

Appendix - A



SUPREME COURT OF GEORGIA
Case No. S18H0178

November 04, 2019

The Honorable Supreme Court met pursuant to
adjournment.

The following order was passed.

ANTHONY TAWON WILLIAMS v. HILTON HALL, WARDEN.

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

All the Justices concur.

Trial Court Case No. 2016-S02-137

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

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

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

Theresa A. Barnes

, Clerk

Appendix - B

¹ Citations to the sequentially-numbered transcript of the November 16, 2016, evidentiary hearing are designated “HT.” followed by the page number(s).

while in the commission of cruelty to children in the second degree (count 3), felony murder while in the commission of contributing to the deprivation of a minor (count 4), cruelty to children in the second degree (count 5), contributing to the deprivation of a minor (count 6), possession of cocaine with intent to distribute (count 7), and possession of cocaine (count 8). *Williams v. State*, 298 Ga. 208 n.1, 779 S.E.2d 304 (2015).

At a joint jury trial from May 12-22, 2009, at which Petitioner was represented by Kelly Dial, the jury found Petitioner and his co-defendant guilty of all charges. *Id.* The trial court originally sentenced Petitioner to four concurrent life sentences for each count of felony murder and merged the remaining counts for sentencing purposes. *Id.* However, in two subsequent orders, the trial court ultimately vacated the three life sentences imposed for counts 2, 3, and 4, leaving only the life sentence imposed for felony murder while in the commission of possession of cocaine with intent to distribute. *Id.*

On direct appeal, through new counsel, Nicholas Dumich, Petitioner raised the following enumerations of error:

- (1) the trial court erred in admitting similar transaction evidence because the State's notice of intent to present such evidence was untimely and because the similar transaction evidence was introduced solely for the improper purpose of placing Petitioner's character at issue;

- (2) the evidence was insufficient to support a conviction for felony murder while in the commission of possession of cocaine with intent to distribute;
- (3) the felony murder guilty verdict predicated upon contributing to the deprivation of a minor should be vacated;
- (4) the trial court committed plain error in failing to instruct the jury properly on the indictment's charges of possession of cocaine and possession with intent to distribute cocaine;
- (5) the trial court committed plain error in its limiting instruction to the jury on similar transaction evidence;
- (6) the guilty verdicts represented mutually exclusive verdicts and the trial court's failure to properly instruct the jury amounted to plain error;
- (7) the trial court committed plain error in failing to instruct the jury on proximate cause;
- (8) the trial court erred in denying Petitioner's motion for a separate trial from his co-defendant; and
- (9) ineffective assistance of trial counsel for (a) failing to request a jury charge on involuntary manslaughter and (b) not objecting to an untimely similar transaction notice.

(HT. 85-134).

On November 2, 2015, the Georgia Supreme Court affirmed Petitioner's convictions and sentences. *Williams v. State*.

Petitioner originally filed this pro se habeas corpus petition on February 11, 2016, and later amended his claims to include five total grounds. Petitioner's former appellate attorney, Nicholas Dumich, and his former trial attorney, Kelly Dial, both testified at the November 16, 2016, habeas corpus evidentiary hearing.

The Court will address similar grounds together.

GROUND 1, 2, AND 4

In ground 1, Petitioner alleges that he received ineffective assistance of appellate counsel, in that appellate counsel failed to challenge trial counsel's failure to object when the State misapplied O.C.G.A. § 16-12-1(b)(3) to Petitioner's case by using felony deprivation of a minor as a felony murder predicate, which resulted in a fundamentally unfair trial in violation of Petitioner's due process rights under the Fourteenth Amendment and the Sixth Amendment to be informed of the nature and cause of the accusation. Petitioner also alleges that appellate counsel was ineffective for not filing a motion for reconsideration with the Georgia Supreme Court after his conviction and sentence were affirmed.

In ground 2, Petitioner alleges that he received ineffective assistance of appellate counsel, in that appellate counsel failed to challenge the life sentence

imposed on count 4 of the indictment under the new rule of lenity at the motion for new trial and on direct appeal.

In ground 4, Petitioner alleges that he received ineffective assistance of appellate counsel, in that appellate counsel failed in not raising a meritorious issue on appeal.

Findings of Fact

Petitioner was represented by Nicholas Dumich (hereinafter “appellate counsel”) at the motion for new trial stage and on direct appeal. (HT. 39, 41-42). Appellate counsel, an experienced appellate attorney, had handled over a hundred appeals prior to representing Petitioner. (HT. 40).

Appellate counsel was originally retained to represent Petitioner but was subsequently appointed to continue representing Petitioner after Petitioner became eligible for appointed counsel. (HT. 41). Appellate counsel spent approximately 140 hours working on Petitioner’s motion for new trial and direct appeal. (HT. 42). Appellate counsel reviewed the trial transcript, spoke with trial counsel, communicated extensively with Petitioner, followed up and worked with Petitioner on issues that concerned Petitioner, handled the motion for new trial hearing, and ultimately raised what he believed to be the best issues on Petitioner’s behalf on direct appeal to the Georgia Supreme Court. (HT. 41-47, 53, 54, 65, 66).

Appellate counsel raised the issue on direct appeal that the contributing to the deprivation of a minor charge should not have been a predicate offense for felony murder. (HT. 47-48, 50). However, the Georgia Supreme Court found that this issue was moot because Petitioner's original sentence for that offense was vacated by the trial court. (HT. 48-49).

Appellate counsel thought about filing a motion for reconsideration with the Georgia Supreme Court, and even consulted with others at the public defender's office, before deciding that such a motion would have been unsuccessful. (HT. 49).

Conclusions of Law

Strickland v. Washington, 466 U.S. 684, 687 (1984), sets forth a two-pronged test, both of which must be proven by the petitioner in order to prevail on a claim of ineffective assistance.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreasonable.

Strickland, 466 U.S. at 687.

As to the first prong, this Court's scrutiny of an attorney's performance must be "highly deferential." *Strickland*, 466 U.S. at 689.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id.

An appellate attorney has no constitutional duty to raise every non-frivolous issue requested by a client. *Jones v. Barnes*, 463 U.S. 745 (1983). A petitioner can still raise a *Strickland* claim based on an appellate attorney's failure to raise a particular claim "but it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). When the claim is that appellate counsel was ineffective for not raising a particular issue on appeal, a petitioner must overcome the "strong presumption" that appellate counsel's actions fell within the range of reasonable professional conduct and affirmatively show that appellate counsel's decision not to raise the issue "was an unreasonable one which only an incompetent attorney would have made." *Griffin v. Terry*, 291 Ga. 326, 337, 729 S.E.2d 334 (2012) (citations omitted).

As to *Strickland*'s prejudice prong:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. Where the claim is that appellate counsel was ineffective for not raising a particular issue on appeal, a petitioner must show there is a reasonable probability that the outcome of his appeal would have been different had the issue been raised. *Nelson v. Hall*, 275 Ga. 792, 573 S.E.2d 42 (2002); *see also Griffin v. Terry*, 291 Ga. 326, 328-29, 729 S.E.2d 334 (2012).

Petitioner has failed to establish that appellate counsel's performance was deficient under *Strickland* as to grounds 1, 2, and 4. This Court credits appellate counsel's testimony that, after reviewing the trial transcript, speaking with trial counsel, and communicating extensively with Petitioner, appellate counsel raised what he believed to be the best issues possible on Petitioner's behalf on direct appeal.

More specifically as to ground 1, appellate counsel argued on appeal that contributing to the deprivation of a minor was an improper predicate offense for felony murder; however, the Georgia Supreme Court found this argument to be moot, as Petitioner's original conviction and sentence for this offense had already been vacated by the trial court. *Williams*, 298 Ga. at 214 (3). Petitioner has not shown how appellate counsel could have presented this issue differently or more convincingly at the time. Neither trial counsel nor appellate counsel had the benefit of *Williams v. State*, 299 Ga. 632, 791 S.E.2d 55 (2016), which held that contributing to the deprivation of a minor could not be used a predicate offense for

felony murder, at their disposal, as this case had not been decided at the time of Petitioner's trial and appeal. This case held that because the felony deprivation statute, O.C.G.A. § 16-12-1(d.1)(1) and (e), specifically criminalizes the death of a minor resulting from an accused's contribution to the deprivation or delinquency of a child, whereas felony murder criminalizes general conduct resulting in the death of another, deprivation of a minor cannot serve as a predicate offense for felony murder. The reasonableness of counsel's conduct is examined from counsel's perspective at the time, and there is no general duty on the part of defense counsel to anticipate changes in the law. *Perera v. State*, 295 Ga. 880, 885-86, 763 S.E.2d 687 (2014). Thus, appellate counsel's performance was not deficient in this regard.

Additionally, after Petitioner's convictions were affirmed, appellate counsel consulted with others at the public defender's office, but ultimately decided not to file a motion for reconsideration, as he believed it would be denied. Petitioner has not shown that appellate counsel performed unreasonably in deciding not to pursue a motion for reconsideration.

Petitioner has also failed to show that appellate counsel's performance was deficient for not raising a rule of lenity argument. "When the statutory law establishes different punishments for the same offense, courts sometimes apply the rule of lenity to resolve the statutory ambiguity." *Rollf v. Carter*, 298 Ga. 557, 784 S.E.2d 341 (2016). Any such statutory ambiguity should be resolved in a

defendant's favor. *Id.* When uncertainty arises as to which penal statute is applicable, a defendant is entitled to have the lesser of the two penalties administered. *Dixon v. State*, 278 Ga. 4, 7(1)(d), 596 S.E.2d 147 (2004) (citing *Brown v. State*, 276 Ga. 606, 608-09, 581 S.E.2d 35 (2003)). Petitioner has not shown how the rule of lenity is applicable to his case, considering that his felony murder convictions with the underlying predicate offenses of possession of cocaine, cruelty to children second degree, and contributing to the deprivation of a minor were vacated by the trial court. Petitioner ultimately received one life sentence for felony murder while in the commission of possession of cocaine with intent to distribute, and he has not shown what lesser criminal statute would have invoked the rule of lenity in his case.

Petitioner has also not established the requisite prejudice as to grounds 1, 2, and 4. Appellate counsel challenged the use of contributing to the deprivation of a minor as a predicate offense for felony murder, based on the applicable case law available to him at the time of the direct appeal. However, nothing appellate counsel could have argued would have changed the fact that Petitioner's conviction and sentence for felony murder while in the commission of deprivation of a minor had already been vacated by the trial court, which rendered any argument challenging that specific charge moot. *Williams*, 298 Ga. at 214 (3). Additionally, Petitioner has not shown that if a rule of lenity argument had been raised on appeal,

a reasonable probability exists that the outcome of the appeal would have been different. Finally, Petitioner has not shown that a motion for reconsideration would have been meritorious, as Petitioner has not shown any new evidence or law that appellate counsel should have raised.

In conclusion, Petitioner has not satisfied either prong of the *Strickland* Sixth Amendment test as to grounds 1, 2, and 4. Thus, grounds 1, 2, and 4 lack merit.

GROUND 3

In ground 3, Petitioner alleges that he received ineffective assistance of trial counsel, in that trial counsel failed to object when the State misapplied O.C.G.A. § 16-12-1(b)(3) to Petitioner's case by using felony deprivation of a minor as a felony murder predicate, which resulted in a fundamentally unfair trial in violation of Petitioner's due process rights under the Fourteenth Amendment and the Sixth Amendment right to be informed of the nature and cause of the accusation.

Findings of Fact and Conclusions of Law

Ground 3 is procedurally defaulted under O.C.G.A. § 9-14-48(d), as Petitioner did not timely raise this ground at the trial court level under the relevant procedural rule and on direct appeal. *Chatman v. Mancill*, 278 Ga. 488, 489, 604 S.E.2d 154 (2004); *Gaither v. Gibby*, 267 Ga. 96, 97, 475 S.E.2d 603 (1996); *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985).

O.C.G.A. § 9-14-48(d) of Georgia's habeas corpus statute provides:

The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted.

Cause to excuse a default under O.C.G.A. § 9-14-48(d) may be constitutional ineffective counsel under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). *Turpin v. Todd*, 268 Ga. 820, 826, 493 S.E.2d 900 (1997). Actual prejudice can be shown by satisfying either the prejudice standard of *Strickland* or the actual prejudice test of *United States v. Frady*, 456 U.S. 152 (1982). *Todd*, 268 Ga. at 829. *Frady* requires that a petitioner show not merely that errors at trial created a possibility of prejudice, but that the errors “worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *Frady*, 456 U.S. at 170.

Here, Petitioner has failed to show cause and actual prejudice to overcome the default of ground 3. Particularly, Petitioner has not shown actual prejudice to overcome the default of ground 3. Petitioner’s original conviction and sentence for felony murder while in the commission of contributing to the deprivation of a minor was vacated by the trial court. Petitioner is currently serving a singular life sentence for his conviction of felony murder while in the commission of possession of cocaine with intent to distribute. Any argument challenging his other

guilty verdicts, which have been vacated, is moot. *See Williams*, 298 Ga. at 214 (3); *Threatt v. State*, 293 Ga. 549 n.2, 748 S.E.2d 400 (2013); *Nicely v. State*, 291 Ga. 788, 795(3), 733 S.E.2d 715 (2012); *Powell v. State*, 291 Ga. 743, 749(3), 733 S.E.2d 294 (2012); *Mills v. State*, 287 Ga. 828, 830(2), 700 S.E.2d 544 (2010).

Accordingly, ground 3 is defaulted and provides no basis for relief.

GROUND 5

In ground 5, Petitioner alleges there has been a new substantive change in the law that prohibits the State from using O.C.G.A. § 16-12-1(b)(3), deprivation of minor, as a predicate offense for felony murder, and that such a new law should be applied retroactively to Petitioner's case.

Findings of Fact and Conclusions of Law

First, this ground, as pled, fails to state a basis for habeas corpus relief under O.C.G.A. § 9-14-42(a), as it fails to allege that in the proceedings which resulted in his conviction there was a substantial denial of Petitioner's constitutional rights.

Second, this Court need not reach the issue of whether or not the change in the law reflected in *Williams v. State*, 299 Ga. 632, 791 S.E.2d 55 (2016), is substantive and should be applied retroactively. Regardless of whether or not the change in *Williams* should be applied retroactively, Petitioner has not shown that he is entitled to habeas corpus relief. Again, Petitioner's original conviction and sentence for felony murder while in the commission of contributing to the

deprivation of a minor was vacated by the trial court. Petitioner is only serving a life sentence for felony murder while in the commission of possession of cocaine with intent to distribute. Because Petitioner does not stand convicted of felony murder while in the commission of contributing to the deprivation of a minor, any challenge to such a crime is moot. *See Williams*, 298 Ga. at 214 (3); *Threatt*, 293 Ga. at 549 n.2; *Nicely*, 291 Ga. at 795(3); *Powell*, 291 Ga. at 749(3); *Mills*, 287 Ga. at 830(2).

Accordingly, ground 5 is moot and provides no basis for habeas corpus relief.

CONCLUSION

Wherefore, the petition for a writ of habeas corpus is DENIED.

If Petitioner desires to appeal this order, Petitioner must file an application for a certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within thirty (30) days from the date of the filing of this order. Petitioner must also file a notice of appeal with the Clerk of the Superior Court of Coffee County within the same thirty (30) day period.

The Clerk of the Superior Court is hereby DIRECTED to mail a copy of this order to Petitioner, Respondents, and the Office of the Georgia Attorney General.

CLARENCE D. BLOUNT, Senior Judge
Sitting by Designation

Prepared by:



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*Supreme Court
State of Georgia*

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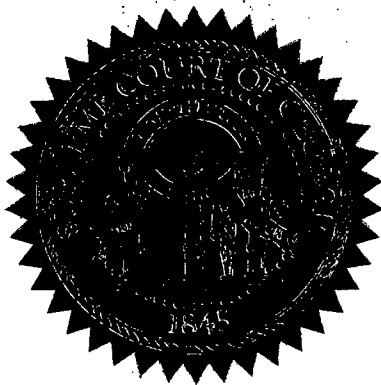
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**SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA**

November 27, 2019

I, Therese "Tee" Barnes, Clerk, of the Supreme Court of Georgia, do hereby certify that the foregoing order dated November 4, 2019, Motion to Stay Remittur filed November 13, 2019 and order dated November 14, 2019, hereto attached, is a true and correct copy, in the Supreme Court of Georgia Case No. S18H0178, **ANTHONY TAWON WILLIAMS v. HILTON HALL, WARDEN**, as appears from the records and files in this office.

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



Therese S Barnes, Clerk

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