline review. (Resp't Resp. at 9-12). Petitioner's reply adds nothing that changes the outcome. (Pet'r Points at 17-18.)

3. Law and Disposition

The Fifth Amendment's grand jury indictment requirement is not applicable to the States under the Fourteenth Amendment. *Heath v. Sec'y, Fla. Dep't of Corr.*, 717 F.3d 1202, 1204-05 (11th Cir. 2013) (citing *Grim v. Sec'y, Fla. Dep't of Corr.*, 705 F.3d 1284, 1287 (11th Cir. 2013)). "The sufficiency of a state indictment is an issue on federal habeas corpus only if the indictment was so deficient that the convicting court was deprived of jurisdiction." *Heath v. Jones*, 863 F.2d 815, 821 (11th Cir. 1989). When the state court has found the indictment sufficient under state law, the federal court need not address the issue further. *Alexander v. McCotter*, 775 F.2d 595, 599 (5th Cir. 1985) (holding that challenge to indictment was precluded when "[the state appellate court] has necessarily, though not expressly, held that the [state] courts have jurisdiction and that the indictment is sufficient").

Under the Due Process Clause and the Sixth Amendment, however, "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ." U.S. Const. amend. VI; *see also In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948) (stating that this Sixth Amendment

right to be informed is applicable to the states through the Due Process Clause of the Fourteenth Amendment).

Here, without addressing procedural default, Petitioner's challenge otherwise fails. Because the Supreme Court has never held that the Fifth Amendment grand jury indictment requirement is applicable to the States, there is no viable Fifth Amendment claim. Further, any challenge to Counts Two, Three, and Four of the indictment fails because either the related conviction was vacated or the charge was subject to a directed verdict. Additionally, it appears that the Georgia Supreme Court implicitly found that the indictment was sufficient, *see Alexander*, 775 F.2d at 599, and a state court's approval, implicit or otherwise, of a state indictment cannot be "'contrary to' a Supreme Court holding." *Grim*, 705 F.3d at 1287 (citation not provided). Petitioner's Fifth Amendment claim fails. Further - although not raised by Petitioner, under due process requirements, the murder, aggravated assault, and tampering with evidence charges were sufficient to inform Petitioner of the nature and cause of the charges against him. *See supra* III.B.1. Because there is no viable Fifth Amendment claim, neither trial or appellate counsel were ineffective for failing to challenge the indictment on Fifth Amendment grounds. Ground Two fails.13

C. Ground Three: Prosecutorial Misconduct

1. State Court History

On direct appeal, Petitioner raised only the sufficiency of the evidence and the admission of similar transaction evidence. *See Muhammad*, 290 Ga. at 880-81, 725 S.E.2d at 303. In his state habeas proceedings, Petitioner asserted prosecutorial misconduct for the first time. (*See* Resp't Ex. 4 at 11-12.) The state habeas court found that the prosecutorial misconduct claims failed because they were procedurally defaulted based on Petitioner's failure to raise them on direct appeal and because Petitioner had not overcome his default. (*Id.* at 14-15.)

2. Parties' Arguments

Now in federal court, Petitioner again argues that his conviction was obtained based on prosecutorial misconduct. (Pet. at 6.) Petitioner alleges that the prosecution (1) manipulated Hakeem and presented false testimony by Hakeem that Petitioner was the driver and the victim the passenger on the morning of the murder when Hakeem previously had told an assistant district attorney that Petitioner was the passenger; (2) presented false testimony by Deputy Huner that he saw what he could not have seen from his view point - Petitioner at the victim's home on the morning of the murder coming down the stairs, turn, and run back up the stairs; (3) presented false testimony by Inez Watson; (4) during closing misstated the doctor's testimony and argued that Petitioner committed the murder; (5) asserted, without factual support, that Petitioner came up behind the victim and killed her; (6) asserted eight times, without adequate evidentiary support, that Petitioner killed the victim; (7) vouched for the credibility of state witnesses; (8) asserted as a motive divorce, which was not substantiated by the record; (9) asserted that Petitioner was staging things to look like a burglary and ignored Petitioner's explanations; and (10) told the jury there were marks on the victim's neck to match the ribbon, when the photographs did not show those marks. (Pet. at C-1 to -11.)14

Respondent argues that Petitioner's prosecutorial misconduct claims are procedurally defaulted and that Petitioner has not overcome his default. (Resp't. Br. at 17-19.) Petitioner replies that the issue was not raised on direct appeal because of ineffective assistance of appellate counsel. (Pet'r Points at 19, 27.) Petitioner repeats previous arguments on appellate counsel's ineffectiveness, which the Court has addressed below,15 and adds additional arguments regarding appellate counsel which are addressed below in section III.E.2. (*Id.* at 21-28.) Otherwise, in his reply on Ground Three, Petitioner does not raise a matter that warrants further discussion.

3. Law and Disposition

Claims of trial error such as prosecutorial misconduct must be raised on direct appeal or are procedurally defaulted. As indicated by the state habeas court, Petitioner did not raise on direct appeal any claims of prosecutorial misconduct. Accordingly, they are procedurally defaulted under Georgia law, and the federal bar to review applies. As discussed below, Petitioner does not show ineffective assistance of appellate counsel to overcome his default, and he does not otherwise overcome his default. Accordingly Ground Three fails.

D. Ground Four: Similar Transaction Evidence

1. State Court History

On direct appeal, counsel for Petitioner, relying on state law, argued that the trial court erred in allowing similar transaction evidence in regard to Alvinice. (Resp't Ex. 7e-part 11 at 1417-1Ok9 [10-30].) Counsel for Petitioner argued that the prior incident should have been excluded because it occurred ten years earlier and was arson not murder. (*Id.*) The Georgia Supreme Court, also relying on Georgia law, found no error. *Muhammad*, 290 Ga. at 882, 725 S.E.2d at 305. The court found as follows.

> [S]imilar transaction evidence was admitted showing that [Petitioner] had a prior romantic involvement with Alvinice Muhammad (no relation). Alvinice purchased a home in Marietta that she shared with two female housemates. Alvinice allowed [Petitioner] to stay at that home for a few weeks. [Petitioner] began acting violently toward Alvinice, however, and Alvinice asked [Petitioner] to move out. [Petitioner] refused. [Petitioner] then decided to obtain a restraining order against Muhammad. On the morning she planned to do so, Alvinice woke to find [Petitioner] straddling her body and choking her with both hands on her throat.16 [Petitioner] released Alvinice only after one of her roommates ran into the room. Thereafter, Alvinice obtained the restraining order. In retaliation, [Petitioner] burned down Alvinice's house, telling her: "I told you I could get into the house anytime I got ready, and if I can't live in the house, nobody can live in the house.". . .
>
> [T]he State offered the evidence of the prior arson to show [Petitioner's] bent of mind or course of conduct in using escalating degrees of violence toward women. [Petitioner] pushed and shoved both Alvinice and Shelia. [Petitioner] choked both Alvinice and Shelia. With both women, there was the development of a romantic relationship, a separation, and a resulting escalation of domestic violence including choking. The similarities are apparent. As such, the trial court did not err in its determination that [Petitioner's] crime against Alvinice was sufficiently similar to the murder of Shelia to constitute an admissible similar transaction. *Muhammad*, 290 Ga. at 882-83, 725 S.E.2d at 304-05.

In his state habeas corpus proceedings, Petitioner asserted ineffective assistance of trial and appellate counsel for failing to consult with him in regard to the similar transaction evidence, (*see* Resp't Ex. 4 at 5, 12.) The state habeas court found that counsel did consult with Petitioner; that, as a general matter, counsel would have consulted Petitioner in regard to the similar transaction evidence as it was raised on appeal; and that Petitioner had not shown that appellate counsel was deficient. (*Id.* at 5, 11.) The state habeas court found that Petitioner's claims of ineffective assistance of trial counsel failed because he had procedurally defaulted them and had not overcome his default. (*Id.* at 14-15.)

2. Parties' Arguments

Petitioner argues that appellate counsel provided ineffective assistance by failing to adequately argue the erroneous admittance of similar transaction evidence on Petitioner's violence toward Alvinice, that

the trial court erred in allowing such evidence, and that trial counsel provided ineffective assistance on the issue. (Pet. at 6, D-1 to -3.) Petitioner indicates that appellate counsel should have argued (1) that the transactions were dissimilar because he was not in a romantic relationship with Alvinice at the time he (admittedly) set fire to her home, although he had been in one earlier, and (2) that there was no evidence to show that he had assaulted Alvinice. (*Id.* at D-2.)

Respondent argues that the trial and appellate counsel claims on this issue are procedurally defaulted and provide no basis for relief. (Resp't Br. at 24-25.) Respondent further argues that the trial court's evidentiary decision fails to state a claim for relief. (*Id.* at 26.)

In his reply on Ground Four, Petitioner repeats prior argument and argues that there was no evidence or official charge to show that he had assaulted Alvinice. (Pet'r Points at 29-31.)

3. Law and Disposition

A criminal defendant possesses a Sixth Amendment right to "reasonably effective" legal assistance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show constitutionally ineffective assistance of counsel, a petitioner must establish that (1) counsel's representation was deficient and (2) counsel's deficient representation prejudiced him. *Id.* at 690-92. The Court may resolve an ineffective assistance claim based on either of the above prongs. *Pooler v. Sec'y, Fla. Dep't of Corr.*, 702 F.3d 1252, 1269 (11th Cir. 2012). Claims of ineffective assistance of appellate counsel also are governed by the *Strickland* test. *Owen v. Fla. Dep't of Corr.*, 686 F.3d 1181, 1202 (11th Cir. 2012). To succeed on a claim of ineffective assistance of appellate counsel, the movant must demonstrate deficient performance by counsel and demonstrate that, if counsel had not performed deficiently, there is a reasonable probability that the appellate outcome would have been favorable to the movant. *See Ferrell v. Hall*, 640 F.3d 1199, 1236 (11th Cir. 2011).

Petitioner fails to show that appellate counsel was ineffective. The Georgia Supreme Court found similarity based on Petitioner's earlier romantic relationship with Alvinice, which Petitioner admits although he emphasizes that the romantic relationship was over at the time of the arson. Additionally, Petitioner is incorrect in stating that there was no evidence to show that he had assaulted Alvinice. Alvinice provided testimonial evidence on the issue. (*See* Resp't Ex. 7d-part 1 at 946-47 [10-18].) Uncharged conduct may be used as similar transaction evidence, *Gilstrap v. State*, 215 Ga. App. 180, 182, 450 S.E.2d 436, 438 (1994), and the Court discerns nothing that appellate counsel should have raised on direct appeal that reasonably would have changed the Georgia Supreme Court's decision.

As to a trial court's decision to admit the evidence, absent the involvement of a specific constitutional right, such as the right against coerced confessions, the due process clause gives a federal court limited authority to review a state court's evidentiary rulings. *See Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir. 1984). Absent a violation that rises to the level of denying "fundamental fairness," this Court will not review a state court's decision in regard to the admission of evidence. *Id.* at 770 (quoting *Shaw v. Boney*, 695 F.2d 528, 530 (11th Cir. 1983)) (internal quotation marks omitted). "To constitute a denial of fundamental fairness, the evidence erroneously admitted at trial must be material in the sense of a crucial, critical, highly significant factor." *Jameson v. Wainwright*, 719 F.2d 1125, 1127 (11th Cir. 1983).

Based on the other, significant, evidence against Petitioner, the Court finds that the trial court's decision to admit the similar transaction evidence, though significant and important, was not critical to Petitioner's conviction. The Court finds no fundamental unfairness in the state court's evidentiary decision and declines further review. Petitioner had new counsel on appeal, and his claims of ineffective assistance of trial counsel on this issue should have been raised on direct appeal to avoid procedural default. As indicated by the state habeas court, Petitioner did not raise on direct appeal any

claims of ineffective assistance of trial counsel. Accordingly, those claims are procedurally defaulted under Georgia law, and the federal bar to review applies. Petitioner has not overcome the bar by showing ineffective assistance of appellate counsel or otherwise overcome the bar. Ground Four fails.

E. Grounds Five and Six: Ineffective Assistance of Appellate Counsel

1. State Court History on Grounds Five and Six

Petitioner's appellate counsel filed a notice of appeal in the Rockdale County Superior Court, as required by Georgia law. *See* O.C.G.A. § 5-6-37 (requiring notice of appeal to be filed with the clerk of the court wherein the case was determined). Counsel, however, neglected to state the name of the court to which the appeal was made, and the clerk of Rockdale County apparently forwarded the appeal to the Georgia Court of Appeals, which then forwarded the appeal to the Georgia Supreme Court. (*See* Resp't Ex. 7b-part 5 at 483, 486-90 [10-13].)

In his state habeas corpus proceedings, Petitioner asserted ineffective assistance of appellate counsel for failing to raise claims of ineffective assistance of trial counsel and on other matters. (*See* Resp't Ex. 7a-part 1 at 7-14 [10-7].) In reviewing appellate counsel's testimony, the state habeas court found that appellate counsel had gone through the transcript and looked for issues, communicated with Petitioner about the issues that he wanted to raise, met with Petitioner on a couple of occasions, spoke with Petitioner's family on several occasions, and contacted trial counsel. (Resp't Ex. 4 at 6.) The state habeas court found that appellate counsel had seen no viable claims of ineffective trial counsel, no suggestion that trial counsel did an insufficient investigation, no issues with the indictment, and no instances of prosecutorial misconduct or misconduct with regard to the testimony of state's witnesses. (*Id.* at 6-7.) After citing the standard in *Strickland*, the state habeas court further found -

> Petitioner has failed to show that appellate counsel's performance was deficient. After reviewing the trial transcript and preparing for the motion for new trial, counsel did not see any viable ineffective assistance of counsel claims. Petitioner has not shown that appellate counsel's decisions on what issues to raise or not raise were unreasonable. Petitioner has not shown that evidence and/or witnesses favorable to the defense exist that trial counsel did not discover and which appellate counsel did not present post-trial. . . .
>
> Similarly, Petitioner has not shown that appellate counsel acted unreasonably when, after reviewing the indictment, counsel did not raise any issues as to the indictment. Despite Petitioner's claims that the three counts of murder in the indictment were incorrect, Petitioner was only convicted and sentenced for one of those counts - i.e., malice murder; the court directed a verdict of acquittal on the count two felony murder and merged the count three felony murder, of which Petitioner was found guilty, into the malice murder. The Court's review of count one, malice murder, shows that it tracks the statutory language of O.C.G.A. § 16-5-1. Accordingly, counsel acted reasonably when he saw no basis on which to allege that trial counsel was ineffective when trial counsel did not challenge counts one, two and three of the indictment. Petitioner has also failed to establish the requisite prejudice in this regard.
>
> Counsel acted reasonably even though he did not make a claim regarding trial counsel's failure to point out Hakeem Davis' alleged perjury at trial[, which pertained to testimony on the driver/passenger positions of the victim and Petitioner when they left the marital home on the morning of the murder]. At trial, counsel cross examined Davis specifically about his statement to the police and how his original statement to the police differed from his testimony in court. Since trial counsel brought out to the jury that Hakeem Davis' testimony differed from [his initial] statement to the police appellate counsel acted reasonably even though he did not claim trial

counsel was ineffective due to his failure to point out Davis' alleged perjury.

The Court has credited counsel's testimony that he consulted with Petitioner regarding his case to the extent needed, including the similar transaction evidence, and entertained phone calls from family members. Again, Petitioner has not shown that information and witnesses helpful to the defense exist which additional consultation would have revealed.

Petitioner has also failed to establish that, but for the alleged errors of counsel, there is a reasonable probability that the outcome of the proceedings would have been different had appellate counsel raised these issues on appeal.(*Id.* at 9-11.)

2. Ground Five: Appellate Counsel's Failure to Raise Ineffective Assistance of Trial Counsel

a. Parties' Arguments

Petitioner argues that appellate counsel was ineffective for failing to raise ineffective assistance of trial counsel and that the state habeas court's decision on the issue was contrary to federal law. (Pet. at E-1.) Petitioner argues that appellate counsel should have argued that trial counsel was ineffective for failing (1) to obtain a photograph of Huner's vantage point - which would have made implausible his testimony that he allegedly had seen Petitioner coming down the stairs and then turning a fleeing back up the stairs; (2) to present expert testimony on whether the downstairs window had been broken from inside or outside the residence or expert testimony that Petitioner's hands would have shown damage if he had been the person who strangled the victim; (3) to discover Alvinice's conviction for a crime of deceit, thus making the similar transaction evidence inadmissible; (4) to present testimony from Hakeem and Javonte on where the victim had stayed before her demise; (5) to challenge the indictment; (6) to object to the jury instructions on presumption (as presented in Ground Seven);17 (7) to investigate the origin of the fiber found on the victim and the blood that was on the floor next to her; and (8) to present evidence and/or testimony from Valery Drinkard to show why Petitioner and the victim were separated and that Petitioner had initiated the separation; and (9) for allowing the jury to assume that Javonte had seen the ribbon in a prior home. (*Id.* at E-1 to -5.)

Respondent responds that the Court should defer to the state habeas court's disposition of Ground Five claims raised in his state proceedings and that Petitioner procedurally defaulted his other Ground Five claims and they do not provide grounds for relief. (Resp't Br. at 27-31.)

In his reply on Ground Five, Petitioner repeats prior arguments and adds nothing that warrants further discussion. (Pet'r Points at 32-36.) Otherwise, in his reply, in order to overcome his procedural default on prosecutorial misconduct (Ground Three), Petitioner raises claims of ineffective assistance of appellate counsel in regard to trial counsel's ineffective assistance on the prosecution's closing comments that the medical examiner had stated that Petitioner had come up behind the victim and killed her, that Petitioner was lying, that the government witnesses were telling the truth, and that Petitioner had failed to testify about the similar transaction evidence.18 (*Id.* at 25-27.)

b. Law and Disposition

As state earlier, Petitioner must show that counsel was deficient and that he was prejudiced by the deficiency. *Strickland* , 466 U.S. at 690-92. By way of example on showing prejudice, (1) if a petitioner complains of counsel's failure to obtain witnesses, he must "show that witnesses not presented at trial actually were available and willing to testify at time of trial" or, (2) if a petitioner complains of counsel's failure to investigate, he must show that knowledge of the uninvestigated matters would have changed counsel's representation. *Gilreath v. Head*, 234 F.3d 547, 552 n.12 (11th Cir. 2000). Additionally, when a petitioner raises an ineffective assistance of counsel claim already decided by the state court, "the petitioner must do more than satisfy the *Strickland* standard; the petitioner must also show that

the state court applied *Strickland* in an objectively unreasonable manner." *Frederick v. Dep't of Corr.*, 438 Fed. Appx. 801, 803 (11th Cir. Aug. 17, 2011) (citing *Rutherford v. Crosby*, 385 F.3d 1300, 1309 (11th Cir. 2004); *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009) (noting that the standard of review is "doubly deferential" when "a *Strickland* claim [is] evaluated under the § 2254(d)(1) standard")).

Petitioner does not show that the state habeas court applied *Strickland* unreasonably and, further, Petitioner shows no viable claim of ineffective assistance of trial counsel that had a reasonable chance of succeeding on appeal and that appellate counsel was ineffective for failing to raise. Petitioner's claim based on the lack of a photograph from Huner's vantage point fails because there has been no proffer - of a photograph or other evidence - which shows that Huner could not have seen Petitioner coming down the stairs.19 *See Hill v. Moore*, 175 F.3d 915, 923 (11th Cir. 1999) (holding that absent proffer of evidence, the petitioner could not show prejudice based on counsel's failure to introduce such evidence); *cf. Gilreath*, 234 F.3d at 552 n.12. Petitioner's claims based on lack of expert testimony regarding the window breakage and lack of damage to Petitioner's hands similarly fail because there is no viable showing that such witnesses were available and willing to testify at the time of trial. *See Gilreath*, 234 F.3d at 552 n.12.

Petitioner's claim based on Alvinice's alleged conviction for a crime of deceit fails because in Ground Five (3) he cites no support20 in regard to Alvinice's alleged conviction and, further, does not show that the alleged conviction would have had a reasonable chance of changing the admittance of similar transaction evidence, the jury's awareness that Petitioner was convicted for the arson of Alvinice's home, or the final outcome. *See Gilreath*, 234 F.3d at 552 n.12. Petitioner's claim based on testimony that Hakeem and Javonte could or should have provided fails because there is no proffer or affidavit in regard to such testimony.

As to the indictment, had appellate counsel argued that trial counsel was ineffective as Petitioner now argues,21 there is no reasonable probability that his argument would have succeeded before the Georgia Supreme Court. *See Cotton v. State*, 279 Ga. 358, 361, 613 S.E.2d 628 (2005) (stating that under Georgia law "the failure to file a special demurrer . . . would not support a finding of the violation of the constitutional right to effective legal representation"); *Drewry v. State*, 201 Ga. App. 674, 675, 411 S.E.2d 898, 900 (1991) ("An indictment which charges the offense in the language of the defining statute and describes the acts constituting the offense sufficiently to put the defendant on notice of the offense with which he is charged survives a general demurrer."); *see also supra* III.B.1. (reviewing the relevant counts, malice murder, and aggravated assault).

Petitioner's claim in regard to investigation of the origin of the fiber found on the victim and the blood that was on the floor next to her fails because he provides no reliable proffer as to what the investigation would have uncovered. *See Hill*, 175 F.3d at 923. Petitioner's claim in regard to potential evidence and/or testimony from Drinkard in regard to the reasons for Petitioner's and the victim's separation fails because there is no affidavit showing that Drinkard would have testified as stated by Petitioner and there is no reliable proffer of any other evidence on the matter. *See Gilreath*, 234 F.3d at 552 n.12; *Hill*, 175 F.3d at 923. Petitioner's claim in regard to Javonte's testimony is without merit as Javonte's testimony on the ribbon was sufficiently straightforward, (Resp't Ex. 7d-part 2 at 1081, 1085 [10-19]), and it is up to the jury to weigh the testimony and evidence before it.

Petitioner's reply also fails. Petitioner shows no viable claim of ineffective assistance of appellate counsel for failing to raise ineffective assistance of trial counsel on prosecutorial misconduct. A prosecutor's comments on the content, or lack of content, in a defendant's testimony (here, Petitioner's failure to testify on the similar transaction testimony) is not an impermissible comment on a defendant's failure to testify when the defendant takes the stand and testifies. *See United States v.*

Nnanna, 103 Fed. Appx. 632, 634 (9th Cir. June 2, 2004) ("Because Nnanna did take the stand and testify, . . . the prosecutor's comments cannot thus be construed to have been an improper comment on his failure to testify . . . ."). *Cf. Portuondo v. Agard*, 529 U.S. 61, 69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) ("[W]hen a defendant takes the stand, his credibility may be impeached and his testimony assailed like that of any other witness."). Further, based on the evidence in this case, the Georgia Court of Appeals would likely have rejected a claim that trial counsel was ineffective for failing to object to the comments on credibility and Petitioner lying. *Wright v. State*, 319 Ga. App. 723, 739, n.61, 738 S.E.2d 310, 324 n.61 (2013) (citing as permissible: argument that a story that does not fit is a lie, comment that inconsistent witness could not tell the truth, argument on what jury should conclude and comment that defendant told lies, and calling defense witnesses liars where evidence authorized conclusion that witnesses were untruthful). Further, the evidence discussed earlier supports the closing comments that Petitioner strangled the victim from behind, and there is no reasonable probability that the Georgia Court of Appeals would have granted relief based on a claim that trial counsel was ineffective for failing to object to closing comments that were supported by the evidence. *Wade v. State*, 197 Ga. App. 464, 465, 398 S.E.2d 728, 730 (1990) ("It is well settled that during closing argument the prosecutor may make any argument which can be reasonably supported by the evidence adduced at trial.").

3. Ground Six: Appellate Counsel on Remaining Issues

a. Parties' Arguments

Petitioner argues that appellate counsel was ineffective for (1) failing to communicate with Petitioner; (2) failing to see the inconsistent testimony of Watson, Hakeem, and Javonte;22 (3) failing to raise a claim of prosecutorial misconduct in misstating facts, in regard to Petitioner's presence during the crime and the origin of the ribbon, and the staging of testimony so as to present inadmissible testimony; (4) failing to raise a claim of ineffective assistance of trial counsel for failing to investigate witnesses, do discovery, subject evidence to a strong adversarial testing, object to jury instruction, object to the indictment, and object to prosecutorial misconduct;23 (5) failing to discover that Hakeem stated that prosecutors had told him how to testify; (6) failing to contact Alvinice's acquaintance who would have made a statement regarding Alvinice's bias and failing to discover Alvinice's criminal background; (7) failing to argue that the indictment was deficient;24 and (8) being inexperienced, as shown by appellate counsel originally filing Petitioner's appeal in the wrong court. (Pet. at F-1 to -4.)

Respondent argues that the Court should deny the claims that Petitioner procedurally defaulted and should defer to the state habeas court's decision on the remaining claims. (Resp't Br. at 31-33.) In his "Points," Petitioner does not reply on Ground Six. (*See* Pet'r Points at 36-37.)

b. Law and Disposition

The *Strickland* standard and related case law again applies. The state habeas court's conclusion that appellate counsel communicated with Petitioner is accepted because Petitioner provides no clear and convincing evidence showing otherwise. Further, the state habeas court's rejection of Petitioner's claim that appellate counsel was ineffective warrants deference as Petitioner shows no viable claim that had a reasonable chance of succeeding on appeal and that appellate counsel was ineffective for failing to raise.

The Court has reviewed the Petitioner's citations in regard to alleged inconsistent testimony by Watson, Hakeem, and Javonte. *See supra* n.22. Witnesses are not required to be consistent, and it is up to the jury to determine the facts. *See Baker v. Welker*, 438 Fed. Appx. 852, 854 (11th Cir. Aug. 23, 2011) ("Trials allow a full airing of differing accounts of a chaotic event. Impeachment allows a party to highlight inconsistencies within a witness's testimony and inconsistencies between a witness's

testimony and that of other witnesses. The task then falls to the jury to sort through all the testimony to determine the facts."). Additionally, as stated earlier, the evidence against Petitioner is sufficient, and the undersigned perceives no viable claim in regard to inconsistent testimony that would have had a reasonable chance of succeeding on direct appeal.

Further, Petitioner presents no viable prosecutorial-misconduct claim that would have had a reasonable chance of succeeding on direct appeal. Petitioner's contention that the prosecution misstated facts in regard to his presence during the crime fails because Petitioner does not identify the allegedly misstated facts and, further, Petitioner's presence at the scene of the crime is not in controversy - Petitioner testified that he opened the front door for the police. (Resp't Ex. 7e-part 1 at 1153-54 [10-20].) Petitioner's contention that the prosecution misstated facts in regard to the origin of the ribbon fails because Petitioner does not identify the misstated facts and because the evidence against Petitioner is sufficient even if the origin of the ribbon is unknown. Petitioner's contention that the prosecution staged testimony so as to present inadmissible testimony fails as vague and conclusory.

Petitioner's claim in regard to Hakeem's alleged statement that prosecutors told him how to testify fails because there is no supporting evidence, such as an affidavit by Hakeem, on the matter. *See Gilreath*, 234 F.3d at 552 n.12; *Hill*, 175 F.3d at 923. Petitioner's claim in regard to a statement by Alvinice's acquaintance fails for the same reason. Petitioner's claim in regard to the indictment fails as there is no indication that Petitioner challenged the indictment within ten days of his arraignment, which failure, as a general rule, waives the right to challenge the indictment. *See Bighams v. State*, 296 Ga. 267, 269, 765 S.E.2d 917, 920 (2014) (stating that most challenges to the indictment are waived if not brought within ten days of arraignment). Petitioner's claim based on the filing of the notice of appeal in the wrong court fails and does not show that counsel was so inexperienced as to bring into question his representation. The notice of appeal was filed in the correct court - the Rockdale County Superior Court, and it is apparent that the notice of appeal was sufficient to confer jurisdiction upon the Georgia Supreme Court.

F. Ground Seven: Jury Instructions

1. State Court History

In instructing the jury on intent, the trial court stated --

> I instruct you that this defendant will not be presumed to have acted with criminal intent. But you, the jury, may find such intention or the absence of intention upon a consideration of words, conduct, demeanor, motive, and other circumstances connected with the act for which the accused is being prosecuted.
>
> Now ladies and gentlemen, every person is presumed to be of sound mind and discretion. But this presumption may be rebutted. You may infer, ladies and gentlemen, if you wish to do so, that the acts of a person of sound mind and discretion are the product of that person's will, and a person of sound mind and discretion intends the natural and probable consequences of those acts. Whether or not you make such inference or inferences is a matter solely within the discretion of the jury.(Resp't Ex. 7d-part 2 at 1310 [10-21].)

2. Parties' Arguments

Petitioner asserts that his due process rights were violated by the jury instruction on presumption (the second paragraph above), which allowed him to be convicted without proof beyond a reasonable doubt of intent to kill and asserts that trial counsel was ineffective on this issue. (Pet. at G-1 to -2.) Petitioner also indicates that appellate counsel was ineffective. (*Id.* at G-2.) Respondent argues that

the Court should decline review of Ground Seven for the reason that it was procedurally defaulted and that it also fails on the merits. (Resp't Br. at 33-35.) Petitioner's reply on Ground Seven adds nothing to his prior argument that changes the outcome. (Pet'r Points at 37-42.)

3. Law and Disposition

The Court agrees with Respondent. Had trial counsel challenged the instruction or appellate counsel raised the issue on appeal, there is no reason to think that the challenge would have been successful. *See Pendley v. State*, 308 Ga. App. 821, 826, 709 S.E.2d 18, 23 (2011) (citing the same jury instruction on presumption, stating that "[t]his charge, taken directly from the pattern jury instructions, has been upheld by the Supreme Court of Georgia as a correct statement of the law[,]" and rejecting claim that the charge impermissibly shifted the burden of persuasion on the element of intent).

IV. Petitioner's Motions for Discovery and to Expand the Record

Petitioner moves for discovery and to expand the record. (Mot. for Pre-Hearing Disc., ECF No. 16; Mot. to Expand, ECF No. 17.) Petitioner seeks to use discovery to obtain: (1) a photograph that would show what Huner could have seen from his vantage point at the window; (2) a sworn deposition by Hakeem to show that the prosecution told him to present false testimony and not talk with the defense; and (3) an expert to look at the photographs of the broken window and, apparently, give the opinion that the window could have been broken from the outside as Petitioner testified. (Mot. for Pre-Hearing Disc. at cm/ecf pages 3-4.) Petitioner asserts that discovery "may well uncover favorable material information . . . ." (*Id.* at 4.) Movant also seeks to expand the record with the above evidence, should it be discovered. (Mot. to Expand.)

Respondent opposes both motions on the grounds that Petitioner fails to show good cause or due diligence. (Resp't Resps., ECF Nos. 18, 19.) Petitioner replies but adds nothing of significance to his prior argument. (Pet'r Reply, ECF No. 20.)

The habeas corpus discovery rule states that,

> (a) . . . A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure . . . .
>
> (b) . . . A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.Rule 6, Rules Governing Section 2254 Cases in the United States District Court.

The party requesting discovery must show good cause to believe that the evidence he seeks would create doubt that is sufficient to undermine confidence in his conviction or convictions. *Arthur v. Allen*, 459 F.3d 1310, 1310 (11th Cir. 2006). Good cause cannot be based on speculation and hypothesis. *Id.* at 1310-11. Further, under the AEDPA, a federal petitioner is not entitled to discovery on factual matters that, as a result of lack of diligence, he failed to develop in state court. *Crawford v. Head*, 311 F.3d 1288, 1329 (11th Cir. 2002).

At this point in time - more than five years since his convictions - Petitioner is not entitled to have someone else create/produce a picture, an affidavit/deposition from Hakeem, and/or an opinion from an expert when Petitioner himself has failed to obtain any of the material and has not reasonably and diligently pursued the development of any of the material. Further, as indicated elsewhere in this Report and Recommendation, none of these matters bring into question other significant evidence against Petitioner. Petitioner's motions must be denied.

V. Certificate of Appealability ("COA")

Under Rule 11 of the Rules Governing § 2254 Cases, "[t]he district court must issue or deny a

certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." The Court will issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The applicant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1236 (11th Cir. 2015) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)) (internal quotation marks omitted), *cert. denied*, __ U.S. __, 136 S. Ct. 324, 193 L. Ed. 2d 235 (2015).

The undersigned recommends based on the above discussion that a COA should be denied. If the Court adopts this recommendation and denies a COA, Petitioner is advised that he "may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." Rule 11(a), Rules Governing § 2254 Cases in the United States District Courts.

VI. Conclusion

For the reasons stated above,

IT IS RECOMMENDED that the instant petition for a writ of habeas corpus, [Doc. 1], and a COA be **DENIED** and that the instant action be **DISMISSED**.

IT IS ORDERED that Petitioner's motions for discovery and to expand the record, [Docs. 16, 17], are **DENIED**.

The Clerk is **DIRECTED** to withdraw the reference to the Magistrate Judge.

IT IS SO RECOMMENDED, ORDERED, and DIRECTED, this 2nd day of August, 2016.

/s/ Alan J. Baverman

ALAN J. BAVERMAN

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

In citing an exhibit, the Court normally only once provides a parallel citation to the court's electronic filing system, i.e., ECF No. However, to aide the reader in locating relevant portions of Respondent's Exhibit Seven, which is filed in multiple parts, the Court will bracket the ECF location in each citation.

The Court also notes that the Georgia Supreme Court misstated that Petitioner was indicted on two counts of tampering with evidence. Petitioner was indicted only on one count.

2

Under Georgia law, a claim of trial error that is not raised on direct appeal generally is deemed waived and, thus, procedurally barred from consideration in a subsequent state proceeding for collateral relief. *Chatman v. Mancill*, 278 Ga. 488, 489, 604 S.E.2d 154, 155 (2004); *Black v. Hardin*, 255 Ga. 239, 239-40, 336 S.E.2d 754, 754-55 (1985) (holding that failure to timely raise an issue at trial "or to pursue the same on appeal" constitutes a procedural default); *Brewer v. State*, 224 Ga. App. 656, 658, 481 S.E.2d 608, 611 (Ct. App. 1997) ("Issues and objections not raised at trial cannot be raised for the first time on appeal because they are deemed waived."). A claim of ineffective assistance of

trial counsel is procedurally defaulted if a petitioner either fails to raise if on direct appeal (if the petitioner has new counsel on appeal) or in a first habeas corpus petition (if the petitioner is represented by trial counsel on appeal). O.C.G.A. § 9-14-51; *see also White v. Kelso*, 261 Ga. 32, 32, 401 S.E.2d 733, 734 (1991) ("Because an attorney cannot reasonably be expected to assert or argue his or her own ineffectiveness, claims of ineffective assistance of counsel are often properly raised for the first time in a habeas corpus petition. . . . However, "[n]ew counsel must raise the ineffectiveness of previous counsel at the first possible stage of post-conviction review[,]" - during a motion for a new trial or, if newly appointed for appeal, on direct appeal - or such claims are waived and procedurally defaulted.). A claim of ineffective assistance of appellate counsel is procedurally defaulted if not raised in a first state habeas petition, unless it "could not reasonably have been raised" in a first state habeas petition (original or as amended). O.C.G.A. § 9-14-51; *Chambers v. Thompson*, 150 F.3d 1324, 1326-27 (11th Cir. 1998) (discussing O.C.G.A. § 9-14-51).
3

The Court refers to Hakeem Davis, Petitioner's son who was fourteen at the time of the murder, as Hakeem although at times in police reports he is referred to as Hakim. (Resp't Ex. 7b-part 1 at 200 [10-9]; Resp't Ex. 7d-part1 at 960 [10-18].)
4

Javonte Kennedy was nine at the time of the murder. (Resp't Ex. 7b-part 1 at 200 [10-9].)
5

Petitioner admitted that 8:23 a.m. was not the correct time, that he broke the window at his wife's new house, and that the 911 call on the window breakage at his wife's new house occurred at approximately 7:41 a.m. (Resp't Ex. 7e-part 1 at 1195-96 [10-20].)
6

As stated by Petitioner in his state habeas petition, his theory of the case was that the victim had "died at her own hand, that he found her lifeless body with a rope around her neck and he removed it to render aid." (Resp't Ex. at 6A, ECF No. 10-1.)
7

Petitioner refers to Dr. Smith's testimony, which is reviewed above.
8

(*See* Resp't Ex. 7c-part 1 at 581 [10-15] (stating that Hakeem had stated the victim was driving and they turned right); Resp't Ex. 7d-part 1 at 969-70 [10-18] (Hakeem testifying that Petitioner was driving and they turned right).)
9

See Simpson v. State, 293 Ga. 131, 134, 744 S.E.2d 49, 52 (2013) (discussing the essential elements of murder and stating that the indictment required "proof appellant 'did unlawfully and with malice aforethought cause the death of [the victim], a human being, by strangling her and causing blunt force trauma to her head[]' . . . [and] was not required to be exact in describing how appellant strangled the victim" (citing O.C.G.A. § 16-5-1)).
10

Bishop v. State, 266 Ga. App. 129, 131, 596 S.E.2d 674, 677 (2004) ("[A]ggravated assault has two elements, (1) an attempt to commit a violent injury, or an act that places another in reasonable apprehension thereof, and (2) that the assault was aggravated by the use of a deadly weapon [or object likely to result in serous bodily injury when used offensively, and] intent may be inferred.").
11

"A person commits the offense of tampering with evidence when, with the intent to prevent the apprehension or cause the wrongful apprehension of any person or to obstruct the prosecution or defense of any person, he knowingly destroys, alters, conceals, or disguises physical evidence or makes, devises, prepares, or plants false evidence." O.C.G.A. § 16-10-94(a). If it involves another person, it is a felony. O.C.G.A. § 16-10-94(b).
12

Respondent has addressed some of the matters in Ground Two as raising claims on the sufficiency of the trial evidence. (Resp't Resp. at 6.) Petitioner presents Ground Two as a challenge to the indictment. (Pet. at 6.) The Court construes Petitioner's argument to assert the impact of the indictment error and does not construe his argument as raising any claim in Ground Two other than a challenge to the indictment.
13

Ground Two is limited to a federal constitutional challenge to the indictment, and indictment challenges based on state law (and trial and appellate counsel's assistance thereon) are addressed in Grounds Five and Six. *See infra* III.E.2 and 3.
14

Although in discussing Ground Three Petitioner mentions issues involved in other grounds, he has presented Ground Three as a claim of prosecutorial misconduct. (*See* Pet. at 6.) As stated earlier, the Court adheres to Petitioner's stated ground for relief, and Petitioner's references to issues involved in other grounds are construed as supporting context for Ground Three.
15

In his reply Petitioner again argues that appellate counsel was ineffective for failing to address the prosecution's allegedly telling Hakeem how to testify, (Pet'r Points at 20-21), which the Court has addressed as part of Ground Six below. *See infra* III.E.3.b. Petitioner repeats his argument that appellate counsel was ineffective for failing to obtain a photograph showing that Officer Huner could not have seen Petitioner coming down the stairs, which the Court has addressed as part of Ground Five below. *See infra* III.E.2.b. Petitioner repeats his argument that appellate counsel was ineffective for failing to argue prosecutorial misconduct in presenting Watson's testimony, which the Court has addressed as part of Ground Six below. *See infra* III.E.3.b.
16

Alvinice testified regarding the assault during trial. (Resp't Ex. 7d-part 1 at 947-48 [10-18].)
17

The Court addresses the jury instruction claim with Ground Seven below.
18

During closing, the prosecutor stated, "when [Petitioner] came up behind her because that is what the medical examiner said . . . . The ligature applied to the front in that so they came up from behind." (Resp't Ex. 7e-part 1 at 1239-40 [10-20].) During closing, the prosecutor referred to Petitioner's revisionist history - that he had entered through the window and later added that he closed the window behind him - and stated, "That is a lie, lie, lie." (*Id.* at 1270.) The prosecutor told the jury, "You guys got to decide who you believe here, the defendant over here or the deputy who is telling it. He has no bone to pick in this case. He is just doing his job. He had no reason to come in here and lie about it." (*Id.* at 1271.) The prosecutor further stated, "You know what happened. He was lying through his teeth. . . . He killed his wife. . . . Use your common sense and you know what happened. [Petitioner] killed his wife . . . ." (Resp't 7e-part 2 at 1294 [10-21].)
19

The Court notes that in his application for review to the Georgia Supreme Court, Petitioner attached a drawing allegedly showing that the stairs were not in the line of sight from the window where Huner stood. (*See* Resp't Ex. 5 at 16, ECF No. 10-5.) That hand-drawing is not to scale, and the drawn distance between the rear door and the window appears significantly less than the distance in a photograph of the rear of the home, which distance appears consistent with the stairs being visible from the window. (*See* Resp't Ex. 7e-part 6 at 1353 [10-25].)
20

The Court also has found no support for the alleged conviction either attached to Petitioner's state habeas corpus petition, as amended, or presented as an exhibit during the state habeas corpus proceedings. (*See* Resp't Exs. 1, 2, 3; Resp't Ex. 7a-part 1 at 82-119 [10-7]; Resp't Ex. 7a-part 2 at 120-31 [10-8]; Resp't Ex. 8 at 1522-27, ECF No. 10-31.)
21

Petitioner argues that trial counsel was ineffective for not challenging the indictment as defective because malice and aggravated assault were not proven to the grand jury or at trial, there was no evidence on how Petitioner obtained the ribbon, and there was no evidence that Petitioner was present during the murder. (*See* Pet. at E-3).
22

Petitioner cites the habeas exhibit at 962-63, 1044-46, 1061-62, 1079-80, and the record citations show the following. Hakeem testified that he, Javonte, the victim, and Petitioner had lived in the marital home since sometime after school started in 2009. (Resp't Ex. 7d-part 1 at 962-63 [10-18].) Javonte testified that after prior incidents of violence by Petitioner against the victim (one of which had occurred one or two years prior and the other for which he could not remember the time) they (apparently he and the victim, his mother) would stay in a hotel for a brief period. (Resp't Ex. 7d-part 2 at 1044-46, 1073-80 [10-19].) Javonte also testified that sometimes he and his mother had stayed at Ola Duncan's house. (*Id.* at 1084.) Watson testified that she wanted the victim to have a safe place and that in 2009 the victim would sometimes stay with her or with "Auntie Bay" (also known as Ola Duncan). (*Id.* at 1062; Resp't Ex. 7d-part 1 at 1024 [10-18].)
23

The claims based on failing to perceive ineffective assistance of trial counsel are either addressed as part of Grounds Five and Seven or fail as being conclusory.
24

In Ground Six, the Court addresses only appellate counsel's failure to raise on appeal a state law challenge to the indictment.