IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14034-K

FRANKLIN ELLIOTT BENSON,

Petitioner-Appellant,

versus

GLEN JOHNSON,

Respondent-Appellee.

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

ORDER:

Franklin Benson, a Georgia prisoner serving a total sentence of life in prison plus 11 years for malice murder, removal of body parts, and concealing the death of another, filed a *pro se* 28 U.S.C. § 2254 petition, asserting 14 claims for relief. He now seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"). 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," or that the issues "deserve encouragement to proceed further." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted).

Claim 1: Ineffective Assistance of Trial Counsel

Benson asserted that his trial attorneys were ineffective "at several stages of [his] trial." Notably, on direct appeal, Benson argued specifically that his counsel was ineffective for failing

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to object to the court's closure of the courtroom during *voir dire*, and withdrawing written requests for further jury instructions regarding proximate causation and *corpus delicti*. To the extent that Benson attempts to assert ineffective-assistance-of-trial-counsel claims different from those raised in state court, such claims are unexhausted, and, therefore, procedurally defaulted. *See* 28 U.S.C. § 2254(b), (c); *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010).

To the extent that Benson raised the same claims, reasonable jurists would not debate that the state court reasonably applied *Strickland v. Washington*, 466 U.S. 668, 687 (1984), in concluding that he had failed to demonstrate ineffective assistance. See 28 U.S.C. § 2254(d)(1). The state court reasonably concluded that, because Benson had not demonstrated that his counsels' failure to object to the closure of the courtroom impacted the jury-selection process or had any impact on the outcome of his trial, he had not established prejudice. Similarly, the court reasonably concluded that Benson had not shown that the outcome of his trial would have been different, had counsel not withdrawn their requests for further instructions on *corpus delicti* and causation, as the instructions actually given to the jury encompassed that the jury needed to find that Williams was deceased, and that Benson caused her death.

Claim 2: Ineffective Assistance of Appellate Counsel

Benson asserted that his appellate counsel was ineffective for failing to thoroughly review the record. However, after conducting an evidentiary hearing, at which Benson's appellate counsel testified, the state habeas court found that counsel personally reviewed the entire record and raised the issues he believed to be meritorious. Because Benson makes only conclusory assertions that his appellate counsel was ineffective, he has not produced clear and convincing evidence to contradict the state court's findings. *See* 28 U.S.C. § 2254(e)(1). Accordingly, reasonable jurists would not debate that Benson cannot establish deficient performance.

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Claims 3 and 4: Sufficiency of the Evidence

Benson argued that the trial court erred in denying his motion for a new trial and the appellate court erred in refusing to reverse his convictions, because the evidence was insufficient. However, on direct appeal, the Georgia Supreme Court, citing *Jackson v. Virginia*, 443 U.S. 307 (1979), concluded that the evidence presented at trial was sufficient to permit a rational jury to find beyond a reasonable doubt that Benson killed Williams intentionally and unlawfully, and that Williams died from some criminal agency and not from natural causes. Reasonable jurists would not debate that, given the evidence adduced at trial, the state court's conclusion constituted a reasonable application of *Jackson*. *See* 28 U.S.C. § 2254(d)(1).

Claims 5 and 6: Procedural Default

Benson argued that the trial court erred in closing the courtroom during *voir dire*, and the appellate court erred in refusing to reverse his convictions on that basis. On direct appeal, the Georgia Supreme Court denied these claims as procedurally barred, because Benson did not raise a contemporaneous objection to the closure. Because the state court expressly relied on a state procedural rule to deny Benson's claims, and this rule constitutes an independent and adequate state ground, the claims are barred from federal review. *See Ward*, 592 F.3d at 1156-57.

Claims 7 through 14: Procedural Default

Benson's remaining claims were denied as procedurally defaulted by the state habeas court, because they had not been raised on direct appeal. Because the state habeas court relied on an adequate and independent state procedural ground to deny Benson's claims, they are barred from federal review. *See Ward*, 592 F.3d at 1156-57.

CONCLUSION:

Based on the foregoing, Benson's motion for a COA is DENIED. His motion for leave to proceed IFP is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

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

FRANKLIN ELLIOTT BENSON, Petitioner,	:	
v.	:	CIVIL ACTION NO. 1:16-CV-1503-ELR
GLEN JOHNSON, Respondent.	:	

ORDER

Presently before the Court is the Magistrate Judge's Final Report and Recommendation (R&R) recommending that the instant habeas corpus petition be denied and the case dismissed. [Doc. 34]. Petitioner has filed his objections in response to the R&R. [Docs. 36, 37].

A district judge has broad discretion to accept, reject, or modify a magistrate judge's proposed findings and recommendations. United States v. Raddatz, 447 U.S. 667, 680 (1980). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the Report and Recommendation that is the subject of a proper objection on a *de novo* basis and any non-objected portion under a "clearly erroneous" standard.

Petitioner was convicted after a jury trial in Newton County Superior Court of malice murder, the removal of body parts from the scene of death or dismemberment, and concealing the death of another. After the Georgia Supreme Court affirmed his convictions, Benson v. State, 754 S.E.2d 23 (Ga. 2014), he unsuccessfully sought

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habeas corpus relief in Dooly County Superior Court. The Georgia Supreme Court then denied Petitioner's application for a certificate of probable cause to appeal the denial of habeas corpus relief.

In the R&R, the Magistrate Judge recommends that Petitioner's 28 U.S.C. § 2254 petition for a writ of habeas corpus be denied because he failed to demonstrate that he is entitled to relief.

In his objections, Petitioner first argues at length that the evidence presented at his trial was not sufficient to establish all the elements of murder. The murder victim, Petitioner's girlfriend, was found dismembered and scattered around property owned by Petitioner in Newton County. Benson, 754 S.E.2d at 25. It was unclear to authorities how the victim died or where the murder occurred, and Petitioner contends that the state had not provided evidence of malice or corpus delicti. The Georgia Supreme Court, however, reviewed the evidence presented at Petitioner's trial and concluded that the evidence

> was sufficient to authorize a rational jury to find beyond a reasonable doubt that appellant killed the victim intentionally and unlawfully and that the victim died from some criminal agency and not from natural causes. In sum, the State proved malice and the corpus delicti beyond a reasonable doubt, and the evidence was sufficient to authorize a rational jury to find that the State had excluded every reasonable hypothesis other than appellant's guilt and to find him guilty beyond a reasonable doubt of the crimes for which he was convicted and sentenced.

Benson, 754 S.E.2d at 27.

This Court agrees with the Magistrate Judge that the state court's conclusion was reasonable and is thus entitled to deference under § 2254(d).

Petitioner next objects to the Magistrate Judge's conclusion that his Grounds 9 and 10 are procedurally defaulted. In his Ground 9, Petitioner contends that the state failed to establish venue in Newton County because it did not prove where the murder occurred. Whether this claim is procedurally defaulted is irrelevant. The Supreme Court has never held that the Fourteenth Amendment extended to the states the Sixth Amendment's guarantee that an accused be tried in the district where the crime was committed. Thus, Petitioner's venue claim is a matter of state law that is not cognizable under § 2254. See Hance v. Zant, 696 F.2d 940, 957 (11th Cir. 1983) *overruled on other grounds*, Brooks v. Kemp, 762 F.2d 1383 (11th Cir.1985) (en banc).

In his Ground 11, Petitioner contends that the trial court failed to instruct the jury on all essential elements and material allegations as indicted. However, after concluding that this claim was procedurally defaulted, the Georgia Supreme Court held in the alternative that this claim was without merit, Benson, 754 S.E.2d at 28, and Petitioner has failed to demonstrate that the state court's determination was unreasonable under § 2254(d).

Finally, Petitioner objects to the Magistrate Judge's rejection of his claims of ineffective assistance of trial and appellate counsel. Petitioner's claim of ineffective assistance of trial counsel relates to trial counsel's purported failure to preserve the issues of venue and the jury instruction claim raised in Ground 11, and his ineffective assistance of appellate counsel claim is merely that appellate counsel failed to raise his claims of ineffective assistance of trial counsel. As this Court has already determined that Petitioner is not entitled to relief with respect to the underlying claims, he cannot demonstrate prejudice under Strickland v. Washington, 466 U.S. 668 (1984), and his ineffective assistance claims fail.

As to the remainder of the R&R to which Petitioner has not expressly objected, this Court concludes that the Magistrate Judge's findings and conclusions are correct.

Accordingly, the R&R, [Doc. 34], is hereby **ADOPTED** as the order of this Court, and the petition is **DENIED**. This Court further agrees with the Magistrate Judge that Petitioner has not raised claims of debatable merit, and a Certificate of Appealability is **DENIED**. The Clerk is **DIRECTED** to close this action.

IT IS SO ORDERED, this 4th day of September, 2018.

Eleanor L. Ross

ELEANOR L. ROSS
UNITED STATES DISTRICT JUDGE

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

FRANKLIN ELLIOTT BENSON, GDC ID 1000132641, Petitioner,	:	HABEAS CORPUS 28 U.S.C. § 2254
v.	:	CIVIL ACTION NO. 1:16-CV-1503-ELR-CMS
GLEN JOHNSON, Respondent.	:	

FINAL REPORT AND RECOMMENDATION

This case is before me on (A) state inmate Franklin Elliott Benson's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [1] and Attachment to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [4], (B) Warden Glen Johnson's Answer-Response [12] and Brief in Support [12-1], and (C) various motions and responses filed by Benson and Warden Johnson [27], [28], [29], [31] & [33]. For the reasons set forth below, I **RECOMMEND** that Benson's § 2254 petition be **DENIED** and that a Certificate of Appealability be **DENIED**. For the additional reasons set forth below, I **DENY** Benson's other pending motions [28] & [31].[1]

[1] I previously considered and resolved a number of earlier motions filed by Benson. *See* [30] (granting [22] and denying [11], [21] & [23]).

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In 2008, Benson was indicted "for malice murder, the removal of body parts from the scene of death or dismemberment, and concealing the death of another" in connection with the death of Leslyan Williams. *Benson v. State*, 754 S.E.2d 23, 25 n.1 (Ga. 2014). Benson was defended by retained counsel. When the case was called for trial, the presiding judge "closed the courtroom during voir dire, which resulted in several of [Benson's] family members and others being . . . excluded." *Id.* at 27. Benson did not object, and he was subsequently convicted on all counts. *Id.* at 25. The trial court then sentenced Benson "to life in prison for malice murder, [twelve] consecutive months in prison for the removal of body parts, and ten consecutive years in prison for concealing the death of another." *Id.* at 25 n.1. Benson fired his trial attorneys and retained new counsel.

On direct appeal, the Georgia Supreme Court summarized the evidence presented at trial as follows:

> [Benson] and [Williams] became romantically involved in 2007, and [Benson] began spending several nights a week at a home that [Williams] had purchased in DeKalb County. [Williams] had family and friends with whom she regularly communicated; was in apparent good health; held a job; was remodeling her home so that she could start a catering business there; and regularly worked in her yard.

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[Benson], who operated an automobile repair business near [Williams's] home, was having financial difficulties with that business in 2007 and had borrowed over $10,000 from [Williams]. On the morning of Saturday, October 27, 2007, both [Benson's] sister, Cassandra, and [Williams's] sister called [Williams] to wish her a happy birthday. [Williams] told them that [Benson] was taking her to a casino in Mississippi for the weekend, and she told her sister, with whom she frequently spoke, that she would call her on Monday. [Benson] and [Williams], however, did not go to Mississippi.

Around noon on October 28, 2007, [Benson] and [Williams] had a domestic dispute over the money that [Benson] had borrowed from [Williams]. The police responded to [Williams's] home, but, because no violence had occurred, the police left after questioning [Benson] and [Williams]. About 6:00 p.m. on October 28, [Benson] called his bank to check on his account, which was overdrawn. At 7:32 p.m. that day, [Williams's] credit card was swiped on the credit card machine at [Benson's] business. Whoever swiped the card attempted to transfer $7,500 from [Williams's] account, but the bank declined the transfer because the amount exceeded the transfer limit on the card.

On Monday morning, October 29, [Williams] was scheduled to meet with Cassandra to go to a job fair. [Williams], however, did not meet with Cassandra and did not answer her cell phone. [Williams] also did not call her sister, as she had promised to do. [Benson] did not start work at his regular hour that Monday and could not be reached on his cell phone.

In the early morning hours of Tuesday, October 30, human body parts were found scattered around a secluded, wooded area near a house owned by [Benson] in Newton County. A coroner examined the remains and determined that

> the cause of death was homicide by an unknown cause. It was not until November 9, 2007, that law enforcement officials identified the body parts are belonging to [Williams]. Meanwhile, [Benson] never reported [Williams] missing before moving out of her house on November 3, and told conflicting stories about her disappearance and his activities around that time.
>
> [Benson] also told law enforcement officers that [Williams] was selling drugs from her house, and he asked another sister, Jennifer, to tell officers the same thing. Jennifer, however, would not do so, because it was not true, and [Williams's] friends and family said that she had never sold drugs. Moreover, [Benson] asked Jennifer to tell law enforcement officers that he never lived with [Williams].
>
> A white, powdered substance that police found in [Williams's] house turned out to be sheetrock powder. In addition, about 8:00 a.m. on October 29, 2007, a video camera at a hotel in Chattanooga, Tennessee, recorded [Benson] towing [Williams's] car into the hotel parking lot and leaving it. [Williams's] car keys were later found at [Benson's] business.

Benson, 754 S.E.2d at 25-26.

Benson contended on direct appeal that "the evidence [was] insufficient to support his convictions, the trial court erred in closing the courtroom during voir dire, and his trial counsel provided constitutionally ineffective assistance." *Benson*, 754 S.E.2d at 25. Citing, among other cases, *Jackson v. Virginia*, 443 U.S. 307 (1979), and *Strickland v. Washington*, 466 U.S. 668 (1984), the Georgia Supreme Court concluded

that (A) there was sufficient evidence to support the convictions, (B) Benson was procedurally barred from contesting the closure of the courtroom during voir dire by his failure to object, and (C) Benson's trial counsel was not constitutionally ineffective (for failing to object to the courtroom closure during voir dire and withdrawing requests to charge the jury on proximate causation and the corpus delecti). *Id.* at *passim.* The Georgia Supreme Court also concluded, in the alternative, that Benson's ineffective assistance of trial counsel claim premised on his attorney's withdrawal of those jury instructions was procedurally barred because the issue had not been raised in Benson's motion for a new trial. *Id.* at 28.

Proceeding *pro se*, Benson sought a state writ of habeas corpus, raising fourteen grounds for relief and contending that his failure to have raised eleven of these grounds was "due to the ineffective assistance of appella[te] counsel." [13-1] at 9. The state habeas court denied Benson's petition on May 18, 2015, concluding that (A) three of his grounds for relief had been resolved by the Georgia Supreme Court on direct appeal and could not be relitigated in a habeas case, (B) ten of his grounds for relief were procedurally defaulted, and (C) his claim of ineffective assistance of

appellate counsel was meritless. *See* [13-2] at *passim*. The state habeas court specifically cited and applied *Strickland* and its progeny to Benson's ineffective assistance of appellate counsel claim. *See id.* at 4-8.

On April 26, 2016, the Georgia Supreme Court declined to grant Benson's application for a certificate of probable cause to appeal, *see* [13-4], and on May 6, 2016, the Georgia Supreme Court denied Benson's motion for reconsideration, *see* [13-6].

Evidently anticipating the outcome his motion for reconsideration, Benson filed his federal habeas petition three days earlier, on May 3, 2016. *See* [1].

In his federal petition, Benson states his fourteen grounds for relief in the following words:

> 1. Petitioner alleges ineffective assistance of trial counsel where trial counsel performed deficiently at several stages of Petitioner's trial. Attorney was totally unprepared and performed no investigation of the charges, circumstances, crime scene, witnesses, and applicable law nor preserve errors.
>
> 2. Petitioner alleges ineffective assistance of appellate counsel where counsel failed to review the record thoroughly for trial errors to properly present errors at motion for new trial in order to preserve for direct appeal.
>
> 3. Petitioner alleges that he was denied due process at trial where the court failed to properly rule on motion for directed

verdict of acquittal where there was no presentation of evidence of essential elements or material allegations. The State Attorney admitted to this failure in the evidence. The court again failed to provide due process when error was shown at motion for new trial.

4. Petitioner alleges that he was denied due process at appeal when the court improperly denied appeal where the trial record was completely void of a presentation of evidence which proved every essential element and material allegation beyond a reasonable doubt.

5. Petitioner was denied due process where trial court closed the courtroom during voir dire of Petitioner's trial.

6. Petitioner was denied due process at appeal where appellate court denied appeal where trial court closed the courtroom to the public without considering alternatives.

7. Petitioner [was] denied due process where the trial court limited closing arguments in violation of Georgia statute.

8. Petitioner [was] denied due process where trial court conducted a portion of Petitioner's trial outside his presence in the courtroom.

9. Petitioner [was] denied due process at trial where jurisdiction did not lie in the county where trial held.

10. Petitioner's due process rights [were] violated where prosecutor knowingly solicited and presented perjured testimony and further bolstered the same in closing.

11. Petitioner [was] denied due process at trial where the court failed to instruct the jury on all essential elements and material allegations as indicted.

> 12. Petitioner [was] denied due process at trial where indictment failed to notify Petitioner of facts which constituted acts allegedly committed which were in violation of the statutes Petitioner was charged with violating.
>
> 13. Petitioner alleges that his due process rights were violated where the court refused to grant a proper and timely filed motion for preliminary hearing.
>
> [14.] Petitioner [was] convicted using a statement of 140 pages where before interview began Petitioner asserted right to silence and the record shows on pg 4 of 140 where Petitioner said he did not want to give statement without attorney present. The D[.]A[.] mention[ed] to the jury that the Petitioner exercised his right to remain silent.

[1] at 8-11. Although renumbered and slightly reworded, these fourteen grounds for relief are substantially identical to the fourteen grounds for relief stated in Benson's state habeas petition, except that Grounds 5 and 7 in the state petition were not carried forward into the federal petition, and Grounds 8 and 14 in the federal petition were raised verbally during the course of state habeas proceedings (but not in writing in the state petition). *Compare* [1] at 8-11 *with* [13-1] at 6-8; *see also* [14-1] at 75-79 & 120-21.

Because Benson is proceeding *pro se*, I have construed his filings liberally. *See, e.g., Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

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Federal habeas review "is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011). "Under 28 U.S.C. § 2254(d), the availability of federal habeas relief is limited with respect to claims previously 'adjudicated on the merits' in state-court proceedings." *Id.* at 91. Thus "[f]ederal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown that the earlier state court's decision 'was contrary to' federal law then clearly established in the holdings of [the Supreme] Court[;] or that it 'involved an unreasonable application of' such law[;] or that it 'was based on an unreasonable determination of the facts' in light of the record before the state court." *Id.* at 100 (internal citations omitted).

"If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102. "It preserves authority to issue the writ in cases where there is no possibility fair minded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Id.* "It goes no further." *Id.* Thus, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling

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.

Furthermore, a federal habeas court reviewing a claim of ineffective assistance of counsel that has already been denied in state court must bear the following in mind. "The *Strickland* standard is a general one, so the range of reasonable applications is substantial[, and because the] standards created by *Strickland* and § 2254(d) are both 'highly deferential,' . . . when the two apply in tandem, review is 'doubly' so." *Id.* at 105. "The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

Turning to Benson's fourteen grounds for relief, I find and conclude as follows:

Benson's Ground 1 (relating his trial counsel's performance) was decided on the merits on direct appeal.[2] The Georgia Supreme Court held

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[2] I do not believe that Benson's inclusion of the three new words "nor preserve errors" at the end of Ground 1 in his federal habeas petition raises a new claim that was not included in Ground 1 in his state habeas petition. *Compare* [1] at 8 *with* [13-1] at 6. But if it did, I would conclude that this new claim was not exhausted in state habeas proceedings, cannot now be raised in a successive state petition, and is thus procedurally defaulted.

that Benson's claim of ineffective assistance of trial counsel was meritless because Benson was not prejudiced by his counsel's failure to object to the closure of the courtroom during voir dire or by counsel's withdrawal of requests to charge the jury on causation and corpus delecti. *See Benson*, 754 S.E.2d at 28. The Georgia Supreme Court explained at length the reasons it reached the conclusion that there was no reasonable probability that the outcome of the trial would have been different, even if trial counsel timely objected or persisted in requesting those jury instructions. *See id.* And the Georgia Supreme Court concluded that the jury charge given "adequately instructed the jury on the concepts of corpus delicti and causation," even without the additional instructions that were requested, then withdrawn by Benson's trial counsel. *See id.* As noted above, given

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See, e.g., *Baldwin v. Johnson*, 152 F.3d 1304, 1311 (11th Cir. 1998) ("a habeas petitioner may not present instances of ineffective assistance of counsel in his federal petition that the state court has not evaluated previously") (internal quotation marks and alterations omitted). *See also* *Chambers v. Thompson*, 150 F.3d 1324 (11th Cir. 1998) (explaining that Georgia's prohibition on successive state habeas petition should be enforced absent circumstances not present in this case); *Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998) (stating that "when it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief").

the deference owed to these conclusions under federal law, the relevant "question is whether there is *any* reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington*, 562 U.S. at 105 (emphasis added). Here, the Georgia Supreme Court supplied a reasonable argument, so I conclude that Benson is not entitled to federal habeas relief on this ground.

Benson's Ground 2 (relating to his appellate counsel's performance) was decided on the merits in state habeas proceedings. As restated in his federal habeas petition, this ground is narrower than the ground Benson presented to the state habeas court. *Compare* [1] at 8 *with* [13-1] at 6. Accordingly, I focus only on that portion of the ineffective assistance claim that Benson has carried forward, namely, that his appellate counsel "failed to review the record thoroughly for trial errors to properly present errors at motion for new trial in order to preserve for direct appeal." [1] at 8.

After reviewing Benson's retained appellate counsel's credentials at length, the state habeas court credited counsel's testimony that he "obtain[ed] all of the relevant information," "personally reviewed everything," and "only raised the issues he thought would have been

successful." [13-2] at 8. The state habeas court then implicitly found neither deficient performance, nor prejudice, concluding that "appellate counsel's representation was not only effective, it was excellent." [13-2] at 8.

As noted above, given the deference owed to these conclusions under federal law, the relevant "question is whether there is *any* reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington*, 562 U.S. at 105 (emphasis added). Here, the state habeas court supplied a reasonable argument, so I conclude that Benson is not entitled to federal habeas relief on this ground.

Benson's Grounds 3 and 4 (both relating to the sufficiency of the evidence) were decided on the merits on direct appeal. After summarizing the facts proven at trial as set forth above, *see supra* at 2-4, the Georgia Supreme Court applied the *Jackson v. Virginia* standard and concluded that "viewing the evidence in the light most favorable to the verdict, . . . it was sufficient to authorize a rational jury to find beyond a reasonable doubt that [Benson] killed [Williams] intentionally and unlawfully and that [Williams] died from some criminal agency and not from natural causes."

Benson, 754 S.E.2d at 27. This was (A) a reasonable determination of the facts in light of the evidence presented at trial and (B) a reasonable application of the relevant Supreme Court precedent; thus, the Georgia Supreme Court's resolution of this issue is entitled to deference, *see* 28 U.S.C. § 2254(d), and Benson is not entitled to federal habeas relief on either of these grounds.

Benson's Grounds 5 and 6 (relating to the closure of the courtroom during voir dire) were determined by the Georgia Supreme Court on direct appeal to have been procedurally defaulted because he did not object at the time. *See Benson*, 754 S.E.2d at 27. The Georgia Supreme Court's resolution of this issue, too, is no basis for federal habeas relief, because "*Wainwright v. Sykes*[, 433 U.S. 72, 81, 87 (1977),] made clear that the adequate and independent state ground doctrine applies on federal habeas [review]" and "under *Sykes* and its progeny, an adequate and independent finding of [a state law] procedural default will bar federal habeas review of [a] federal claim," absent "cause and prejudice" or a "fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 262 (1989). The Georgia Supreme Court stated an adequate and independent state ground

for denying Benson relief on direct appeal, and Benson has demonstrated neither "cause and prejudice," nor a "fundamental miscarriage of justice." Consequently, Benson is not entitled to federal habeas relief on these grounds.

Benson's Grounds 7, 8, 9, 10, 11, 12, 13, and 14 (relating to the length of closing argument, proceedings alleged to have occurred in Benson's absence, the county in which the trial was conducted, the alleged use of "perjured evidence," the jury instructions, the form of the indictment, the denial of a motion for a preliminary hearing, and an alleged Fifth Amendment violation) were all determined by the state habeas court to be procedurally defaulted because Benson did not raise these claims earlier. *See* [13-2]. Again, Benson has demonstrated neither "cause and prejudice," nor a "fundamental miscarriage of justice" adequate to overcome the state court's determination that these claims were procedurally defaulted. Consequently, Benson is not entitled to federal habeas relief on these grounds.

Accordingly, I have recommended that Benson's Petition be denied because he has not demonstrated that he is entitled to federal habeas relief on any of the fourteen Grounds he raised.

In addition, I have recommended that a Certificate of Appealability be denied because Benson does not satisfy the requirements necessary for one to be issued. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (requiring a two-part showing (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," *and* (2) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling"); *see also Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014) (en banc) (holding that the *Slack v. McDaniel* standard will be strictly applied prospectively).

I write briefly to explain my denial of Benson's two pending motions.

I have denied Benson's Motion for Summary Judgment [28] and Resubmittal of Motion for Summary Judgment [31] because they simply reargue the grounds for relief stated in his federal habeas petition and briefs, and, in any event, this Final Report and Recommendation renders such "motions" moot.

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I **DIRECT** the Clerk to terminate the referral of this case to me.

SO RECOMMENDED, ORDERED, AND DIRECTED, this 15th day of May, 2018.

Catherine Salinas

CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14034-K

FRANKLIN ELLIOTT BENSON,

Petitioner-Appellant,

versus

GLEN JOHNSON,

Respondent-Appellee.

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

Before: WILLIAM PRYOR and ROSENBAUM, Circuit Judges.

BY THE COURT:

Franklin Elliot Benson has filed a motion for reconsideration of this Court's order dated April 2, 2019, 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 petition. Upon review, Benson's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Appendix D (1)

Supreme Court of Georgia.

BENSON v. The STATE.

No. S13A1504.

Decided: January 21, 2014

Appellant Franklin Benson appeals his convictions for malice murder and other crimes relating to the death of Leslyan Williams.[1] On appeal, he contends that the evidence is insufficient to support his convictions, that the trial court erred in closing the courtroom during voir dire, and that his trial counsel provided constitutionally ineffective assistance. Because these issues are without merit or are procedurally barred, we affirm his convictions.

1. Viewed in the light most favorable to the verdict, the evidence presented at trial showed the following: Appellant and the victim became romantically involved in 2007, and appellant began spending several nights a week at a home that the victim had purchased in Dekalb County. The victim had family and friends with whom she regularly communicated; was in apparent good health; held a job; was remodeling her home so that she could start a catering business there; and regularly worked in her yard. Appellant, who operated an automobile repair business near the victim's home, was having financial difficulties with that business in 2007 and had borrowed over $10,000 from the victim. On the morning of Saturday, October 27, 2007, both appellant's sister, Cassandra, and the victim's sister called the victim to wish her a happy birthday. The victim told them that appellant was taking her to a casino in Mississippi for the weekend, and she told her sister, with whom she frequently spoke, that she would call her on Monday. Appellant and the victim, however, did not go to Mississippi.

Around noon on October 28, 2007, appellant and the victim had a domestic dispute over the money that appellant had borrowed from the victim. The police responded to the victim's home, but, because no violence had occurred, the police left after questioning appellant and the victim. About 6:00 p.m. on October 28, appellant called his bank to check on his account, which was overdrawn. At 7:32 p.m. that day, the victim's credit card was swiped on the credit card machine at appellant's business. Whoever swiped the card attempted to transfer $7,500 from the victim's account, but the bank declined the transfer because the amount exceeded the transfer limit on the card.

On Monday morning, October 29, the victim was scheduled to meet with Cassandra to go to a job fair. The victim, however, did not meet with Cassandra and did not answer her cell phone. The victim also did not call her sister, as she had promised to do. Appellant did not start work at his regular hour that Monday and could not be reached on his cell phone.

In the early morning hours of Tuesday, October 30, human body parts were found scattered around a secluded, wooded area near a house owned by appellant in Newton County. A coroner examined the remains and determined that the cause of death was homicide by unknown cause. It was not until November 9, 2007, that law enforcement officials identified the body parts as belonging to the victim. Meanwhile, appellant never reported her missing, began moving out of her house on November 3, and told conflicting stories about her disappearance and his activities around that time.

He also told law enforcement officers that the victim was selling drugs from her house, and he asked another sister, Jennifer, to tell officers the same thing. Jennifer, however, would not do so, because it was not true, and the victim's friends and family said that

she had never sold drugs. Moreover, appellant asked Jennifer to tell law enforcement officers that he never lived with the victim.

A white, powdered substance that the police found in the victim's house turned out to be sheetrock powder. In addition, about 8:00 a.m. on October 29, 2007, a video camera at a hotel in Chattanooga, Tennessee, recorded appellant towing the victim's car into the hotel parking lot and leaving it. The victim's car keys were later found at appellant's business.

On appeal, appellant contends that the evidence is insufficient to support his convictions because the State did not prove malice or the corpus delicti beyond a reasonable doubt. We disagree.

The State, of course, must prove malice beyond a reasonable doubt to convict someone of malice murder. See OCGA § 16–5–1(a) ("A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being."). "Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." Id. at (b). " 'It is for a jury to determine from all the facts and circumstances whether a killing is intentional and malicious.' " Shaw v. State, 292 Ga. 871, 872, 742 S.E.2d 707 (2013) (citation omitted). And "it is for the jury, not appellate judges, to 'resolve conflicts in the evidence and to determine the credibility of witnesses, and the resolution of such conflicts adversely to the defendant does not render the evidence insufficient .' " Butler v. State, 292 Ga. 400, 402, 738 S.E.2d 74 (2013) (citation omitted).

To sustain a conviction for malice murder, the State must also prove the corpus delicti beyond a reasonable doubt, and it "may be shown by indirect as well as direct evidence." Richardson v. State, 276 Ga. 548, 549, 580 S.E.2d 224 (2003). The corpus delicti is established by proof " 'that the person alleged in the indictment to have been killed is actually dead, and second, that the death was caused or accomplished by violence, or other direct criminal agency of some other human being.' " Id. (citation omitted). Even in cases in which a victim's body has not been found, "evidence that the victim was a person with personal relationships that uncharacteristically seemed to have been abandoned supports a finding that the victim has died by criminal means." Hinton v. State, 280 Ga. 811, 816, 631 S.E.2d 365 (2006). Similarly, we have held that where a coroner could not determine the cause of death of a victim whose body was badly decomposed and partially eaten, the State proved the corpus delicti beyond a reasonable doubt based on evidence that the victim, when she was last seen alive, was in apparent good health, and with nothing to show any mental disturbance, . she parted on the street from a companion, indicating to the latter that she would be back in a few minutes. She did not return. About nine days later her body was found in a secluded spot in a ditch covered over with corrugated paper on which bricks lay. Some of her front teeth were missing, and were found near the body.

Wrisper v. State, 193 Ga. 157, 161, 17 S.E.2d 714 (1941).

Here, viewing the evidence in the light most favorable to the verdict, we conclude that it was sufficient to authorize a rational jury to find beyond a reasonable doubt that appellant killed the victim intentionally and unlawfully and that the victim died from some criminal agency and not from natural causes. In sum, the State proved malice and the

corpus delicti beyond a reasonable doubt, and the evidence was sufficient to authorize a rational jury to find that the State had excluded every reasonable hypothesis other than appellant's guilt and to find him guilty beyond a reasonable doubt of the crimes for which he was convicted and sentenced. See former OCGA § 24–4–6 (now codified at OCGA § 24–14–6 in the new Evidence Code); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

2. Appellant argues that the trial court erred in closing the courtroom during voir dire, which resulted in several of his family members and others being improperly excluded from voir dire.[2] Appellant, however, did not object to the closure at trial and thus is procedurally barred from raising the issue on appeal. See State v. Abernathy, 289 Ga. 603, 611, 715 S.E.2d 48 (2011) (holding that when a defendant fails to object to the closure of a courtroom at trial, "the issue of closure may only be raised in the context of an ineffective assistance of counsel claim" (citation and brackets omitted)).

3. Appellant contends that he was denied the effective assistance of counsel and that the trial court therefore should have granted his motion for a new trial.

To prevail on this claim, appellant must show that his counsel performed deficiently and that, but for the deficiency, there is a reasonable probability that the outcome of the trial would have been more favorable to him. See Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "This burden, although not impossible to carry, is a heavy one." Young v. State, 292 Ga. 443, 445, 738 S.E.2d 575 (2013). Moreover,

a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged

deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Strickland, 466 U.S. at 697.

(a) Appellant argues that trial counsel were ineffective by failing to object to the closure of the courtroom during voir dire. However, appellant has made no showing that the courtroom's closure affected the jury selection process or tainted the ultimate jury chosen. Appellant therefore has failed to carry his burden to show that, if trial counsel had objected to the closure of the courtroom during voir dire, there is a reasonable probability that the outcome of the trial would have differed. See Reid v. State, 286 Ga. 484, 488, 690 S.E.2d 177 (2010) (addressing the defendant's claim that trial counsel provided ineffective assistance by failing to object to the closure of the courtroom during the testimony of two witnesses and holding that the claim lacked merit because the defendant did not show how the failure to object to the closure resulted in harm).

(b) Appellant contends that trial counsel were ineffective for withdrawing their written requests to charge the jury on proximate causation and the corpus delicti. This claim, however, is procedurally barred, because appellant "did not raise it in his motion for new trial and did not obtain a ruling on it by the trial court." Cowart v. State, —— Ga. ——, ——S.E.2d ——, 2013 Ga. LEXIS 964, at * 11 (Case No. S13A1295, decided Nov. 18, 2013).

Even if appellant had properly preserved the claim, it would be without merit, because appellant has failed to establish that there is a reasonable probability that the outcome of the trial would have been different if his counsel had not withdrawn the requests to

charge. The trial court charged the jury that the State was required to prove "every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt." The indictment was available to the jury in the jury room, and it alleged that appellant did "unlawfully with malice aforethought cause the death of Leslyan Williams." The court also charged that to convict appellant of malice murder, the State had to prove beyond a reasonable doubt that appellant unlawfully and with malice caused the death of another human being. The court also instructed the jury that malice constituted "the unlawful intention to kill without justification, excuse or mitigation" and that the jury could find appellant guilty only if, based on the evidence and the court's charge, it found beyond a reasonable doubt that he committed the offenses charged in the indictment.

Because the charge as a whole instructed the jury that the State had to prove beyond a reasonable doubt that Leslyan Williams was dead and that appellant had caused that death by committing a criminal act, the charge adequately instructed the jury on the concepts of corpus delicti and causation. See Richardson, 276 Ga. at 551, 580 S.E.2d 224 (holding that where a charge as a whole instructs the jury that "the State had the burden of proving beyond a reasonable doubt that the victim named in the indictment was dead and that appellant had caused that death by committing a criminal act," the charge adequately instructed the jury on the concept of corpus delicti); Pennie v. State, 292 Ga. 249, 252, 736 S.E.2d 433 (2013) (holding that trial counsel was not ineffective in failing to request a charge on proximate causation, because, in part, the charge as a whole was "sufficient to inform the jury that, in order to convict Appellant of the felony murder of [the victim], it had to determine that he caused" the victim's death). In light of

these charges, the strength of the evidence that appellant caused the victim's death by a criminal act, the fact that appellant's defense was that he was not present when the victim was killed, and the fact that there was no evidence of any unforeseen intervening cause after appellant's criminal conduct, see State v. Jackson, 287 Ga. 646, 654, 697 S.E.2d 757 (2010) (explaining that [p]roximate causation imposes liability for the reasonably foreseeable results of criminal . conduct if there is no sufficient, independent, and unforeseen intervening cause"), we conclude that there is no reasonable probability that the outcome of the trial would have differed if trial counsel had not withdrawn the request to charge on the corpus delicti and causation.

Judgment affirmed.

THOMPSON, Chief Justice.

All the Justices concur, except HUNSTEIN, J., who concurs in judgment only as to Division 2.

Appendix F

United States Constitutional Amendments

Amendment V

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation. [1791]

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense [1791]

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws [1868]

Appendix G

Official Code Of Georgia Statutes

O.C.G.A. § 9-14-48 (d) permits a petitioner to overcome a procedural bar if she can show cause and prejudice or a miscarriage of justice. The language of the miscarriage of justice provision is of particular significance. It provides that in all case habeas corpus relief shall be granted to avoid a miscarriage of justice. The phrase "in all cases" in that code section conveys a strong statement of public policy that the writ of habeas corpus shall always be available to correct miscarriages of justice. Further, even the filing of one habeas petition does not preclude a defendant from filing a second petition; it merely subjects her to a procedural bar as to certain issues. Allen v Thomas 265 Ga 518

However Georgias customary procedural default rule which holds that claims not raised at trial and enumerated at appeal are waived does not apply to a claim that a criminal conviction or sencence was void on jurisdictional or other grounds. Such claims may be decided on habeas even where the issue was not raised in the trial court and is not enumerated as error on appeal.

A claim that criminal conviction was void may be considered in a traditionally recognized proceeding to challenge a criminal conviction but habeas corpus is undoubtedly such a proceeding; indeed a claim that sentencing court lacked jurisdiction is one of the traditional grounds for the writ of habeas corpus rooted in basic principals of due process. The habeas court must look through the lable that a convicted defendant puts on a claim to determine if it is in substance a claim that conviction or sentence was void and not merely voidable and thus waivable. Tolbert v Toole 296 Ga 357 (2014)

O.C.GA. 16-5-1(a) a person commits the offense of Malice murder when he unlawfully, with malice afore thought, causes the death of another human being.

Appendix G

O.C.G.A. § 17-9-4 The judgment of a court having no jurisdiction of the person or subject matter or void for any other cause is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it

Miscarriage of justice; Blacks Law Dictionary defines miscarriage of justice as: A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted dispite a lack of evidence on an essential element of the crime.