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OPIN-1 Ntc of Issuance of Opinion

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14325

D.C. Docket No. 1:13-cv-01434-AT

SCOTT WINFIELD DAVIS,

Petitioner-Appellant,

versus

ERIC SELLERS, WARDEN,

Respondent-Appellee.

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

(October 10, 2019)

Before MARCUS and HULL, Circuit Judges, and WRIGHT,* District Judge.

WRIGHT, District Judge:

* Honorable Susan Webber Wright, United States District Judge for the Eastern District of Arkansas, sitting by designation.

Scott Winfield Davis ("Davis"), a Georgia prisoner serving a life sentence for malice murder, appeals the district court's denial of his petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. The district court granted a certificate of appealability on two issues: (1) whether Davis's due process claims are procedurally defaulted and, if not, whether the claims fail on the merits; and (2) whether the district court abused its discretion in denying Davis's request to employ the stay and abeyance procedure set forth in *Rhines v. Weber*, 544 U.S. 269, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005). After careful review and oral argument, we affirm.

I. BACKGROUND

We begin by reviewing the evidence presented at Davis's criminal trial and procedural history.

A. Murder, Arson, Alibi, and Initial Arrest

On Friday, December 6, 1996, a private detective gave Davis the home address of David Coffin, Jr., who was dating Davis's estranged wife, Megan.

After two years of marriage, Megan had filed for divorce and left the couple's Atlanta home. Davis, who desperately hoped for a reconciliation, hired the detective to follow Megan, and told an acquaintance that he would kill anyone who had a sexual relationship with his wife. With the address in hand, Davis told the detective that he planned to drive by Coffin's house that weekend.

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On Saturday, December 7, 1996, while Coffin was spending the night at Megan's apartment, his home was burglarized and vandalized, and a phone call was placed from his home phone to Davis's. Later that night, Davis left multiple, emotional messages on Megan's phone, begging her to answer and asking if she were sleeping with Coffin. Coffin returned to his house the next morning and discovered his television set destroyed and entertainment room in disarray. Missing from the residence were Coffin's Porsche automobile, Beretta handgun, two shotguns, caller identification box, and two watches.

On Monday, December 9, 1996, Davis called in sick to work. That evening, Davis exchanged vehicles with his neighbor, Greg Gatley, telling Gatley that he needed his Jeep Cherokee, which was white, to return a table and chairs borrowed for a Christmas party. Coffin also owned and drove, in addition to the Porsche, a white Jeep Cherokee. After Gatley and Davis exchanged cars, Gatley drove Davis's car to a nearby gym called Australian Body Works, and the next time he saw Davis was later that night, when Davis returned the Jeep.

On Tuesday, December 10, 1996, a morning 911 call took Dekalb County

Fire Department personnel to a road near Coffin's home, where Coffin's stolen Porsche sat unoccupied and on fire. That evening, Coffin's neighbor observed flames coming from Coffin's house and called 911. Firefighters later discovered Coffin's charred body in what remained of his incinerated home.

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The same evening, Davis made several calls to the police. Before the discovery of the house fire and Coffin's body, Davis reported that an intruder had entered his home and sprayed him with mace. Davis told the responding officer that his attacker put a gun to his head and warned him to "leave Megan alone" and that after a failed attempt to steal his car, the attacker fled on foot and jumped over his backyard fence. Davis called police a second time to report that a gas can, tools, and clothing were missing from his home after the alleged attack, and made a third emergency call a few hours after firefighters were dispatched to the fire at Coffin's house. With his last call, Davis reported that he had awakened to find flames on his back patio and a person in a ski mask with a handgun. Davis told the responding officers that he had fired a shotgun at the masked person, who had shot back and fled over the back fence, and that Davis had extinguished the fire with a garden hose.

After firefighters discovered Coffin's body, homicide detectives Rick Chambers and Marchal Walker went to the scene and learned about Davis's

emergency calls and his connection to Megan and Coffin. The detectives went to Davis's residence, a short distance away, where Davis repeated the information he had reported earlier. Given similarities between the events at Davis's house and Coffin's, and the assailant's reference to Megan, the detectives requested that

Davis provide a written statement, and he agreed. Davis voluntarily allowed officers at the scene to transport him to the homicide office to give his statement.

At the homicide office, Davis dictated a statement to Chambers, and Chambers asked him some questions. At first, Chambers viewed Davis as a victim, but as his story progressed, he became suspicious and provided Davis *Miranda* warnings. Davis waived his *Miranda* rights and continuing with the interview, said that he had learned that Coffin's house was on fire and that Coffin had been shot. At that time, law enforcement had no information about the cause of death, as Coffin's body had been severely burned. Only later would an autopsy reveal that Coffin died from a gunshot wound to the head. When asked how he had learned that Coffin had been shot, Davis said that he thought that Megan or her friend, Craig Foster, had told him during a phone conversation. Chambers left the interview room and called Megan and Foster, who both denied that they knew how Coffin died or that they had told Davis that Coffin had been shot. Chambers, assisted by Walker, continued the remainder of Davis's interview on audiotape.

Davis was free to go when the interview concluded, and Chambers and Walker drove him home. Before Chambers left Davis's residence, he scanned the back fence for evidence of a fleeing intruder but found nothing.

On Thursday, December 12, 1996, Davis told Gatley that they needed to "get their stories straight," and asked Gatley to tell police that he had seen him at

the Australian Body Works Gym on December 9, the night the two had exchanged vehicles. Gatley told Davis that he was just going to tell the truth.

On Friday, December 13, 1996, officers arrested Davis on charges of Coffin's murder, the burglary and arson of Coffin's home, and the theft of Coffin's Porsche. Davis was eventually released, and the Fulton County District Attorney dismissed the charges in mid-1998, but Davis remained a suspect.

B. Indictment and Pretrial Motion to Dismiss Based on Lost and Destroyed Evidence

In November 2005, a Fulton County grand jury charged Davis with felony and malice murder, alleging that between December 9 and 10, 1996, he shot Coffin and set his body on fire. Davis urged the trial court that the State's loss or destruction of evidence during the nine-year period between his initial arrest and eventual indictment violated his right to due process. Before trial, he filed a motion to dismiss the indictment based on the loss or destruction of evidence and reported that the State's attorney had notified defense counsel that much of the

physical evidence in the case had been lost or destroyed. In his written motion, Davis alleged that the State lost or destroyed the following evidence:

- a Beretta handgun (the alleged murder weapon) recovered from the murder scene, near Coffin's body
- a bullet and a bullet casing removed from Coffin's body
- a hat tassel found in the Jeep Cherokee that Davis borrowed from Gatley
- a gasoline can recovered from Coffin's torched Porsche
- remnants of a 1996 Atlanta Olympics plastic bag recovered from Coffin's torched Porsche

- a shotgun recovered from Coffin's torched Porsche
- a knife recovered from Coffin's torched Porsche
- a flashlight recovered from Coffin's torched Porsche
- a key recovered from Coffin's torched Porsche
- a caller identification unit recovered from Coffin's torched Porsche
- a second gasoline can found December 26, 1996 on a road close to Coffin's home

Davis argued that the foregoing items were potentially exculpatory and that law enforcement personnel had acted in bad faith by destroying or losing them. After a hearing, the trial court denied the motion, finding that the missing evidence was material but that without a showing of bad faith on the part of the State, the loss or destruction of the evidence did not amount to a denial of due process.

C. Trial, Conviction, and Posttrial Motion for a New Trial Based on Lost and Destroyed Evidence

At trial, over defense counsel's continued objection, witnesses referred to multiple articles of lost or destroyed evidence. For example, Megan identified a photograph of the gas can surrounded by a plastic bag remnant that firefighters recovered from Coffin's Porsche. She testified that the gas can, which had the

word "gasoline" printed on the diagonal, looked like one that had been present in the home she had shared with Davis. Megan also testified that the plastic bag remnant looked like a drawstring bag with a sports insignia that Davis had brought home after the 1996 Atlanta Olympics, but she acknowledged that she did not know whether the gas can and bag were the same items that she had observed in

her marital home. Also notable was testimony that the Beretta handgun that Coffin owned and had reported stolen was discovered under his head.

Several witnesses testified about forensic tests attempted or performed before physical evidence was lost or destroyed. A Georgia Bureau of Investigation ("GBI") firearms examiner testified that the bullet removed from Coffin and Beretta and shell casings from the crime scene were untestable due to fire and water damage. Although the examiner could not verify that the bullet had been fired from the Beretta, she said that the projectile's features were consistent with being fired from that type of gun.

A retired GBI fingerprint examiner, qualified as a latent fingerprint expert, testified that extreme heat from fire and water damage would have destroyed any fingerprints on the Beretta, magazine, bullets and casings. He recalled that he had received fingerprint cards containing latent prints from the exterior of the Porsche and that he had concluded, after an analysis, that these prints did not match those

taken from Davis and Megan. Testimony established that the fingerprint cards were missing, without explanation. The fingerprint expert acknowledged that he did not submit the prints to the GBI's Automated Fingerprint Identification System ("AFIS"), which compares digitized prints against a national database containing prints of millions of convicted criminals. He also confirmed that if the fingerprint cards were still available, they could be matched against other prints individually,

and if the cards held prints of sufficient quality, they could be digitized and submitted to the AFIS.

The evidence established that six law enforcement agencies participated in the underlying arson and murder investigations: The Atlanta Police and Fire Departments; the DeKalb County Police and Fire Departments; the GBI; and the Fulton County District Attorney's Office. Testimony confirmed that various items of missing evidence had been transferred between agencies without regard to standard operating procedures. Chambers testified that the Beretta, bullet, and casings had been shipped from the GBI to the Atlanta Fire Department without proper documentation, and the items were missing without explanation. Chambers recalled that in 1996, he asked the DeKalb police and fire departments to preserve evidence recovered from the Porsche, but in 2005, he learned that the items had been destroyed. Chambers testified that when he learned that evidence was

missing in 2005, he searched agency property rooms but failed to recover the missing evidence.

On December 4, 2006, a jury found Davis guilty of malice murder, and the trial court imposed a life sentence.[1] Davis moved for a new trial, arguing that the court erred in admitting evidence related to lost or destroyed evidence. Davis cited

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an expanded list of lost or destroyed evidence, including the lost fingerprint cards that held latent prints lifted from the exterior of the burned Porsche, and testimony at a post-trial hearing revealed that the State still had possession of the cards shortly before Davis's 2005 indictment. The trial court denied Davis's post-trial motion, finding that the lost evidence was only potentially useful and that there was no bad faith on the part of the State.

D. Direct Appeal

Among Davis's claims on direct appeal, he argued that that the trial court committed reversible error in denying his motion to dismiss the indictment based on the State's loss or destruction of evidence. The Georgia Supreme Court affirmed the trial court's judgment, *Davis v. State*, 385 Ga. 343, 676 S.E.2d 215

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[1] In addition to malice murder, the jury found Davis guilty on two counts of felony murder that were vacated by operation of law. *Davis v. State*, 285 Ga. 343, (citing *Malcom v. State*, 263 Ga. 369, 372(4), 434 S.E.2d 479 (1993)).

(2009), and the United States Supreme Court denied certiorari. *Davis v. Georgia*, 558 U.S. 879, 130 S. Ct. 287, 175 L. Ed. 2d 135 (2009).

E. State Habeas Proceedings

Davis filed a state habeas petition, asserting twelve ineffective assistance of counsel claims. The petition also included two stand-alone due process claims: that the State's firearms expert provided false testimony and that trial court erred in admitting the testimony of a private investigator.

Among Davis's ineffective assistance claims, he faulted his attorneys for failing to obtain an expert witness to show that the tape of his police interview,

which was admitted at trial, had been altered and that there was a second recording device in operation during the interview and a second tape. Davis alleged that "the tape was stopped once and that he was threatened off the tape with the death penalty, among other things."[2] He charged that counsel's failure to investigate the technical integrity of the interview tape resulted in an unfair trial, where "Detective Chambers perjured himself . . . when he testified that the tape was continuous."[3] Davis argued that if counsel had hired an expert to show that the tape had been

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[2] ECF No. 1-3, at 9

[3] ECF No. 1-3, at 12 (Davis's state habeas petition, Ground 12). [4]*Id.*

altered, he could have impeached Chambers and created a complete lack of confidence in the trial.[4]

The state habeas court held an evidentiary hearing, and Davis's attorney called Walker as a witness to authenticate a transcript of Davis's police interview. Walker testified that the transcript contained the entirety of the interview, the court admitted the transcript, and Walker was not questioned further. Chambers also testified and recalled that Davis's interview was taped using a "basic" cassette recorder, which, to his knowledge, was stopped once by Walker to turn the tape over. Chambers stated that he was unaware of any other stops, but he said that it was possible that the recording was stopped for another reason, such as getting Davis some water. Chambers denied that Davis was threatened with the death

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penalty, that the tape had been altered, or that there was a second tape recorder in use during the interview. When asked whether the tape contained previous recordings, Chambers responded, "It was Detective Walker's tape, and I believe he had another interview on there we taped over."[4]

Davis's state habeas counsel retained a tape expert named James Griffin, who analyzed the audiotape played for the jury at Davis's criminal trial. In

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[4] ECF No. 1-20, at 70.

testimony before the state habeas court, Griffin opined that the tape was neither authentic nor continuous. Specifically, he testified that the recording contained voice-activated pauses, which would occur automatically when the tape recorder detected that surrounding sound fell below a certain volume; that Davis's interview was taped over previous recordings; and that the tape was manually stopped two times during the interview, once on each side, not including a stop when the tape ran out at the end of the first side. Griffin stated that prior to one manual stop, Davis was asked whether he wanted water, and after the recording resumed, a someone said, "turn the tape over," followed by a fumbling or rummaging sound. Griffin opined that the directive, "turn the tape over," and fumbling noises indicated the presence of a second tape recorder.

In a written order denying habeas relief, the state court made findings of fact and conclusions of law related to Davis's allegations about audiotape tampering

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and the existence of a second recording *only* in connection to his ineffective assistance of counsel claim. The state court denied the claim, finding that Davis failed to show either deficient performance or prejudice as required under *Strickland v. Washington,* 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). On March 18, 2013, the Georgia Supreme Court denied Davis's application for a certificate of probable cause to appeal the denial of habeas corpus relief.

F. Federal Habeas Proceedings

Next, Davis filed a petition in the United States District Court for the Northern District of Georgia seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Davis pleaded eleven grounds for relief, each framed as a challenge to factual and legal findings by the state habeas court.[5] Relevant to this appeal, Davis's petition challenged nonexistent determinations by the state court regarding purported independent due process claims related to missing or destroyed evidence.

Focusing exclusively on the state habeas proceedings, the district court found that any claims based on the loss or destruction of evidence, untethered from ineffective assistance of counsel claims, were procedurally defaulted. The district court found that Davis's state habeas petition included only two independent due process claims that centered on testimony from the State's firearms expert and

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[5] Respondent reports incorrectly that Davis's § 2254 petition raised the same claims asserted in his state habeas petition and that he filed an attachment that seemed to challenge various factual and legal determinations by the state habeas court. Paragraph 12(a)(4) of Davis's § 2254 petition form required that he list all grounds raised in post-conviction petitions filed in state court, and Davis merely complied with that instruction. *See* ECF 1, at 2, 10-11. Additionally, Davis's attachment challenging the state habeas court's determinations refers to paragraph 14 of the petition form, which is reserved for the petitioner's grounds for habeas relief under § 2254.

Davis's private investigator, not the state's loss or destruction of evidence. On the other hand, the district court noted that the state habeas record contained "frequent conflation" of Davis's ineffective assistance of counsel claims and what were, conceivably, independent due process arguments. Accordingly, the district court also addressed the merits of an independent due process claim based on lost or destroyed evidence. While observing that "the state's handling of the evidence in this case is certainly troubling," the district court ultimately determined that the lost evidence was not apparently exculpatory, and even if viewed as potentially useful, Davis failed to demonstrate bad faith.

The district court entered judgment denying Davis's § 2254 petition, and commenting that the pervasive loss of evidence in Davis's case caused it "to pause repeatedly," the district court granted a certificate of appealability as to whether Davis's independent due process claims were procedurally defaulted, and, if not, whether the claims fail on the merits.

G. Notices of New Evidence, Motion for Reconsideration, Expansion of the Certificate of Appealability

In denying habeas relief, the district court addressed "notices of new evidence" that Davis filed after submission of the magistrate's final report and recommendation. Davis reported that his attorney had received a taped conversation between then-retired detective Marchal Walker and criminal justice student/amateur sleuth Jennifer Bland ("Bland"). Davis said that Walker admitted

to Bland that there were two audiotapes of his police interview and that Walker provided both tapes, along with transcripts, to an assistant district attorney named Joe Burford. Davis argued: "This establishes not only that . . . Chambers was untruthful when he repeatedly testified that there was one tape, but that the prosecutors knew that this was a lie but still allowed Chambers to testify that there was only one tape in violation of their obligations under [*Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963) and *Giglio v. United States,* 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972)]."[6]

Davis requested that the district court either grant an evidentiary hearing or "remand" the case to state court based on newly discovered information. Without addressing the merits of Davis's request for "remand," the district court denied his request for a hearing, finding that he failed to meet the standard imposed under 28 U.S.C. § 2254(e)(2)(B).[7] Following the entry of judgment denying habeas relief, Davis moved for reconsideration, requesting that the district court either "remand"

[6] ECF No. 65, at 4.

[7] Having listened to recordings of the Bland/Walker conversations, the district court observed that Bland assumed the existence of a second tape and posed leading questions. The district court also noted the lack of any information regarding the content of a second tape or reasons

the case back to the state court for a consideration of new evidence of a second tape or amend the certificate of appealability to include the question of whether Davis is entitled to "a stay and remand." The district court granted Davis's motion to the extent that it amended the certificate of appealability, finding that "reasonable jurists could disagree whether or not the Court should stay the case and remand it the state court to examine the 'second tape' issue".[9]

II. STANDARD OF REVIEW

When reviewing a district court's denial of a habeas petition, we review questions of law and mixed questions of law and fact *de novo,* and findings of fact for clear error. *Grossman v. McDonough*, 466 F.3d 1325, 1335 (11th Cir. 2006)(citing *Maharaj v. Sec'y for Dep't of Corr.,* 432 F.3d 1292, 1308 (11th Cir.2005), *cert. denied,* 549 U.S. 819, 127 S. Ct. 348, 166 L.Ed.2d 33 (2006)). The question of whether federal habeas claims have been exhausted presents a mixed question of law and fact to be reviewed *de novo. Kelley v. Sec'y for Dep't of Corr.,*

377 F.3d 1317, 1345 (11th Cir. 2004)(citing *Lusk v. Singletary*, 112 F.3d 1103, 1105 (11th Cir. 1997)).

why Davis failed to question Walker about a second tape during the state habeas hearing. [9]ECF 89, at 2.

When reviewing a claim adjudicated on the merits in state court, our review under 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), is limited. We may grant a writ of habeas corpus on such a claim only where the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 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).

A state court decision is "contrary to" clearly established federal law if the state court either "arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or "decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495, 1523 (2000). A state court decision is an "unreasonable application" of Supreme Court precedent if it "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the [petitioner's] case." *Id.* A federal habeas court may not grant relief "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal

law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411, 120 S. Ct. at 1522. "Pursuant to AEDPA, we may only grant relief where the state court's ruling contained an error so clear that fairminded people could not disagree about it." *Krawczuk v. Sec'y, Fla. Dep't of Corr.*, 873 F.3d 1273, 1293 (11th Cir. 2017)(citing *Wright v. Sec'y, Fla. Dep't of Corr.*, 761 F.3d 1256, 1277 (11th Cir. 2014)).

III. DUE PROCESS CLAIMS BASED ON LOST OR DESTROYED EVIDENCE A. Exhaustion

Regardless of whether Davis presented an independent due process claims based on lost or destroyed evidence in the state habeas proceedings, we find that he clearly exhausted the claims with his motion to dismiss the indictment and motion for a new trial and related claim on direct appeal. As Respondent now acknowledges, Davis's due process claims based on missing evidence "may now be raised using somewhat different language and arguments, [but] they are still the same due process claims that trial and appellate counsel thoroughly addressed and litigated at the trial court level and on direct appeal."[8] Davis was not required, for

[8] Resp.'s Br. at 14-15. Respondent's concession extends only as far as the specific items listed in Davis's pre-trial motion to dismiss the indictment: a Beretta handgun, a bullet and bullet casing, a hat tassel, two gas cans, a plastic bag, a shotgun, a knife, a flashlight, and a telephone caller ID unit. *See* Resp.'s Br. at 14. Respondent argues that we should defer to the Georgia Supreme Court's finding that Davis waived any challenge to the fingerprint card and other evidence not specifically listed in his written motion to dismiss the indictment.

exhaustion purposes, to raise the same claims for duplicate review in a state habeas petition. *Mauk v. Lanier*, 484 F.3d 1352, 1357 (11th Cir. 2007)(citing *Castille v. Peoples,* 489 U.S. 346, 349, 109 S. Ct. 1056, 1059 (1989)("The Supreme Court has recognized, however, that a claim can be exhausted even when there exists a possibility of further state court review, so long as the claim has been 'fairly presented' to the state courts.").

Davis has, however, abandoned any additional independent due process claims, including those that he unquestionably pursued in the state habeas proceedings, as he failed to address them plainly and prominently in his appeal briefs. *See Brown v. United States*, 720 F.3d 1316, 1332 (11th Cir. 2013)(citing *United States v. Jernigan,* 341 F.3d 1273, 1283 n. 8 (11th Cir. 2003)("Merely making passing references to a claim under different topical headings is insufficient. Instead, the party must clearly and unambiguously demarcate the specific claim and devote a discrete section of his argument to it . . . so the court may properly consider it.").

B. The Decision of the Georgia Supreme Court Passes Review Under 28 U.S.C. § 2254(d).

Although the district court erred in finding Davis's due process claims based on lost or destroyed evidence procedurally defaulted, we affirm the denial of

habeas relief because we conclude that the Georgia Supreme Court's denial of the claims on direct appeal is entitled to deference under 28 U.S.C. § 2254(d). *United*

States v. Chitwood, 676 F.3d 971, 975 (11th Cir. 2012)("[W]e may affirm for any reason supported by the record, even if not relied upon by the district court.").

A due process claim based on lost or destroyed evidence comes under "'what might loosely be called the area of constitutionally guaranteed access to evidence.'" *Arizona v. Youngblood,* 488 U.S. 51, 55, 109 S. Ct. 333, 102 L.Ed.2d 281 1988)(quotation omitted). In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment commands the State to disclose favorable evidence in its possession or control that is material to guilt of a criminal defendant. When the State suppresses or fails to disclose material exculpatory evidence, a due process violation results, and the question of bad faith is irrelevant. *Illinois v. Fisher,* 540 U.S. 544, 548, 124 S. Ct. 1200, 1202–1203, 157 L.Ed.2d 1060 (2004)(citing *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963); *United States v. Agurs,* 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976)). Relevant here, the State's duty to preserve evidence is limited to "evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413 (1984). "To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that

was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably

available means." *Id.* at 489, 104 S. Ct. 2528 (citation omitted). Additionally, "the failure to preserve . . . 'potentially useful evidence' does not violate due process 'unless a criminal defendant can show bad faith on the part of the police.'" *Illinois v. Fisher,* 540 U.S. 544, 547–48, 124 S. Ct. 1200, 157 L.Ed.2d 1060 (2004)(quoting *Arizona v. Youngblood,* 488 U.S. 51, 58, 109 S. Ct. 333, 102 L.Ed.2d 281 (1988)).

Our review is limited to the record that was before the Georgia Supreme Court, and it focuses on what the state court "knew and did" at the time it rendered its decision. *Cullen v. Pinholster*, 563 U.S. 170, 182, 131 S. Ct. 1388, 1399, 179 L. Ed. 2d 557 (2011). In his brief to the Georgia Supreme Court, Davis argued that that the trial court committed reversable error in denying his motion to dismiss based on the State's loss or destruction of evidence.[9] He enumerated the same lost or destroyed items listed in his written motion (a Berretta handgun, a bullet and casing, a hat tassel, two gas cans, a plastic bag, a shotgun, a knife, a flashlight, a

[9] Br. of Appellant, Davis v. State, No. S09A0395, 2008 WL 5644537 (Ga. Dec.11, 2008).

key, and a caller ID unit), and he included the expanded list of items cited in his motion for a new trial.

Davis generally argued that missing weapons, shell casings, projectiles and gas cans could have been examined for fingerprints and that tests could have shown whether the missing shell casing and projectile matched the alleged murder

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weapon. The bulk of Davis's argument focused on the fingerprint cards that held latent prints taken from the door of the Porsche. Davis maintained that the prints would identify the "actual" murderer, and he argued that the State acted in bad faith by failing to utilize the AFIS. Davis recounted testimony from the post-trial hearing on his motion for a new trial, which revealed that the fingerprint cards still existed in 2005, just prior to his indictment.

Davis also cited evidence showing that each of the six agencies involved in the underlying arson and fire investigations grossly mishandled the missing evidence in violation of standard operating procedures. He argued:

> The care exhibited by these agencies was little more than what would be expected from school children exchanging toys at a holiday gathering. No one was keeping track of what was being transferred: for example, one chain of custody document helpfully explains that "three bags of evidence" were being transferred to the DA's office. No one can identify what was in any of the bags. The location of the bags, to say nothing of the contents of the bags, remains a mystery.

Scott Winfield DAVIS, Appellant, v. State of Georgia, Appellee., 2008 WL 5644537 (Ga.), at 113.

In denying Davis's claim, the Georgia Supreme Court identified the correct legal standard as determined by the United States Supreme Court, repeating *Trombetta's* standard for constitutional materiality and *Youngblood's* bad-faith requirement. *See Davis v. State,* 285 Ga. at 349, 676 S.E.2d at 220(quoting *Milton v. State,* 232 Ga. App. 672, 678–679, 503 S.E.2d 566 (1998)). Regarding the items

that Davis listed in his pretrial motion to dismiss, the Georgia Supreme Court found as follows:

> In his motion to dismiss, Davis challenged the loss or destruction of a handgun, a bullet and its casing, a tassel from a hat, two gas cans, a plastic bag, a shotgun, a knife, a flashlight, a key and a telephone caller identification unit. Other than the tassel and one of the gas cans, all . . . items were found either in the victim's burned car or home and were generally not suitable for forensic testing because they had been damaged by fire and doused with water. Furthermore, any testing that was conducted on the items was preserved at trial by witness testimony. In any event, Davis has failed to show that any of the items were exculpatory. Moreover, there is no evidence that the State acted in bad faith.

Davis, 285 Ga. at 349, 676 S.E.2d 215, 220 (2009)(citing *Pickens v. State,* 225 Ga. App. 792, 799, 484 S.E.2d 731 (1997)).

As for the fingerprint card and other items that were not listed in Davis's pretrial motion to dismiss, the Georgia Supreme Court found that Davis failed to contest loss of the items and had "waived any such challenges" on direct appeal. Alternatively, the state court held that "even if the challenges were not waived,

they are without merit due to any showing that the State acted in bad faith." *Davis*, 285 Ga. at 349, 676 S.E.2d at 220.

We cannot say that the Georgia Supreme Court's resolution of Davis's claim was contrary to, or an unreasonable application of *Trombetta*, *Youngblood*,

or any other clearly established federal law, or that the state court's adjudication was based on an unreasonable determination of the facts.[10]

We find entirely reasonable the Georgia Supreme Court's conclusion that the Beretta, bullet and casings, hat tassel, gas cans, plastic bag, shotgun, knife, flashlight, key and telephone caller identification unit failed to meet the standard for constitutional materiality. Testimony from law enforcement and forensic examiners showed that that these items, save the hat tassel from Gatley's Jeep Cherokee and gas can found abandoned on a road, were rendered untestable by fire and water damage. Unsurprisingly, Davis failed to show that these items had an

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[10] We take the facts of this case as reported by the Georgia Supreme Court and from the record. Davis has not directly challenged these facts, but to the extent that he does so indirectly in making legal arguments, we find that he has not rebutted by clear and convincing evidence the presumption of correctness that attaches to the state court's determination of facts. 28 U.S.C. § 2254(e)(1)("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). 24

exculpatory value that was apparent before they were lost or destroyed, and he failed to show that the hat tassel or gas can had any exculpatory value. Davis now argues that access to the gas can recovered from Coffin's vehicle would have enabled him to "run serial numbers" and establish that it was dissimilar from the gas can that he had owned when married. He also contends that access to bullets and casings would have allowed him to track down where the ammunition was purchased and that never-recovered torn clothing, which he maintains was left by

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the intruder who fled his home over a fence, would have identified the person who attacked him. Whether considered individually or collectively, these items and the missing fingerprint cards were "potentially useful" at best.

We further find that the Georgia Supreme Court's ultimate conclusion as to bad faith passes review under 28 U.S.C. § 2254(d). *See Gill v. Mecusker*, 633 F.3d 1272, 1291 (11th Cir. 2011)(citing *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011)(("[T]he 'precise question' that must be answered under the AEDPA standard must focus on [the] state court's ultimate conclusion."). To be sure, the failure to follow standard operating procedures for the custody and preservation of evidence is relevant to the absence or presence of bad faith. *See Youngblood*, 488 U.S. at 65, 109 S. Ct. at 341, 102 L. Ed. 2d 281(noting that in *Trombetta,* "the importance of police compliance with *usual procedures* was manifest"). However, there is no evidence that departures from

protocol were coordinated or designed to deprive Davis of evidence expected to play a significant role in his defense. As the Georgia Supreme Court observed: "Even if we were to assume that the State's 'handling of the [items] (indicated) careless, shoddy and unprofessional investigatory procedures, (it did) not indicate that the police in bad faith attempted to deny [Davis] access to evidence that they knew would be exculpatory.'" *Davis v. State*, 285 Ga. 343, 349, 676 S.E.2d 215,

220 (2009)(quoting *Jackson v. State,* 258 Ga. App. 806, 810(3), 575 S.E.2d 713 (2002)).

In cases involving a failure to preserve evidence, a finding of bad faith is necessarily tied to the State's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. *Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337, 102 L. Ed. 2d 281("We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.,* those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant."). The Georgia Supreme Court was without evidence that officers knew or should have known that the lost or destroyed evidence was exculpatory, and as was the case in *Trombetta*, "[t]he record contain[ed] no

allegation of official animus towards [Davis] or of a conscious effort to suppress exculpatory evidence," *Trombetta,* 467 U.S. at 488, 104 S. Ct. at 2533, 81 L.Ed.2d 413.

C. The District Court Did Not Err in Denying Davis's Request for a Stay

We next address whether the district court erred in denying Davis's request to stay and hold in abeyance this federal habeas case to allow him to pursue any

relief available in state court regarding a "second tape" of his 1996 police interview.[11]

In *Rhines v. Weber*, 544 U.S. 269, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005), the Supreme Court recognized that when a federal habeas petition is "mixed" because it contains both exhausted and unexhausted claims, a district court has discretion to hold the exhausted claims in abeyance while the petitioner presents the unexhausted claims in state court. The *Rhines* Court recognized that

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[11] The district court amended the certificate of appealability, finding that "reasonable jurists could disagree whether or not the Court should stay the case and remand it the state court to examine the "'second tape' issue." ECF No. 89, at 2. More accurately stated, the question on appeal is whether the district court erred in failing to stay and hold in abeyance the federal habeas case, while Davis attempted to exhaust available remedies in state court. It is not within the province of federal habeas court to "remand" a claim to a state court or otherwise direct a state court in the performance of its duties.

the AEDPA's one-year statute of limitation for federal habeas petitions multiplied the consequences of the complete exhaustion requirement mandated under *Rose v. Lundy,* 455 U.S. 509, 102 S. Ct. 1198, 71 L.Ed.2d 379 (1982), and presented a risk that "petitioners who come to federal court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims." *Rhines*, 544 U.S. at 275, 125 S. Ct. at 1533, 161 L. Ed. 2d 440.

In this case, the district court did not abuse its discretion in failing to utilize the stay-and-abeyance procedure because Davis had no available state court remedies to pursue. Davis's ostensible due process claims based on alteration of

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the tape played during his criminal trial and the suppression of a second tape are procedurally defaulted because he failed to comply with Georgia's successive petition rule, which provides:

> 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 the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

Ga. Code Ann. § 9-14-51. Our review of the record confirms that Davis never moved to amend his state petition to include an independent due process claim based on the state's alteration of evidence or suppression of a second tape. Consequently, such claims are subject to § 19-14-51, which imposes a procedural

bar that Davis can overcome only if he raises grounds for relief that are constitutionally nonwaivable, which is not the case, or which could not reasonably have been raised in his original or an amended state petition.

The record confirms that Davis was aware of facts that provided a basis for his claims before he filed his state habeas petition, and he failed to develop or present the claims when he had the opportunity in state court. He acknowledges that "leading up to the state habeas proceedings," his attorney had "interviewed an expert who explained that the single recording seemed to show stops and that a second recorder was operating in the room" and that his attorney knew that the

transcript of Davis's police interview contained a reference to "tape #2."[12] Davis explains that he chose not to proceed with an independent due process claim during the state habeas proceedings because Chambers had testified that there was only one tape of Davis's interview,[13] and Walker claimed in an 2010 interview with a private investigator that he had no knowledge of a second recording.[14] Davis

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[12] Pet'r's Br., 56.

[13] Davis fails to cite the portion of Chambers's trial testimony specifically stating that only one tape was used to record the interview. Chambers identified a microcassette tape marked "David Coffin," as "the" tape used to record Davis's police interview.

[14] Davis's assertion that Walker claimed no knowledge of a second recording is based on the affidavit of a private investigator named Debra Mulder. The affidavit, which Davis submitted in support of his "notice of new evidence" in district court, states that Mulder interviewed Walker in 2010, and he told her that only one tape recorder was used during Davis's 1996 police interview. ECF No. 64-1, at 1. [17]Pet'r's Br., 56-57.

contends that if "Walker had said what he has now repeated three times, postconviction counsel would have clearly raised a *Brady/Giglio* claim based on the State's failure to turn over the second recording."[17] But as Respondent notes, Walker testified before the state habeas court, and Davis's attorneys failed to ask him a single question about altered evidence or the possibility of a second tape. We find no basis to conclude that a state court judge would find that Davis's claim could not have been raised in the original or an amended state habeas petition. Because a successive petition would be procedurally barred under Georgia law, Davis's claim is technically exhausted, and utilization of the *Rhines* stay-andabeyance procedure would be futile and an abuse of discretion. *See Coleman v.*

Thompson, 501 U.S. 722, 732, 111 S. Ct. 2546, 2555, 115 L. Ed. 2d 640 (1991)(noting that a "habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him"); *see also Rhines,* 544 U.S. at 277, 125 S. Ct. at 1534-35, 161 L. Ed. 2d 440(noting that the stay-and-abeyance procedure, if employed too frequently, has the potential of undermining AEDPA objectives of comity, finality, and federalism).

If we were faced with a mixed petition, which is not the case, Davis still would not meet the requisites for the stay-and-abeyance procedure. The "limited circumstances" that permit utilization of the procedure are these: (1) the petitioner

has "good cause" for failing to exhaust claims in state court; (2) the unexhausted claims are "potentially meritorious;" and (3) "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Rhines,* 544 U.S. at 278, 125 S. Ct. at 1535, 161 L. Ed. 2d 440.

Davis insists that he was not aware of the factual predicate for a *Brady* claim related to the second tape until after he filed his federal habeas petition. But as we have explained, such is not the case, and Davis fails to meet the good-cause requirement. Furthermore, while Davis alludes to a "*Brady/Giglio* claim regarding the second tape," he fails to demonstrate that this ill-defined claim is potentially meritorious.

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Whether proceeding under *Brady* or *Giglio*, a defendant must show that the evidence in question was material. For a *Brady* claim, "'evidence is 'material' . . . when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith v. Cain*, 565 U.S. 73, 75, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571 (2012)(quoting *Cone v. Bell,* 556 U.S. 449, 469–470, 129 S. Ct. 1769, 173 L.Ed.2d 701 (2009)). And to prevail with the brand of *Brady* error known as a *Giglio* violation, a petitioner must show that "the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material-*i.e.*, that

there is 'any reasonable likelihood' that the false testimony 'could ... have affected the judgment.'" *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006)(quoting *Giglio,* 405 U.S. at 154, 92 S. Ct. 763)). In either case, the question of materiality must be evaluated in the context of the entire record. *See United States v. Agurs*, 427 U.S. 97, 112, 96 S. Ct. 2392, 2402, 49 L. Ed. 2d 342 (1976).

Notwithstanding evidence that Davis had threatened to kill anyone who slept with Megan, that he had hired someone to follow Megan and to obtain Coffin's address, and that he had gone to extreme measures to establish an alibi, Davis contends that the only evidence linking him Coffin's murder was his statement to Chambers that Coffin had been shot. Davis suggests that he uttered the statement only because Chambers threatened him with the death penalty "off tape." Davis

can only speculate that Chambers's alleged threat was recorded on a second tape, and it simply does not follow that the specter of the death penalty would prompt Davis to say that Coffin had been shot. In sum, we find that the district court properly declined to stay the federal habeas proceedings.

Finally, Davis filed a motion to supplement the record with an affidavit by Marchal Walker, which we carried with the case. Davis offers the affidavit as additional evidence that there were two recording devices in use during his police interview and that Walker provided two tapes and two transcripts to the

prosecution. Because we find that Davis's ostensible claims related to a second tape are procedurally barred, the motion is denied.

IV. CONCLUSION

For the reasons stated, we AFFIRM the district court's denial of habeas corpus relief, we conclude that the district court committed no error in denying Petitioner Davis's request for a stay under *Rhines v. Weber*, 544 U.S. 269, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005), and we DENY Petitioner Davis's motion to supplement the record.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14325-CC

SCOTT WINFIELD DAVIS,

Petitioner - Appellant,

versus

ERIC SELLERS,

Respondent - Appellee.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: HULL and MARCUS, Circuit Judges and WRIGHT*, District Judge.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

*Honorable Susan Webber Wright, United States District Judge for the Eastern District of Arkansas, sitting by designation.

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

SCOTT WINFIELD DAVIS,	:	
	:	
Petitioner,	:	
	:	
v.	:	
	:	
ERIC SELLERS,	:	CIVIL ACTION NO.
	:	1:13-CV-1434-AT
	:	
Respondent.	:	

ORDER

This matter is before the Court on the Magistrate Judge's Final Report and Recommendation ("R&R") [Doc. 38] and Petitioner's objections thereto [Doc. 44]. In reviewing an R&R, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." *United States v. Schultz*, 565 F.3d 1353, 1361 (11th Cir. 2009) (per curiam) (quoting *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988) (internal quotation marks omitted)). Absent objection, the Court "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge," 28 U.S.C. § 636(b)(1), and "need only satisfy itself that there

is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72, advisory committee note, 1983 Addition, Subdivision (b). Further, the Court "has broad discretion in reviewing a magistrate judge's report and recommendation" – it "does not abuse its discretion by considering an argument that was not presented to the magistrate judge" and "has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge." *Williams v. McNeil*, 557 F.3d 1287, 1290-92 (11th Cir. 2009).

I. Background[1]

A Fulton County jury convicted Petitioner of malice murder, and the trial court sentenced Petitioner to life imprisonment. *Davis v. State*, 676 S.E.2d 215, 215-16 (Ga. 2009). Petitioner filed a motion for a new trial, which he later amended, and the trial court ultimately denied the motion. *Id.* at 216. Attorneys Bruce Morris and Brian Steel represented Petitioner at trial and on appeal, and attorney Don Samuel was also retained to represent Petitioner on appeal. (Doc. 1 at 18.)[2]

[1] The Court briefly summarizes the procedural history here. The background of the case is more fully set forth in the R&R.

[2] The listed document and page numbers in citations to the record refer to the document and page numbers shown on the Adobe file reader linked to the Court's electronic filing database, CM/ECF.

The Georgia Supreme Court found that the following evidence, which it "[c]onstrued most strongly to support the verdict," was "sufficient to authorize a

rational trier of fact to find [Petitioner] guilty of murder beyond a reasonable doubt":

> . . . [A]fter two years of marriage, [Petitioner's] wife filed for divorce and moved out of the couple's home. [Petitioner], who did not want to get divorced, threatened to kill anyone who had a sexual relationship with his wife. [Petitioner's] wife subsequently began dating David Coffin, and [Petitioner] hired a private investigator to follow her. [Petitioner] asked the investigator to locate Coffin's home address and telephone number, and after the investigator provided the information to him, [Petitioner] said that he was going to drive by Coffin's residence during the next weekend. That Saturday night, Coffin's house was burglarized, and his car was stolen. During the burglary, a call was made from Coffin's home to [Petitioner's] house, and later that night [Petitioner] made repeated calls to his wife's apartment, asking if she was sleeping with Coffin.
>
> Two days after the burglary, [Petitioner] called in sick to work, and sometime that night, Coffin was fatally shot inside his house. The next morning, Coffin's car and other items stolen from his home were found burning near a MARTA station. A gas can and bag found inside the burning car were identified as being similar to items owned by [Petitioner]. That night, Coffin's house was destroyed by arson, and his body was found inside.
>
> That same night, [Petitioner] made false reports to the police about having twice been attacked by an unidentified assailant at his own house, claiming one attack before, and another attack after, the fire at Coffin's home. During his statement to police about the alleged attacks, [Petitioner] said that he knew Coffin had been shot. However, at that time, the police did not know Coffin had been shot due to the charred condition of his body. It was not until the autopsy was later

> performed that the cause of death was revealed to be a gunshot wound to the head. A few days later, [Petitioner] attempted to establish an alibi for himself by asking a neighbor to say that he had seen [Petitioner] at a gym on the night of the murder. . . .

Davis, 676 S.E.2d at 216-17. On April 28, 2009, the Georgia Supreme Court affirmed the trial court's judgment. *Id.* at 221. The United States Supreme Court denied Petitioner a writ of certiorari on October 5, 2009. *Davis v. Georgia*, 558 U.S. 879 (2009).

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Represented by new counsel, Marsha G. Shein, E. Jay Abt, and Andy M. Cohen, Petitioner filed a habeas corpus petition in the Superior Court of Gwinnett County on August 25, 2010. (Docs. 1-3, 1-4, 1-5; Doc. 1-12 at 30-31.) After conducting evidentiary hearings on July 25 through 29, October 27, and December 2, 2011, (Docs. 1-15 through 1-21), the state habeas court entered a written order denying the petition. (Doc. 16-10.) On March 18, 2013, the Georgia Supreme Court denied Petitioner a certificate of probable cause to appeal the denial of habeas corpus relief. (Doc. 16-11.)

Still represented by Ms. Shein, and with the assistance of Howard Jarrett Weintraub and Benjamin Black Alper, Petitioner filed this 28 U.S.C. § 2254 petition on April 29, 2013. (Doc. 1.) Petitioner's arguments present a challenge for the Court to discern which of his exhausted federal claims he raises in the instant petition. However, the Court agrees with the Magistrate Judge's determination that Petitioner raises the following grounds for relief: (1) the state habeas court's factual findings were unreasonable in light of the evidence presented at the

evidentiary hearing; (2) trial and appellate counsel were ineffective for failing to call an expert to show that the tape of Petitioner's police interview had been altered and that there was a second tape or additional recording device, and trial counsel was ineffective for failing to investigate the police department's taped interview of Petitioner; (3) Petitioner was deprived of his due process rights to a fair trial when the state's gun expert committed misconduct while working at the Georgia Bureau of Investigation ("GBI") crime

lab by failing to properly test firearms and by testifying falsely; (4) his attorneys were ineffective for failing to (a) fully investigate the exculpatory nature of the missing evidence individually to prove bad faith, (b) investigate the lost evidence to prove bad faith, (c) investigate or raise the violation of Petitioner's due process right to the preservation of evidence created under state law and administrative rules, (d) object to the loss of exculpatory evidence, (e) raise the unfair prejudice in the loss of certain evidence and the use of that evidence at trial, and (f) raise the violation of Petitioner's right to cross examine the witnesses against him recognized by *Crawford v. Washington*, 541 U.S. 36 (2004); and (5) the prosecution violated Petitioner's right to due process when Chris Harvey, an investigator with the Fulton County District Attorney's Office, had Linda Tolbert, a former Atlanta Fire Department employee, sign a false affidavit denying that her signature was on the receipt for a U.P.S. package that contained the Beretta handgun. (Doc. 1 at 12; Doc. 7 at 14-80.)

Whether Petitioner properly raised an independent due process claim in state habeas proceedings based on the Government's loss or destruction of the roughly 70 items of evidence is not completely clear. In his revised brief in support of his petition, Davis argues that "[t]he misconduct uncovered at the habeas hearing, the expert testimony and the massive amount of SOP violations establish a violation of Petitioner['s] due process rights without the need to prove ineffective assistance of counsel." (Doc. 7 at 40; *id.* at 42; 55; 61 ("Based on

Guzman, ineffective assistance of counsel is not the only means to reverse Petitioner's conviction, independently the misconduct would be enough.").)

Petitioner claims that the prosecution's loss or destruction of over 70 pieces of evidence, alongside the conduct of its witnesses, indicates bad faith which entitles him to a new trial. In the alternative, he claims the lost evidence was apparently exculpatory and that this too entitles him to a new trial. In particular, he argues that the State lost (1) the purported murder weapon, a 9mm Beretta, along with a clip, shell casings, and the bullet recovered from the victim's head; (2) fingerprints lifted from the victim's Porsche which were never properly tested but which did not match Petitioner's prints; and (3) a gas can found in the victim's burning car (a Porsche) that was never traced, but which was identified by the Petitioner's ex-wife as belonging to Petitioner. As a result, some of this evidence was never tested. Davis contends that some of the evidence against him was destroyed as late as 2005 – 8 to 9 years after criminal charges were originally filed

against him (and then dismissed in 1997), 3 years after the case was reopened, and not too long before his eventual trial. (Doc. 44 at 25; *see also* Habeas Transcript, Doc. 1-18 at 114-16.)

He also claims that the police evidence room for the case looked like a garbage dump. (*See* Doc. 7 at 8.) Finally, he claims several witnesses against him were compromised or were liars, including Ms. Davy, the state GBI ballistics expert who was later fired for misconduct, and Ms. Tolbert, an Atlanta Fire Department employee who signed an affidavit claiming she'd never signed an

acknowledgment of receipt of some of the lost evidence but then later admitted she'd lied on that affidavit.

The Magistrate Judge rejected this last independent due process claim and found that Petitioner had not exhausted any such due process claims, other than those pertaining to the state's firearm expert. (Doc. 38 at 9-12.) Next, the Magistrate Judge concluded that the state habeas court's factual findings were supported by the record and that Petitioner had failed to rebut those findings by clear and convincing evidence. (*Id.* at 15-25.) The Magistrate Judge then determined that the state habeas court's rejection of Petitioner's grounds regarding the audio-taped police interview is entitled to deference and that Petitioner's claim concerning the state's firearms expert's testimony lacked merit. (*Id.* at 34-37, 40-42.) The Magistrate Judge also found that the state habeas court's conclusions that Petitioner's attorneys were effective in connection with the lost evidence issue and that Petitioner did not show prejudice were entitled to

deference. (*Id.* at 53-59.) As previously noted, the Magistrate Judge determined that Petitioner had not exhausted a substantive due process claim regarding the lost evidence. However, the Magistrate Judge alternatively found that Petitioner had not met his burden to establish a due process violation. (*Id.* at 59-66.) Finally, the Magistrate Judge concluded that Petitioner's claim concerning Ms. Tolbert's allegedly false affidavit was new and procedurally defaulted and that, in any event, it was not supported by the record. (*Id.* at 66-68.)

II. 28 U.S.C. § 2254 Standards

Under 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus on behalf of a person being 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). In general, a state prisoner who seeks federal habeas corpus relief may not obtain that relief unless he first exhausts his available remedies in state court or shows that a state remedial process is unavailable or ineffective. *Id.* § 2254(b)(1). A federal court may not grant habeas corpus relief for claims previously adjudicated on the merits by a state court unless the state court adjudication resulted in a decision that (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." *Id.* § 2254(d); *Van Poyck v. Fla. Dep't of Corrs.*, 290 F.3d 1318, 1322 n.4 (11th Cir. 2002) (per curiam) ("[I]n

the context of a habeas review of a state court's decision–only Supreme Court precedent can clearly establish the law.").

When applying § 2254(d), the federal court evaluating a habeas petition must first determine the applicable "clearly established Federal law, as determined by the Supreme Court of the United States." *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000) (quoting 28 U.S.C. § 2254(d)(1)). Next, the federal habeas court must ascertain whether the state court decision is "contrary to" that

clearly established federal law by determining if the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or whether the state court reached a result different from the Supreme Court on a set of materially indistinguishable facts. *Id.* at 412-13. In other words, a state court decision is "contrary to" clearly established federal law only when it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Id.* at 405; *see also Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (holding that a state court decision is not contrary to federal law simply because it does not cite Supreme Court authority; the relevant inquiry is whether the reasoning or the result of the state decision contradicts that authority).

If the federal habeas court determines that the state court decision is not contrary to clearly established federal law, it must then determine whether the state court decision was an "unreasonable application" of clearly established federal law. It evaluates this by determining whether the state court identified the correct governing legal principle from the Supreme Court's decisions but

unreasonably applied it to the facts of the petitioner's case. *Williams*, 529 U.S. at 413. "For purposes of § 2254(d)(1), 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Williams*, 529 U.S. at 410) (emphasis in original). "Under § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly

established federal law erroneously or incorrectly [but r]ather, that application must also be unreasonable." *Williams*, 529 U.S. at 411. Thus,

> [a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Harrington, 562 U.S. at 103; *see also Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam) ("Where [in a federal habeas corpus petition] the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but [also] objectively unreasonable."). Additionally, the state court's determinations of factual issues are presumed correct. 28 U.S.C. § 2254(e)(1). A petitioner can overcome this presumption only by presenting "clear and convincing evidence" that the state court's findings of fact were erroneous.

Id.

III. Discussion of Petitioner's Objections A. The State Habeas Court's Factual Findings

In his objections (Doc. 44), Petitioner first challenges the Magistrate Judge's conclusions regarding ground one – in which Petitioner disputes the state habeas court's factual findings – as if the Magistrate Judge had determined in that ground that Petitioner's attorneys provided him effective assistance. However, the Magistrate Judge repeatedly stated during his discussion of ground one that he was only addressing the state habeas court's factual findings and not any legal conclusion regarding counsel's effectiveness. The Court agrees with the

Magistrate Judge's conclusion that the state court's factual findings were entitled to a presumption of correctness because Petitioner has not rebutted those findings by clear and convincing evidence. "[S]ome evidence suggesting the possibility" that the Petitioner's version of the facts is correct is not sufficient to show that the state court made an unreasonable determination of fact. *Bottoson v. Moore*, 234 F.3d 526, 540 (11th Cir. 2000). Therefore, the Court overrules Petitioner's first objection.

B. The Procedurally Defaulted Due Process Claims

Petitioner next objects that he did raise independent due process claims before the state habeas court. In response to the Court's order (Doc. 55), Petitioner has provided pinpoint record citations for the pleadings in which he contends he presented an independent due process claim to the state habeas court (Doc. 56). They include the following: (1) a pleading titled "Supplement to Habeas Petition

Issue of Bad Faith," filed in the state proceeding prior to the habeas hearing (Doc. 1-12) and outlining the panoply of lost evidence problems and other bad faith-related issues identified by Petitioner; (2) portions of the state habeas transcript; (3) the Certificate of Probable Cause to Appeal filed with the Supreme Court of Georgia in the state habeas proceeding (again setting forth what Petitioner contends were constitutional deficiencies in his trial); and (4) a proposed order filed by Petitioner in the state habeas proceeding ("Proposed

Habeas Order"), which was not adopted by the state habeas court.[3] In addition, Petitioner argues that his state habeas pleadings were amended to conform to the new evidence presented at oral argument, and that such amendment was accomplished, *inter alia*, via his oral argument at the state habeas level.

(Objections at 8.)

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[3] The Court notes that Petitioner's counsel submitted pin cites for some of these materials only in his reply in support of his response to the Court's order; the specific documents were identified in his initial brief. (Doc. 58.) Petitioner's reply does not change the Court's conclusion on this issue. Many of the pin cites refer to due process issues that are plainly intertwined with ineffective assistance of counsel issues. (*E.g.*, Proposed Habeas Order, Doc. 56-1 at 3 (Counsel made a "general due process violation objection" but did "not present any witnesses or information regarding the evidence chain of custody handling or law enforcement policy violations. . ."); *id.* at 5 ("At the motion for new trial hearing and on appeal, counsel again raised the missing evidence issue, focusing on this issue as a due process violation, lumping the due process issue with a general complaint regarding all of the missing evidence . . . and [failed to] call witnesses to discuss the evidence of chain of custody by the persons responsible for the missing evidence."); *id.* at 32 ("Counsel[] were ineffective in failing to properly present this [due process destruction of evidence] issue to the trial or Supreme Court.").) On the other hand, some parts of the Proposed Habeas Order can be read as supporting Petitioner's contention that he has preserved his independent due process claim. (*Id.* at 33 ("If material exculpatory evidence is lost or destroyed, it is a violation of a defendant's right to due process, regardless of the good or bad faith [of the] government . . .").)

The Court has reviewed those documents and finds that the arguments that Petitioner presented concerning lost evidence and bad faith in those pleadings appear generally, though not consistently, to have been made in the context of his ineffective assistance of counsel claims and not as independent due process claims.

"[T]he exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record." *McNair v. Campbell*, 416 F.3d 1291, 1303 (11th Cir. 2005) (internal quotation marks, alteration, and citation omitted). It is clear from the record that the state

and the state habeas court did not discern that Petitioner was asserting any independent substantive due process claims other than those pertaining to the state firearms expert and the private investigator, and addressed only the grounds clearly asserted in the petition. Accordingly, Petitioner's independent due process claims, with the exception of those pertaining to the state firearms expert and the private investigator, are procedurally defaulted. *See* O.C.G.A. § 914-51 (prohibiting

a Georgia court from considering claims in a second state habeas corpus petition that could have been raised in the first habeas petition); *Ogle v. Johnson*, 488 F.3d 1364, 1370-71 (11th Cir. 2007) (A claim that "could not be raised in a successive state habeas petition . . . is procedurally defaulted.").

The Court, however, recognizes that the record is not crystal clear on these issues. There are instances where it seems that habeas counsel did raise independent due process claims. It is for this and other reasons described herein that the Court grants a certificate of appealability. For example, habeas counsel argued at the state habeas hearing that it was ineffective assistance of counsel to fail to investigate and seek the disciplinary records of Ms. Davy, the state's ballistics expert. But counsel also later argued there is a "new issue, the key issue, . . . [one] they couldn't have known about" – "they" referring to Petitioner's trial and appellate counsel. (Doc. 1-20 at 98.) This issue was that Ms. Davy is "a big, fat liar." (*Id.*) Habeas counsel argues, "[h]e gets a new trial just on that ground. It violates his due process that she was allowed to testify about the cause of death,

testify about the firearms, testify about key pieces of evidence, when she very well may have been lying through her teeth." (Doc. 1-20 at 100.)

And in Petitioner's "Supplement to Habeas Petition Issue of Bad Faith" in his state habeas case, he outlines the numerous problems posed by lost evidence in his case, arguing that "an atmosphere of bad faith on securing vital evidence permeated this case to such a degree as to deprive the Petitioner of his . . . rights to

due process." He then asserts that "[a]ny defendant in these circumstances is deprived of due process and of the right to confront his or her accusers." (Doc. 112 at 1; 25.)[4] This could be construed as an independent due process argument. On the other hand, Petitioner later returns his focus to his ineffective assistance of counsel argument in the Supplement when he argues, "[r]egardless of the manifest injustice of losing the evidence and still being allowed to enter it in evidence . . . the trial attorneys and appellate counsel failed to address the issue as bad faith and that the evidence was apparently exculpatory." (*Id.* at 28.) In Petitioner's conclusion to this filing, he again conflates his arguments, stating in one paragraph that "[o]ne of the most significant elements of the ineffective assistance of counsel claim [raised] deals head on with the number of items lost," then turning and immediately arguing that the *Mussman* case[5] "works to reaffirm and strengthen the Petitioner's claim of due process violations." (*Id.* at 30.) *See also* Petitioner's Application for Certificate of Probable cause to Appeal (Doc. 43

at 11 ("During the habeas hearing, new evidence was revealed that reinforced Applicant's claim of bad faith and due process violations that counsel failed to pursue, investigate, or was not aware of.").)

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[4] Petitioner made this comment in a section of the filing regarding swabbings taken at the scene, but the comment can be construed as applying to more than just that evidence.

[5] *Mussman v. State*, 697 S.E.2d 902 (Ga. Ct. App. 2010), *rev'd*, 713 S.E.2d 822 (Ga. 2011), and *vacated*, 717 S.E.2d 654 (Ga. Ct. App. 2011).

Because of this frequent conflation of the ineffective assistance of counsel claims and what are arguably independent due process arguments, the Court will address the merits of Petitioner's due process claims regarding the state's alleged mishandling of the evidence and bad faith in Section II.H, and grant a certificate of appealability.

C. Counsel's Handling of the Lost Evidence Issue

Petitioner objects that counsel ineffectively dealt with the lost evidence and misconduct issues by failing to show bad faith prior to trial with evidence that was available to counsel, by failing to consult experts to show bad faith, by not showing violations of Standard Operating Procedures ("SOP") or calling any custodians of the evidence at a pretrial hearing, and by erroneously arguing that gross negligence equated to bad faith. The Magistrate Judge accurately addressed each of these issues on pages fifty-four through fifty-nine of the R&R, applied the right legal standard, and correctly set forth the facts based on the record before this Court. Accordingly, the Court agrees with the Magistrate Judge's conclusion that the state habeas court's rejection of Petitioner's ineffective assistance claims is entitled to deference pursuant to § 2254(d).

D. The Fingerprint Evidence

Petitioner further objects that his due process rights were violated because the lost fingerprint cards (containing prints lifted from the victim's Porsche) had

apparent exculpatory value. The fingerprint evidence falls within the body of lost evidence that Petitioner contends is subject to both his ineffective assistance of counsel and due process claims. Despite the Court's rulings above as to defaulted claims, the Court reviews the substance of the finger print evidence due process claim in the interest of providing a complete and fair review. The Court agrees with the Magistrate Judge that Petitioner failed to present clear and convincing evidence sufficient to rebut the state habeas court's finding that the missing fingerprint cards were not of the quality required for Automated Fingerprint Identification System ("AFIS") or otherwise were required to be submitted to AFIS. The Court finds unconvincing Petitioner's argument that, because GBI policy required that fingerprints which were not of AFIS quality be identified as such in the GBI reports and because the reports in this case said nothing about the AFIS quality of the prints, the lost fingerprint cards *must* have been of AFIS quality. The Magistrate Judge accurately addressed Petitioner's claim concerning the lost fingerprint cards on pages fifty-one, fifty-six, and sixty-two at footnote twelve. The Court agrees that Petitioner has not shown that the fingerprint cards had apparent exculpatory value *other than* the fact that they did not match Petitioner's fingerprints, which was brought out at trial. Petitioner does not present an alternative and convincing theory of the exculpatory nature of this

evidence. (Objections at 81 ("The crime scene fingerprints found on the stolen Porsche were not the Petitioner's. Therefore by definition, they were exculpatory.").) The state court already addressed this issue, finding that "the

exculpatory nature of such fingerprint evidence was brought out at trial through the testimony of various witnesses. Fingerprints were not found on many pieces of evidence tested by the state, and fingerprints lifted from the victim's vehicle did not match Petitioner's fingerprints." (State Habeas Order, Doc. 1-42 at 21.) The Court does note that the jury did not receive a jury charge instructing it that it could draw an adverse inference from the lost evidence, unlike in some of the case authority cited by the Magistrate Judge. (Objections, Doc. 44 at 102.) But this does not change the fact that the "apparently exculpatory" qualities of the lost fingerprint evidence – that they did not match Petitioner's prints – were presented at trial. Suggesting that these prints would do anything else – like lead the prosecution to another suspect – would be speculative at best.

Accordingly, the Court overrules this objection.

E. Petitioner's Audio-Taped Police Interview

Petitioner alleges that the state altered the audiotape of his police interview and failed to disclose a second recording. Petitioner contends that he presented this allegation to the state habeas court as an independent due process claim. However, the record does not support this contention, and this claim is procedurally defaulted.

Moreover, the Magistrate Judge addressed this issue on pages thirty-four through thirty-seven and footnotes seven through nine of the R&R, applied the right legal standard, and correctly set forth the facts based on the record before this

Court. Petitioner disputes the Magistrate Judge's finding that the detective's testimony was in accord with what Petitioner told his attorneys. However, the record shows that Petitioner only told his attorneys that the detectives threatened him with the death penalty when the recorder was stopped, (Doc. 1-19 at 50; Doc. 1-21 at 9-10), and that, although Petitioner initially asked his attorneys to have an expert analyze the tape, Petitioner ultimately changed his mind, (Doc. 1-21 at 910). Although Petitioner disputes the state habeas court's factual findings regarding the audiotape, "some evidence suggesting the possibility" that the Petitioner's version of the facts is correct is not sufficient to show that the state court made an unreasonable determination of fact. *Bottoson*, 234 F.3d at 540. The Court agrees with the Magistrate Judge that the record does not support a finding of bad faith on the part of the state with regard to the audiotape.

Accordingly, the Court also overrules Petitioner's objections as to this ground.

F. Firearm Expert's Testimony

Petitioner next argues that his due process rights to a fair trial were violated because the state's firearms expert, Bernadette Davy, falsified reports. The Magistrate Judge thoroughly and accurately addressed this issue on pages thirty-seven though forty-two of the R&R. The Court agrees that Petitioner has not shown that Davy testified falsely in his case and that Petitioner has not

presented any evidence to show that the prosecutor had any knowledge of Davy's misconduct. The Court rejects Petitioner's unsupported assertion in his objections that the prosecutor should be deemed aware of Davy's violations because the police

were allegedly aware of her disciplinary history prior to trial. The Court further agrees with the Magistrate Judge that Petitioner has not shown that Davy's testimony had any impact on the jury's verdict.

G. Tolbert's False Affidavit

Petitioner objects to the Magistrate Judge's finding that his claim concerning Tolbert's allegedly false affidavit was new and procedurally defaulted. The Court need not reach this issue, because it concludes that the Magistrate Judge's alternative finding that this ground lacks merit is correct. Petitioner contends that in 2006, prior to trial, Tolbert knowingly and falsely executed an affidavit claiming that she did not sign for a package from the GBI containing, among other evidence, the alleged murder weapon and a gas can.

Petitioner claims that Chris Harvey, an investigator with the District Attorney's office, is the individual that procured this false affidavit. And Petitioner contends that as a result of this deceit, his attorneys were misled and lost an opportunity to retrieve and locate critical evidence. (Objections at 74.) Tolbert later recanted this affidavit in her testimony at the state habeas hearing in 2011. Petitioner claims that this incident is more evidence of bad faith on the part of the prosecution.

Tolbert testified that she was a dispatcher and switchboard operator at the Atlanta Fire Department. (Doc. 1-17 ("Habeas Transcript") at 142.)[6] Sometimes she manned the front desk where she worked, and so would acknowledge receipt for items delivered to the department. (*Id.* at 143.) In May of 1999, Ms. Tolbert signed an acknowledgment of receipt for items of evidence arriving from GBI. Ms. Tolbert typically placed items she signed for on a credenza, and did not maintain a chain of custody. (*Id.* at 144-45.) She did not open the packages and so had no cause to know if they contained evidence or not. (*Id.* at 146.) All she did was "sign for things and pass them along." (*See id.* at 149.)

On May 17, 2006, Ms. Tolbert signed an affidavit denying she'd signed anything acknowledging the fire department's receipt of evidence in this case, stating "I was shown the document in which my forged signature was obtained and I cannot identify who signed it. Even though this was my position for the past several years, like in any receptionist position, I was relieved for lunch by other Fire Department personnel. I took vacations and I did take time off from work. I would highly suggest that a more thorough investigation is done to see who was at the front desk on that day in question to determine which person may have signed my name." (Doc. 1-25 at 1.) Her explanation for this statement is that when she spoke

[6] The Court cites to the docket page numbers, not the numbers as they appear on the original state habeas transcript.

to a "police officer" about this matter, she stated that the 1999 signature acknowledging receipt of the evidence "looks like my signature

but it might not be my signature because other people sat at my desk. So that's where that came from." (Habeas Transcript, Doc. 1-17 at 155.)

She then recanted her statement in her 2006 affidavit that "I cannot identify who signed [the U.P.S. acknowledgment of receipt]," and she "made that statement" because "it [the 1999 signature on the acknowledgment of receipt] was just so unclear." (*Id.*) When asked if she misrepresented herself in signing the 2006 affidavit, she said "yes." (*Id.*) On re-direct, she testified that she may have signed an electronic acknowledgment which may have "slightly distorted" her signature, which caused her alleged confusion. On re-cross, she said "That is the only reason I said that, because of the scanner. That's the only reason I said that." (*Id.* at 159.) She then reaffirmed, "That's my signature, yes," when referring to the original 1999 acknowledgment of receipt. She finally testified that Chris Harvey directed her to prepare her affidavit. (*Id.* at 164.) This last part is troublesome, because it suggests an intentional change in position, directed by the prosecution.

Nevertheless, the Court concludes that the Magistrate Judge accurately addressed this issue on pages sixty-seven through sixty-eight of the R&R, applied the right legal standard, correctly set forth the facts based on the record before this Court, and rightly concluded that Petitioner failed to make a showing of bad faith

or misconduct. Tolbert testified that she (a) had no knowledge of the contents of any particular package she received or signed for and (b) made a "simple mistake" when she claimed that her signature acknowledging receipt of

the package was not her own. And, as the Magistrate Judge noted, although Harvey procured the affidavit, Petitioner presented no other evidence that suggests bad faith. The Court finds that Harvey's involvement alone is not enough to suggest bad faith and that Petitioner is entitled to relief, even if once again, the Court understands the reasons for Petitioner's suspicions and argument that a smokescreen was created to thwart Petitioner's defense. Still, Petitioner's bad faith evidence remains ultimately speculative.

Accordingly, the Court agrees with the Magistrate Judge's finding that Petitioner has not shown misconduct or "bad faith" based on Tolbert's mistaken affidavit.

H. The State's Alleged Mishandling of Evidence and Bad Faith

Finally, Petitioner objects to the Magistrate Judge's alternative conclusion that his independent due process claims concerning the lost and/or destroyed evidence lack merit. Petitioner maintains that over 70 pieces of evidence were lost and that the loss and/or destruction of much of that evidence was contrary to law enforcement and state policy as set forth in hundreds of SOPs and many preservation statues. Petitioner also points to the deplorable condition of the police evidence room and the aggregated official animus, deception and bad faith

detailed in Petitioner's claims alleging, among other things, that the audiotape of his police interview was altered, that Davy committed misconduct, and that Tolbert signed a false affidavit. Petitioner asks the Court to consider the

cumulative effect of these errors in addressing his due process claims and submits that reasonable jurists could disagree about whether he had established bad faith. Once again, the Magistrate Judge accurately addressed these issues in the R&R on pages fifty-nine through sixty-six and footnotes twelve through sixteen, applied the right legal standards, and correctly set forth the facts based on the record before this Court. The Court agrees with the Magistrate Judge's findings that the lost evidence was not apparently exculpatory and that, even accepting Petitioner's contention that the evidence was potentially useful, he has not demonstrated the bad faith necessary to establish a due process violation under the governing legal standards. However, the state's handling of the evidence in this case is certainly troubling.

The homicide at issue in this case occurred in December of 1996, and the criminal charges against Petitioner were initially dismissed in 1997. However, the State reopened the case approximately eight years later in November of 2005, and Petitioner was tried in late 2006. By that time, a significant amount of the evidence had been lost, including, among numerous other items, the only fingerprints collected, the items found in the victim's burnt vehicle that Petitioner's ex-wife testified belonged to Petitioner, and a Beretta handgun alleged to be the murder

weapon. Even though Petitioner was not able to test or refute this lost evidence, the trial court allowed the state to rely on it at trial. Additionally, Petitioner presented evidence at the state habeas hearing to show

that the state had failed to follow various SOPs and statutes for preserving evidence, that the evidence room was disorderly, and that large bags of evidence were not inventoried. After Petitioner's trial had concluded, the state's firearms expert resigned following a customary peer review, which revealed that she had intentionally fabricated data in other cases.

While each of the state's actions and/or omissions, including noncompliance with SOPs and preservation statutes, do not independently constitute evidence of bad faith, a reasonable jurist might conclude that the cumulative pattern presented here indicates that Petitioner was denied a fair trial. *See United States v. Lopez*, 590 F.3d 1238, 1258 (11th Cir. 2009) ("Even where individual judicial errors or prosecutorial misconduct may not be sufficient to warrant reversal alone, we may consider the cumulative effects of errors to determine if the defendant has been denied a fair trial.") (citation omitted); *United States v. Thomas*, 62 F.3d 1332, 1343 (11th Cir. 1995) ("[T]he 'cumulative effect' of multiple errors may so prejudice a defendant's right to a fair trial that a new trial is required, even if the errors

considered individually are nonreversible.") (citation omitted).[7] The Court also recognizes the many problems

with *Youngblood*'s doctrinal focus on bad faith as opposed to the potential value of the lost evidence - something commentators have been discussing for decades. *E.g.*, Matthew H. Lembke, THE ROLE OF POLICE CULPABILITY IN LEON AND YOUNGBLOOD, 76 Va. L. Rev. 1213, 1215 (1990) ("Police bad faith should not be dispositive in destruction of evidence cases because focusing on police motivation gives inadequate protection to the rights of the defendant to fundamental fairness. Ignoring the materiality of evidence is illogical when fairness to the defendant is the concern."); Norman C. Bay, OLD BLOOD, BAD BLOOD, AND

[7] Since the number of cases finding evidence of bad faith is small, it should be no surprise that there are few if any reported opinions addressing the issue of whether a court should view each error leading to the destruction or loss of potentially useful or exculpatory evidence in isolation or if a court can look at a pattern of potential misconduct when assessing the kinds of improper motive necessary to show bad faith. At least one court has intimated that it is proper to view repeated instances of lost evidence as a whole when assessing bad faith. *United States v. Osbourn*, No. 05-M-9303-M-1, 2006 WL 707731, at *2 (D. Kan. Mar. 17, 2006) (rejecting suppression challenge when four missing videotapes over nineteen-year period not sufficient to show pattern and practice of bad faith destruction of evidence under *Youngblood* or *Trombetta*); *see also* Martina Kitzmueller, ARE YOU RECORDING THIS?: ENFORCEMENT OF POLICE

YOUNGBLOOD: DUE PROCESS, LOST EVIDENCE, AND THE LIMITS OF BAD FAITH, 86 Wash. U.L. Rev. 241, 293 (2008) ("in the two decades since *Youngblood* was decided, there are few reported cases in which a court has found bad faith.") The number of errors in the prosecution of this case is troubling. Potentially useful evidence was lost, in baffling ways that sometimes sound as if they were lifted from a Hollywood thriller (or a podcast). But given the significant legal hurdles imposed upon habeas petitioners advancing claims like those pressed herein, the Magistrate Judge reached the correct result.

VIDEOTAPING, 47 Conn. L. Rev. 167, 192 (2014) (arguing that isolated instances of police failing to videotape or preserve recordings of police-citizen interactions do not show bad faith but that "[a] court may . . . take a different view when there is a pervasive pattern of not producing videos" under *Youngblood*.)

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III. Petitioner's Motion to Obtain and Listen to the Audiotape

Petitioner did not present this motion to the Magistrate Judge. Thus, the Court rejected it in its September 25, 2015 Order. *See Williams*, 557 F.3d at 1292. Moreover, the motion is moot, as Respondent indicates that the audiotape is not in his possession. (Doc. 48 ¶ 8.)

IV. "Notices" of New Evidence

The Court also rejects Petitioner's efforts (made via "Notices" rather than motions) to obtain a hearing regarding purportedly new evidence about the alleged existence of two tapes of Petitioner's police interview. (Docs. 62, 65.) The Court has listened to digital recordings of the conversations via electronic links provided by Petitioner. Significant portions of the first conversation are unintelligible (as reflected by a transcript of the recording, also provided by Petitioner). (Doc. 62 at 4 (providing electronic link for first phone call); Doc. 65 at 3 (providing electronic link for second phone call).)

The presentation of this issue is a bit strange. Petitioner seeks to have the Court listen to recorded conversations between Jennifer Bland, a criminal justice student and Arkansas resident, and former Atlanta Police homicide detective Marchel Walker. Petitioner characterizes Ms. Bland as "an amateur sleuth." (Doc. 67 at 2.) Petitioner contends that the conversations show there were "in fact two tape recorders in the room the night Petitioner was interviewed by the police in 1996." (Doc. 64-3.) Petitioner contends this evidence shows that two

tapes of Petitioner's police interview do exist and that this raises significant *Brady* and *Giglio* issues.

The Court is not persuaded due to the substance of the conversation and the significant hurdles to granting an evidentiary hearing under the relevant statutes.

First, the substance. Ms. Bland appears to assume the existence of a second tape, and poses some of her questions in both a leading and compound manner, so that Walker's answers are not clear. (*See* Doc. 64-2 at 6; 8 (Bland starts her question with the assumption that "Now on these interviews, this second tape that was a cassette tape . . .".) Walker appears to testify repeatedly that he is not clear on whether or not two tapes actually existed, even as he does appear to confirm that two recording devices may have been in the interview room. (*Compare* Doc. 64-2 at 9 ("I can't remember exactly what happened.") with *id.* at 13).)

One reading of the first interview is that Walker acknowledges the existence of two recording devices, but not necessarily that a second tape exists. For example, Ms. Bland poses a (leading) question that "in 1996 with this Scott Davis case you just had two tapes, one microcassette recorder and then one of the larger style cassette tapes; right?" Walker answers "That is correct." But this comes on the heels of a conversation about whether the police department videotaped interviews at the time of the original investigation in 1996 and 1997. Walker's answer, in context, can easily be seen only as confirmation that the

department had the capability to record two tapes at once for an interview at that time, but lacked video capabilities – not that two tapes of the Davis interview actually existed. Even if such a tape did exist, there is *no* discussion of its contents, or any suggestion that the purported second tape would be any different than the initial tape. Walker offers no opinion whatsoever on the contents of the tape, and so the Court is left to speculate as to what it might mean for the case.

The second recording is more problematic for Respondent. In it, Ms. Bland asks "When you told me that you gave both of the Scott Winfield Davis interview tapes and transcripts to the prosecutors, were you sure that you gave it to the assistant district attorney, Joe Burford?" Walker responds, "Yes . . . we turned it all [in to] them." (Doc. 65 at 3.) This second recording was filed several months after the first. The second tape genuinely raises the troubling constitutional prospect that the prosecution failed to turn over a second audio tape to Petitioner's counsel that might potentially have been exculpatory and in any event, clearly had been requested by Defense counsel. But Petitioner still does not escape two central problems: the Court has no way of ascertaining the content of any second tape, and the presentation of this issue by an unaffiliated third-party who presumes the existence of a second tape and asks questions in a leading matter poses real problems for Petitioner in meeting § 2254(e)(2)'s clear and convincing standard.

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The Court ultimately agrees with Respondent that Petitioner has not shown that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty." 28 U.S.C. § 2254(e)(2). Moreover, as Respondent points out, Petitioner "has given no reason why [the substance of] said recording, or the contents thereof, could not have been presented to the state courts years ago." (Doc. 63 at 3-4.) Petitioner's counsel interviewed Walker prior to the state habeas hearing, but declined to question him at the state habeas

hearing about the second tape. Yet Petitioner claims to have elicited admissions of perjury or destruction of evidence from other state employees once they were under oath and testifying in the habeas hearing. Petitioner offers little insight as to why Walker's testimony was not developed in a similar way.

Nor does Petitioner establish other grounds for an evidentiary hearing. As Petitioner acknowledges, "review under 2254(d)(1) is limited to the record that was before the state court that adjudicated the claims on the merits" – which would not include the new evidence. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011).

Finally, the Court notes that instead of relying on unclear and distorted telephone recordings procured by a third party unaffiliated with this case, Petitioner's counsel could have contacted Walker, sought to elicit the same information as supposedly contained within the phone recordings, and presented

it in a more convincing and complete manner. Counsel did not do this, leaving the Court with suggestive but inadequate legal and factual grounds on which to order an evidentiary hearing. It declines to do so.

V. Conclusion

The Court has wrestled with this case for 18 months since the substantive briefing regarding objections to the R&R and other issues was completed. The Petitioner's invocation of Marcellus's commentary in *Hamlet* that "something is

rotten in the state of Denmark"[8] expresses a core element of the Petitioner's case – that the prosecution and police in bad faith manipulated evidence, withheld evidence, and recklessly lost evidence in zealous pursuit of a guilty verdict. The record of pervasive Government "loss" of evidence is the most disturbing and concrete factor here that has caused the Court to pause repeatedly in its review of a legal challenge subject to the dauntingly high habeas review standard. The Court does not minimize the potential prejudicial impact of the evidentiary gaps fostered by the actions or omissions of law enforcement personnel or the alleged false statements made by law enforcement or prosecution related personnel. But binding precedent and AEDPA standards preclude the Court from conducting the vigorous form of critical, substantive *fresh* review of the case evidence – unrestrained from the findings rendered at the state level -- that the Petitioner seeks, even if this results in a judicial determination that may rest on a faulty or flawed foundation.

In the end, having conducted a careful review of the Magistrate Judge's very thorough R&R and Petitioner's objections thereto, the Court finds that the Magistrate Judge's factual and legal conclusions were correct and that Petitioner's objections should be overruled.

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[8] William Shakespeare, Hamlet, Act I, Scene 4, as quoted in Petitioner's Supplemental Notice to Consider New Evidence of Material Facts. (Doc. 65 at 9.)

For the reasons set forth above, the Court **DENIES** Petitioner's motion to obtain and listen to tape [Doc. 46], **ADOPTS AS MODIFIED HEREIN** the Magistrate Judge's Final Report and Recommendation as the opinion of this Court, and **DENIES** the instant petition, but grants a certificate of appealability to address whether Petitioner's independent due process claims are procedurally defaulted, and, if not, whether Petitioner's due process claims fail on the merits.

The Clerk is **DIRECTED** to close the case.

IT IS SO ORDERED 30th day of March, 2017

Amy Totenberg
United States District Judge

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

SCOTT WINFIELD DAVIS,	::	HABEAS CORPUS
Petitioner,	::	28 U.S.C. § 2254
	::	
v.	::	
	::	
ERIC SELLERS,	::	CIVIL ACTION NO.
Respondent.	::	1:13-CV-1434-AT-RGV

FINAL REPORT, RECOMMENDATION, AND ORDER

Petitioner Scott Winfield Davis, an inmate at the Phillips State Prison in Buford, Georgia, has filed this counseled 28 U.S.C. § 2254 petition to challenge his December 8, 2006, conviction in the Superior Court of Fulton County. The matter is now before the Court on the petition, [Doc. 1], and revised supporting brief, [Doc. 7]; respondent's answer-response, [Doc. 13]; and petitioner's reply, [Doc. 27].[1] For the reasons stated herein, it is **RECOMMENDED** that the petition be **DENIED**.

I. PROCEDURAL HISTORY

A Fulton County jury convicted petitioner of malice murder, and the trial court sentenced petitioner to life imprisonment. Davis v. State, 676 S.E.2d 215, 215-16 (Ga. 2009). Petitioner filed a motion for a new trial, which he later amended, and the trial

[1] Petitioner has also filed a motion to supplement the petition, [Doc. 36], which is **DENIED** for the reasons discussed herein, *infra* at 10-12.

court ultimately denied the motion. Id. at 216 & n. Attorneys Bruce Morris and Brian Steel represented petitioner at trial and on appeal, and attorney Don Samuel was also retained to represent petitioner on appeal. [Doc. 1 at 18].

On direct appeal, petitioner argued that the trial court: (1) improperly permitted the prosecution to elicit sympathy from the jury during closing argument by allowing the prosecutor to dim the lights and call for a moment of silence; (2) erroneously charged the jury on the law of party to a crime when the evidence did not support the charge; (3) improperly allowed prosecution witnesses Greg Gatley and Detective Rick Chambers to provide their opinion of petitioner's guilt; (4) erred by denying petitioner's motion in limine to bar Investigator James Daws' testimony concerning privileged communications; (5) erred in allowing the state to admit certain evidence and present arguments that violated the attorney work product privilege; (6) erred by allowing written documents into the jury room during deliberations in violation of the continuing witness rule; (7) violated petitioner's rights to due process and a fair trial by denying his motion to dismiss the case based on the state's destruction of critical and exculpatory evidence;[2] and (8) erroneously denied petitioner's motion to suppress

[2] The allegedly exculpatory evidence included a Beretta handgun alleged to be the murder weapon, a fingerprint card, and a gas can, as well as at least 52 other evidentiary items that were lost or destroyed during the ten years between the crime

statements obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). Br. of Appellant, Davis v. State, No. S09A0395, 2008 WL 5644537, at *37-126 (Ga. Dec. 11, 2008). The Georgia Supreme Court found that the following evidence, which it "[c]onstrued most strongly to support the verdict," was "sufficient to authorize a rational trier of fact to find [petitioner] guilty of murder beyond a reasonable doubt":

> . . . [A]fter two years of marriage, [petitioner's] wife filed for divorce and moved out of the couple's home. [Petitioner], who did not want to get divorced, threatened to kill anyone who had a sexual relationship with his wife. [Petitioner's] wife subsequently began dating David Coffin, and [petitioner] hired a private investigator to follow her. [Petitioner] asked the investigator to locate Coffin's home address and telephone number, and after the investigator provided the information to him, [petitioner] said that he was going to drive by Coffin's residence during the next weekend. That Saturday night, Coffin's house was burglarized, and his car was stolen. During the burglary, a call was made from Coffin's home to [petitioner's] house, and later that night [petitioner] made repeated calls to his wife's apartment, asking if she was sleeping with Coffin.
>
> Two days after the burglary, [petitioner] called in sick to work, and sometime that night, Coffin was fatally shot inside his house. The next morning, Coffin's car and other items stolen from his home were found burning near a MARTA station. A gas can and bag found inside the burning car were identified as being similar to items owned by [petitioner]. That night, Coffin's house was destroyed by arson, and his body was found inside.
>
> That same night, [petitioner] made false reports to the police about having twice been attacked by an unidentified assailant at his own house,

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and petitioner's trial. See [Doc. 1-34 at 8, 20-21].

> claiming one attack before, and another attack after, the fire at Coffin's home. During his statement to police about the alleged attacks, [petitioner] said that he knew Coffin had been shot. However, at that time, the police did not know Coffin had been shot due to the charred condition of his body. It was not until the autopsy was later performed that the cause of death was revealed to be a gunshot wound to the head. A few days later, [petitioner] attempted to establish an alibi for himself by asking a neighbor to say that he had seen [petitioner] at a gym on the night of the murder. . . .

Davis, 676 S.E.2d at 216-17. On April 28, 2009, the Georgia Supreme Court affirmed the trial court's judgment. Id. at 221. The United States Supreme Court denied petitioner a writ of certiorari on October 5, 2009. Davis v. Georgia, 558 U.S. 879 (2009).

Represented by new counsel, Marsha G. Shein, E. Jay Abt, and Andy M. Cohen, petitioner filed a habeas corpus petition in the Superior Court of Gwinnett County on August 25, 2010. [Docs. 1-3, 1-4, 1-5]; see also [Doc. 1-12 at 30-31]. As grounds for relief, petitioner argued that:

> (1) trial and appellate counsel were ineffective for failing to fully investigate the exculpatory nature of missing evidence individually to prove bad faith;
>
> (2) trial and appellate counsel were ineffective in failing to investigate the lost evidence to prove bad faith;

(3) trial and appellate counsel were ineffective for failing to investigate or raise the violation of petitioner's due process right to the preservation of evidence created under state law and administrative rules;

(4) trial and appellate counsel were ineffective for failing to object to the loss of exculpatory evidence;

(5) trial and appellate counsel were ineffective for failing to raise the unfair prejudice in the loss of certain evidence and the use of that evidence at trial;

(6) trial and appellate counsel were ineffective for failing to raise the violation of petitioner's right to cross examine the witnesses against him recognized by Crawford v. Washington, 541 U.S. 36 (2004);

(7) trial and appellate counsel were ineffective for failing to call an expert to show that the tape of petitioner's police interview had been altered and that there was a second tape or additional recording device;

(8) trial and appellate counsel were ineffective for failing to request the recusal of the Fulton County District Attorney's Office due to the multiple incidents of lost evidence, misconduct by that office, and misconduct by the investigating agency Georgia Bureau of Investigation ("GBI") Crime Lab;

(9) petitioner was deprived of his due process rights to a fair trial when the state's gun expert committed misconduct while working at the GBI crime lab in failing to properly test firearms and in testifying falsely;

(10) trial counsel was ineffective for failing to consult an independent expert for the defense relating to the fire timeline at the victim's residence and other arson related evidence, and appellate counsel was ineffective for failing to raise the issue on appeal as an ineffective assistance of counsel claim;

(11) trial and appellate counsel were ineffective for failing to compel Detective Walker to testify after he had been subpoenaed twice for the hearing on the motion for a new trial;

(12) trial counsel was ineffective for failing to investigate the police department's taped interview of petitioner;

(13) investigator Jim Daws' trial testimony denied petitioner his right to due process to exclude evidence at trial covered by his statutory right to attorney client privilege; and

(14) trial counsel was ineffective for failing to subpoena or obtain phone records and failing to consult or present an expert.

[Doc. 1-3 at 7-14, 23-25, 41-55; Docs. 1-4, 1-5]. After conducting evidentiary hearings on July 25 through 29, October 27, and December 2, 2011, [Docs. 1-15 through 1-21], the state habeas court entered a written order denying the petition, [Doc. 16-10]. On March 18, 2013, the Georgia Supreme Court denied petitioner a certificate of probable cause to appeal the denial of habeas corpus relief. [Doc. 16-11].

Still represented by Ms. Shein, and with the assistance of Howard Jarrett Weintraub and Benjamin Black Alper, petitioner filed this § 2254 petition on April 29, 2013. [Doc. 1]. Petitioner's grounds for relief, as stated by counsel in the revised supporting brief, are as follows:

(1) the state habeas court's decision was based on unreasonable and incorrect statements of law, fact, and evidence, resulting in a violation of petitioner's right to due process;

(2) the state habeas court's determination that petitioner's right to due process has not been violated based on the new evidence presented at the habeas hearing was contrary to and involved an unreasonable interpretation of existing federal and constitutional law;

(3) the state habeas court's determination that the state did not destroy potentially exculpatory evidence in bad faith, resulting in a denial of petitioner's constitutional rights to due process and to the effective assistance of counsel, was contrary to and involved an unreasonable interpretation of existing federal and constitutional law;

(4) the state habeas court's determination that the state did not lose and/or destroy apparently exculpatory evidence, resulting in a denial of petitioner's constitutional rights to due process and to the effective assistance of counsel, was contrary to and involved an unreasonable interpretation of existing federal and constitutional law;

(5) the decision that the state did not violate petitioner's right to due process by misconduct was contrary to and involved an unreasonable interpretation of existing federal and constitutional law;

(6) the state habeas court's determination that counsel provided effective assistance of counsel by failing to raise valid state law issues was contrary to and involved an unreasonable interpretation of existing federal and constitutional law;

(7) the state habeas court's determination that petitioner's right to due process and the effective assistance of counsel was not violated by unfair prejudice caused by the loss of the evidence was contrary to and involved unreasonable interpretation of existing federal law;

(8) the state habeas court's determination that petitioner's rights to due process and to the effective assistance of counsel were not violated by the admission of tainted and altered evidence was contrary to and an unreasonable interpretation of existing federal and constitutional law;

> (9) the state habeas court's determination that petitioner's rights to due process and effective assistance of counsel were not violated by perjured testimony was contrary to and an unreasonable interpretation of existing federal and constitutional law;
>
> (10) the state habeas court's determination that petitioner's right to due process was not violated by the state's suppression of evidence was contrary to and an unreasonable interpretation of existing federal and constitutional law; and
>
> (11) the state habeas court's determination that petitioner's right to effective assistance of counsel was not violated by counsel's failure to raise a confrontation clause argument was contrary to and involved an unreasonable interpretation of existing federal constitutional law.

[Doc. 7 at 14-80].[3] Respondent argues that none of petitioner's stated grounds for relief are cognizable in a federal habeas corpus proceeding because they focus on purported errors in petitioner's state habeas proceedings. [Doc. 13-1 at 5-11, 19, 21-24, 27]. In support of this argument, respondent cites Quince v. Crosby, 360 F.3d 1259, 1262 (11th Cir. 2004), which held that "an alleged defect in a collateral proceeding does not state a basis for habeas relief." [Doc. 13-1 at 6]. Alternatively, respondent asserts that grounds five through eleven are procedurally defaulted and that, should the Court liberally construe grounds three through four, six through eight, and

[3] Although listed in a different order, these grounds for relief are otherwise identical to those raised in the initial petition. See [Doc. 1 at 12-17].

eleven as raising exhausted claims, then the state courts' decisions rejecting those grounds are entitled to deference. [Id. at 11-29].

Petitioner replies that Quince does not apply because his grounds for relief concern the state habeas court's allegedly erroneous decisions and not errors with the habeas proceeding, that none of his grounds are procedurally defaulted, that the state court decisions do not warrant deference, and that he has stated cognizable grounds for federal habeas corpus relief. [Doc. 27 at 3-24]. Additionally, petitioner maintains that an evidentiary hearing is required to resolve his claims. [Id. at 24-25].

To the extent that petitioner alleges procedural defects in the state habeas proceedings, such claims are not cognizable on federal habeas review. Quince, 360 F.3d at 1262. Moreover, petitioner's arguments present a challenge for the Court to discern which of his exhausted federal claims he raises in the instant petition. The Court does not require any "magic words," as petitioner suggests; rather, "petitioner must present [his] claim[s] in clear and simple language such that the district court may not misunderstand [them]." Dupree v. Warden, 715 F.3d 1295, 1299 (11th Cir. 2013) (per curiam). Petitioner has asserted several due process claims in the grounds listed in his federal petition and revised supporting brief. See [Doc. 1 at 12-17; Doc. 7 at 14-80]. However, he raised only two due process claims in the grounds listed in his state

habeas petition and those pertained to the state's firearms expert, asserted as ground 10 in the federal petition, and to testimony by a private investigator that petitioner has not raised in his federal petition. [Doc. 1-3 at 10, 13]. The remaining grounds listed in the state habeas petition only raised ineffective assistance of counsel claims. [Id. at 7-14].

Petitioner has filed a motion to supplement his petition, [Doc. 36], arguing that he did raise the substantive due process claims in the state habeas court and, alternatively, requesting that this case be held in abeyance while he exhausts those claims in state court, [Doc. 36-1]. Petitioner asserts that his motion to supplement was made necessary by the state's filing of the voluminous record after all the pleadings had been filed. [Id. at 1-2]. However, petitioner has not shown a valid reason for supplementing his petition as these arguments could have been presented in his reply brief, [Doc. 27], which was filed after the state submitted the record. Moreover, he has not provided any record citations to show where he allegedly presented these independent due process claims to the state habeas court. See generally [Doc. 36-1]. Petitioner asserts that counsel made due process arguments at the close of the state habeas hearing, [id. at 8], but "the exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record."

McNair v. Campbell, 416 F.3d 1291, 1303 (11th Cir. 2005) (internal quotation marks, alteration, and citation omitted).[4] Accordingly, petitioner's motion to supplement this petition, [Doc. 36], is **DENIED**. Because petitioner's due process claims are now procedurally defaulted, his request to hold this case in abeyance is also **DENIED**. See O.C.G.A. § 9-14-51 (prohibiting a Georgia court from considering claims in a second state habeas corpus petition that could have been raised in the first habeas petition);

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[4] Petitioner did make some due process arguments concerning the lost evidence in his brief in support of the state habeas petition, see [Doc. 1-3 at 53-55; Doc. 1-4 at 1-16], albeit under grounds that raised only ineffective assistance of counsel claims. See [Doc. 1 at 12-17; Doc. 7 at 14-80]. Indeed, in opening remarks at the state habeas evidentiary hearing, counsel for petitioner made only two references to due process violations, without specifying that they were based on claims beyond the two listed as grounds in the petition, and counsel made detailed and repeated references to the ineffective assistance of counsel claims. [Doc. 1-16at 11-12]. In its opening remarks, the state indicated that petitioner's claims were being presented in the context of ineffective assistance of counsel. [Id. at 11-12]. At the conclusion of the state habeas evidentiary hearing on October 27, 2011, counsel for petitioner argued extensively about ineffective assistance of counsel, see [Doc. 1-20 at 76-108], and specifically mentioned an alleged due process violation only in connection with the state firearms expert. [Id. at 100]. Counsel did address issues pertaining to the lost evidence, but his arguments about the lost evidence were made in the context of his ineffective assistance of counsel claims. [Id. at 76-80, 86-90]. It is clear from the record that the state and the state habeas court did not discern that petitioner was asserting any independent substantive due process claims other than those pertaining to the state firearms expert and the private investigator and addressed only the grounds clearly asserted in the petition. [Doc. 16-10]. Nevertheless, to the extent petitioner may be regarded as having exhausted his due process claims regarding the lost evidence, this Report and Recommendation will address the merits of these claims.

Ogle v. Johnson, 488 F.3d 1364, 1370-71 (11th Cir. 2007) (A claim that "could not be raised in a successive state habeas petition . . . is procedurally defaulted."). Accordingly, this Report and Recommendation will address the merits of petitioner's exhausted federal grounds for relief that the Court understands him to raise.

II. DISCUSSION

A. 28 U.S.C. § 2254 Standards

Under 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus on behalf of a person being 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). A state prisoner who seeks federal habeas corpus relief may not obtain that relief unless he first exhausts his available remedies in state court or shows that a state remedial process is unavailable or ineffective. Id. § 2254(b)(1). A federal court may not grant habeas corpus relief for claims previously adjudicated on the merits by a state court unless the state court adjudication resulted in a decision that (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." Id. § 2254(d); Van Poyck v. Fla. Dep't of Corrs., 290 F.3d 1318, 1322

n.4 (11th Cir. 2002) (per curiam) ("[I]n the context of a habeas review of a state court's decision–only Supreme Court precedent can clearly establish the law.").

When applying § 2254(d), the federal court evaluating a habeas petition must first determine the applicable "'clearly established Federal law, as determined by the Supreme Court of the United States.'" Williams v. Taylor, 529 U.S. 362, 404-05 (2000) (quoting 28 U.S.C. § 2254(d)(1)). Next, the federal habeas court must ascertain whether the state court decision is "contrary to" that clearly established federal law by determining if the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or whether the state court reached a result different from the Supreme Court on a set of materially indistinguishable facts. Id. at 412-13. In other words, a state court decision is "contrary to" clearly established federal law only when it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases." Id. at 405; see also Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (holding that a state court decision is not contrary to federal law simply because it does not cite Supreme Court authority; the relevant inquiry is whether the reasoning or the result of the state decision contradicts that authority).

If the federal habeas court determines that the state court decision is not contrary to clearly established federal law, it must then determine whether the state court

decision was an "unreasonable application" of clearly established federal law by determining whether the state court identified the correct governing legal principle from the Supreme Court's decisions but unreasonably applied that principle to the facts of the petitioner's case. Williams, 529 U.S. at 413. "For purposes of § 2254(d)(1), 'an unreasonable application of federal law is different from an incorrect application of federal law.'" Harrington v. Richter, 131 S. Ct. 770, 785 (2011) (quoting Williams, 529 U.S. at 410) (emphasis in original). "Under § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly [but r]ather, that application must also be unreasonable." Williams, 529 U.S. at 411. Thus,

> [a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Harrington, 131 S. Ct. at 786-87; see also Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (per curiam) ("Where [in a federal habeas corpus petition] the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but [also] objectively unreasonable.").

"[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011). Petitioner acknowledges that he fully "develop[ed] the factual basis of [his] claim[s] in State court proceedings." [Doc. 27 at 24]. Additionally, the undersigned has reviewed the pleadings and exhibits and finds that the record contains sufficient facts upon which the issues may be resolved. "It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court." Cullen, 131 S. Ct. at 1399. Accordingly, the undersigned finds that no federal evidentiary hearing is warranted, and the case is now ready for disposition.

B. Ground One: The State Habeas Court's Factual Findings

Petitioner first attacks the state habeas court's order on the ground that it was based on an unreasonable determination of the facts in light of the evidence presented at the evidentiary hearing. [Doc. 1 at 12; Doc. 7 at 14-34]. The state habeas court's determinations of factual issues are presumed correct unless the petitioner presents "clear and convincing evidence" that those findings were erroneous. 28 U.S.C. § 2254(e)(1). Despite this deference to state court factual findings, "[t]o review the actions of a state trial court . . . , federal habeas courts must examine the state trial

record, rather than rely solely on the state . . . court's findings as to what the trial record contains." Ferguson v. Culliver, 527 F.3d 1144, 1149 (11th Cir. 2008) (per curiam). However, "some evidence suggesting the possibility" that the petitioner's version of the facts is correct is not sufficient to show that the state court made an unreasonable determination of fact. Bottoson v. Moore, 234 F.3d 526, 540 (11th Cir. 2000). Rather, a federal court must defer to the state court's finding of fact if "there is support for it in the record" unless it is rebutted by clear and convincing evidence. Crawford v. Head, 311 F.3d 1288, 1317 (11th Cir. 2002). Petitioner presents several particular examples of the state habeas court's alleged erroneous factual findings, which the Court will now address in turn.

First, petitioner argues that the state habeas court unreasonably found that counsel addressed the exculpatory nature of the lost evidence through cross-examination and by raising breaches of standard operating procedures and chain of custody protocols. [Doc. 7 at 17-19, 27-28]. Petitioner contends that the court should not have credited attorney Bruce Morris' testimony that he believed the prejudice resulting from the lost evidence was obvious to the trial court and jury without expert testimony. [Id.]. Petitioner maintains that these findings were unreasonable because counsel's testimony was general and did not discuss the "potential exculpatory value

of specific pieces of evidence," because "[c]ounsel admitted to being troubled by the failure to raise certain issues," and because the court "failed to cite even one page of the trial transcript illustrating how in fact counsel utilized the cross-examinations of witnesses to develop this concept." [Id.].

Morris testified before the state habeas court that, in moving to dismiss the indictment and exclude the lost evidence, the defense "pursued every legal standard" and "raised all issues." [Doc. 1-19 at 10-11]. Morris also testified that he cross-examined the officers at trial regarding the lost evidence and had a continuing objection to testimony referring to any of the lost evidence.[5] [Id. at 25, 89]. On multiple occasions during his testimony, Morris stated that it was obvious to him that the state had not handled the evidence properly, and, thus, he did not think further proof on that point, such as an expert witness or introduction into evidence of other laws, rules, regulations and/or procedures, was necessary. [Id. at 27, 60, 88].

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[5] Petitioner maintains that Morris' use of a continuing objection cannot demonstrate effective assistance because Morris admitted during the habeas evidentiary hearing that "in retrospect," he could "have made a variety of different objections and given different legal arguments for each piece of evidence based upon that piece of evidence of exculpatory value at trial." [Doc. 7 at 33; Doc. 1-19 at 22]. This argument is not a challenge to the state habeas court's factual findings, and the undersigned will address counsel's effectiveness later in this Report and Recommendation.

Additionally, co-counsel, Brian Steel testified that Morris cross-examined the state's witnesses regarding the lost evidence to show that petitioner could not possibly have a fair trial. [Id. at 114-15, 117].

Although petitioner challenges the state habeas court's factual findings regarding counsel's handling of the lost evidence issue on the ground that, in some instances, its order cited only the pre-trial hearing transcript, [Doc. 7 at 32-33; Doc. 16-10 at 10], review of the trial transcript reveals that both attorneys testified accurately and that Morris thoroughly cross-examined the lead detective, Rick Chambers, regarding the lost evidence and showed that its loss and/or destruction violated law enforcement standard operating procedures, [Doc. 16-29 at 19-23, 32-35, 52; Doc. 17-2 at 58; Doc. 17-17 at 9-11; Doc. 17-19 at 21-24, 48, 56-57; Doc. 18-1 at 36, 120-35, 138-41; Doc. 18-2 at 70-73]. In fact, Morris elicited testimony from Detective Chambers at trial admitting that, had the fingerprint evidence been preserved, it could have provided further information helpful to the investigation. [Doc. 18-1 at 136-37].

Additionally, counsel highlighted the missing evidence issue during closing argument. Steel argued:

> . . . then you know what the police do? They lose the evidence. [Petitioner] does not get any discovery in this case until after November of 2005, nine years later. That's when discovery injects, and the

> Honorable Mr. Morris can get that evidence and start investigating, and the prosecution lost it all. There is no pull string on that bag.

[Doc. 19-3 at 41]. Morris also addressed the lost evidence issue during his closing argument. [Doc. 19-4 at 20-22, 41-46]. At one point, Morris noted that, "[e]very witness who testified said, if I still had the evidence, I could do something with it." [Id. at 43]. Thus, the state habeas court's factual findings regarding counsel's handling of the lost evidence issue during trial were supported by "some evidence."

Petitioner cites testimony by Don Samuel, who was retained after trial to assist on the appeal, that he was "troubled" that they did not raise a confrontation clause issue on direct appeal. [Doc. 7 at 17; Doc. 1-18 at 8, 41-44]. This is not sufficient to rebut the state habeas court's factual findings that counsel addressed the lost evidence issue at trial and reasonably believed that cross-examination of the state's witnesses was sufficient to address law enforcement's violation of standard operating procedures. Any legal conclusion that the state habeas court reached regarding counsel's effectiveness as to this issue will be addressed later in this Report and Recommendation.

Petitioner next contends that the state habeas court unreasonably credited the state's expert's testimony that the murder weapon was inoperable for testing purposes

because the court did not address "the suspect nature of this testimony given that this witness has since been fired for falsifying results and deviations have been found in 13% of a sampling of her cases" and "never mention[ed] uncontroverted expert witness testimony that the gun could have been tested." [Doc. 7 at 17-18]. Both of these assertions are belied by the record. The state habeas court addressed petitioner's claims regarding the state's expert, E. Bernadette Davy, in detail. [Doc. 16-10 at 34-37]. The state habeas court noted that petitioner had not presented any evidence to show that Davy actually perjured herself at trial when she testified that the gun could not be tested. [Id. at 36-37]. Petitioner has not presented "clear and convincing" evidence to rebut this finding.

Additionally, the state habeas court did mention defense expert William Dodd's testimony, based on his review of photographs of the now missing gun, "that he believed the gun could have been fired for ballistics analysis." [Id. at 20]. The state habeas court gave less credit to Dodd's testimony not only because he had not personally examined the weapon, but also because "his expertise [was] in the field of fire analysis," rather than forensic firearms examination, a distinction that petitioner does not dispute. [Id.]. Accordingly, petitioner has not rebutted the state habeas

court's factual finding, which is supported by some evidence, that the firearm could not be tested.

Next, petitioner disputes the state habeas court's finding that he presented no evidence to show that the lost fingerprint cards were of sufficient quality to have been submitted to the Automated Fingerprint Identification System ("AFIS"). [Doc. 7 at 19]. Petitioner's record citations, [Doc. 1-17 at 55, 62, 79-80; Doc. 1-18 at 87-107, 117, 121-22; Doc. 1-24 at 5-8, 22-28, 35-36; Doc. 1-34 at 34-50], do not demonstrate that the missing fingerprint cards were of the quality required for AFIS or otherwise were required to be submitted to AFIS. Thus, petitioner has failed to rebut this factual finding with clear and convincing evidence.

Petitioner also contends that the state habeas court erroneously found that the defense "utilized the services of expert witnesses." [Doc. 7 at 21-25]. The state habeas court did not direct this finding regarding the defense's use of experts to any particular issue.[6] [Doc. 16-10 at 6-7]. Morris testified that the defense hired an expert, John Lentini, to evaluate the scene of the fire and "to challenge the State's timeline

[6] Although petitioner suggests that the state habeas court found that the defense "utilized" expert testimony on the lost evidence issue, [Doc. 7 at 25], this is not the case. Nowhere in the state habeas court's conclusions regarding the grounds pertaining to the lost and/or destroyed evidence did it find that petitioner had used experts in connection with that issue. [See Doc. 16-10 at 14-25].

regarding the fire," but ultimately did not call him to testify at trial because "his investigation and his review of the State's witnesses' report was not helpful" to the defense. [Doc. 1-19 at 41-42]. Petitioner points to Morris' additional testimony that he did not recall consulting additional experts or calling any to testify at the pretrial motions hearing or at trial to address certain other issues. [Doc. 7 at 21-25; Doc. 1-19 at 15, 19, 25-27, 40-41, 52, 55, 60-62, 64, 117-18, 138]. However, Morris also testified that Steel found "another gentleman," who "did some experimenting for [them]," and that Lentini gave the defense suggestions for cross-examination. [Doc. 1-19 at 42-44]. Additionally, Steel testified that he "employed . . . [e]xperts [who] looked at all the evidence in the case." [Id. at 109]. Moreover, petitioner admits that his attorneys called one expert witness to testify at trial regarding the victim's blood alcohol levels and unsuccessfully attempted to present additional expert testimony regarding cocaine in the victim's body. [Doc. 7 at 25]. Thus, some evidence supports the state habeas court's finding that the defense "utilized" experts, and petitioner has failed to rebut this finding with clear and convincing evidence.

Petitioner next challenges the state habeas court's statement on page eight of its order that "Morris extensively litigated the missing evidence issue prior to trial by making every conceivable legal argument and providing case law in support of his

arguments." [Doc. 7 at 25-27; Doc. 16-10 at 8]. In this portion of its order, the state habeas court was merely summarizing the relevant testimony presented during the evidentiary hearings, in this instance, Morris' testimony that, as to the lost evidence, the defense (1) "raised all issues, including . . . that there was evidence of bad faith and, alternatively, that the gross negligence should equate to bad faith," (2) "extensively litigated the items of missing evidence," and (3) "incorporated all of the ideas that [counsel] could think of that were supported by federal and state law, whether by statute or case law." [Doc. 1-19 at 11, 13, 16-17; Doc. 16-10 at 8]. Although petitioner obviously disputes Morris' contention that he "extensively litigated the missing evidence issue," any legal conclusion that the state habeas court reached regarding Morris' effectiveness will be addressed later in this Report and Recommendation. In short, petitioner has not rebutted the state habeas court's factual finding as to the substance of Morris' testimony.

Petitioner also contests the state habeas court's finding that "[i]n an attempt to further investigate this lost evidence, counsel spoke with individuals from the Fulton County District Attorney's Office and multiple law enforcement officials, consulted with the former head of the property room of the Atlanta Police Department ("APD"), and had their investigator look into any witnesses whom may have handled such lost

evidence." [Doc. 7 at 28-30; Doc. 16-10 at 9]. This finding is supported by some evidence in that Morris testified that he "had the investigator look into" any individuals who "would have played a role in handling or losing the evidence," that he spoke to Joseph Burford and Sheila Ross of the Fulton County District Attorney's Office, as well as Detectives Chambers and Marshall Walker, and that he "consulted with the gentleman who at one time was in charge of the Property Room in the City of Atlanta Police Department." [Doc. 1-19 at 38; Doc. 1-39 at 38; Doc. 1-41 at 39-41; Doc. 16-12 at 1]. Petitioner has not rebutted this testimony, but notes that Morris did not elaborate on the specific details of his investigation. Again, without yet addressing counsel's effectiveness, the undersigned finds that the state habeas court's description of Morris' testimony is accurate.

Petitioner next contends that the state habeas court's record citations do not support its findings (1) that counsel cross-examined witnesses during trial, including Detective Chambers, regarding APD and GBI "standard operating procedures for maintaining the integrity and chain of custody of evidence, specifically in unsolved cases," and (2) that counsel "established that multiple pieces of evidence were lost or destroyed in violation of law enforcement standard operating procedures." [Doc. 7 at 30-32; Doc. 16-10 at 9-10]. The trial transcript reveals that Morris cross-examined:

(1) former DeKalb County Police Officer Frank Figueroa, the officer who responded to the car fire, regarding the protocol for gathering and preserving evidence, [Doc. 17-16 at 58-60; Doc. 17-17 at 9-11]; (2) Bobby Smith, former Crime Scene Investigation Unit Supervisor for the DeKalb County Police Department, as to the importance of preserving evidence for future use and maintaining the chain of custody, [Doc. 17-19 at 21-23]; (3) former GBI crime lab employee Alfreddie Pryor regarding his ability to test the latent fingerprint cards at the time of trial had they been preserved correctly and GBI's policy regarding the preservation of evidence, [id. at 48, 56]; (4) Detective Chambers about the missing evidence, law enforcement's failure to follow protocol for maintaining the chain of custody and integrity of the evidence in this case, and what the detective did to try and find the lost evidence, [Doc. 18-1 at 120-35, 138-41]; and (5) Deputy Chief John McNeal of Atlanta Fire and Rescue regarding his search for the missing evidence, [Doc. 18-2 at 60, 70-73]. Thus, the state habeas court's finding is supported by some evidence, and petitioner has failed to present clear and convincing evidence to rebut it.

Finally, petitioner correctly notes that the state habeas court's legal conclusions regarding counsel's effectiveness, even if they are stated as factual findings, are not

entitled to a presumption of correctness. [Doc. 7 at 34]. As previously noted, this Report and Recommendation will address those conclusions separately hereinafter.

C. Grounds Two, Eight, Nine, and Ten: The New Evidence Presented at the State Habeas Evidentiary Hearing Regarding the State's Alleged Bad Faith

In these grounds, petitioner apparently challenges the state habeas court's resolution of his claims that: (1) trial and appellate counsel were ineffective for failing to call an expert to show that the tape of petitioner's police interview had been altered and that there was a second tape or additional recording device (state habeas ground seven), and trial counsel was ineffective for failing to investigate the police department's taped interview of petitioner (state habeas ground twelve); and (2) petitioner was deprived of his due process rights to a fair trial when the state's gun expert committed misconduct while working at the GBI crime lab in failing to properly test firearms and in testifying falsely (state habeas ground nine). [Doc. 7 at 34-38; 66-79].

1. Petitioner's Audio-taped Police Interview

Petitioner argues that undisputed evidence presented at the habeas hearing established that the state altered petitioner's taped statement and failed to disclose a second recording. [Doc. 7 at 35, 38, 67]. Petitioner asserts that this new evidence

would likely have led to the exclusion of petitioner's statement, "which allegedly contained incriminating information." [Id. at 37]. Petitioner maintains that trial counsel was ineffective for failing to establish that the taped statement was not authentic and should not have been admitted. [Id. at 67]. According to petitioner, the evidence presented at the habeas hearing shows that Detective Chambers' testimony that the tape was stopped only once to turn it over was false and contrary to what petitioner recalled and had told his attorneys. [Id. at 67-68]. Petitioner argues that impeaching Detective Chambers would have impugned the entire investigation. [Id. at 70-72]. Petitioner further asserts that the "second tape could have confirmed the threats made to [him]," and that counsel's failure to call an audio expert was unreasonable. [Id. at 69].

i. Clearly Established Federal Law

In this Court's review of the state habeas court's denial of petitioner's ineffective assistance of counsel claims, "the relevant clearly established law [for purposes of 28 U.S.C. § 2254(d)] derives from Strickland v. Washington, 466 U.S. 668 (1984), which provides the standard for inadequate assistance of counsel under the Sixth Amendment." Premo v. Moore, 131 S. Ct. 733, 737-38 (2011) (parallel citations omitted); see also Eagle v. Linahan, 279 F.3d 926, 938 (11th Cir. 2001) (applying

Strickland to allegations of ineffective assistance of appellate counsel). "The pivotal question" before this Court "is whether the state court's application of the Strickland standard was unreasonable." Harrington, 131 S. Ct. at 785. "This is different from asking whether defense counsel's performance fell below Strickland's standard." Id.

The Strickland analysis is two-pronged. However, a court need not address both prongs "if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697. First, a convicted defendant asserting a claim of ineffective assistance of counsel must show that "in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance." Id. at 690. A court analyzing Strickland's first prong must be "highly deferential" and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689; Atkins v. Singletary, 965 F.2d 952, 958 (11th Cir. 1992) ("We also should always presume strongly that counsel's performance was reasonable and adequate."); see also Harrington, 131 S. Ct. at 788 ("'Surmounting Strickland's high bar is never an easy task.'" (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010))). "[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail . . . is the hallmark of effective

appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986) (internal quotation marks and citation omitted).

In order to meet the second prong of Strickland, a petitioner must demonstrate that counsel's unreasonable acts or omissions prejudiced him. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. In order to demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.; see also Eagle, 279 F.3d at 943 ("To determine whether the [unreasonable] failure to raise a claim on appeal resulted in prejudice, we review the merits of the omitted claim.").

When this deferential Strickland standard is "combined with the extra layer of deference that § 2254 provides, the result is double deference and the question becomes whether 'there is any reasonable argument that counsel satisfied Strickland's deferential standard.'" Johnson v. Sec'y, DOC, 643 F.3d 907, 910-11 (11th Cir. 2011) (quoting Harrington, 131 S. Ct. at 788). "Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of

counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding." Id. at 911.

ii. State Habeas Court's Decision

The state habeas court made the following findings of fact, which are supported by the record as noted:

> Petitioner, after voluntarily traveling to the Atlanta Police Department, was interviewed by Atlanta Police Department Detectives Rick Chambers and M. Walker concerning Petitioner's involvement in the murder of David Coffin, and that interview was recorded through the use of an audio microcassette tape. [Doc. 1-20 at 67-68; Doc. 17-20 at 31-32]. Petitioner "emphatically" told counsel that law enforcement had stopped the audio tape and threatened him with the death penalty during the interview. [Doc. 1-19 at 50-51]. After listening to the audio tape multiple times and discussing the recording with Petitioner, counsel decided to challenge the admissibility of Petitioner's interview with law enforcement on voluntariness grounds, arguing that law enforcement stopped the tape during the interview and threatened Petitioner with the death penalty. [Id. at 50-51, 94-95; Doc. 1-21 at 9-10].
>
> Despite multiple conversations with counsel concerning the audio tape, Petitioner never informed counsel that he believed the audiotape was manipulated or inaccurately reflected certain portions of the interview. [Doc. 1-21 at 9-10]. Petitioner only alleged that the tape was stopped on at least one occasion and that he was threatened by law enforcement. [Id.; Doc. 1-19 at 50-51, 142]. Petitioner never informed counsel of an additional recording device in the interview room or of the existence of a second audio tape recording. [Doc. 1-19 at 50].
>
> Initially, Petitioner asked counsel to have the tape analyzed by an expert, but ultimately, after further discussions with counsel, Petitioner

made the decision not to have the tape analyzed. [Doc. 1-21 at 9-10]. Counsel believed that an expert analysis, determining that the tape had been stopped, would not strengthen their argument to exclude Petitioner's statement, as Detective Chambers admitted that the tape was stopped but denied threatening Petitioner. [Id.; Doc. 18-1 at 100].

On appeal, counsel continued to analyze any issues surrounding Petitioner's interview with law enforcement. [Doc. 1-18 at 45]. Once again, Petitioner informed counsel that law enforcement had turned off the audiotape recording during the interview. [Id. at 45-46]. Counsel challenged the voluntariness of Petitioner's statements to law enforcement on appeal. [Doc. 1-34 at 23-29].

Detective Chambers testified at trial and at Petitioner's habeas hearing that the tape had been stopped at least once to switch sides of the tape, but Chambers denied that Petitioner was ever threatened while the tape was not recording. [Doc. 1-20 at 67-70; Doc. 18-1 at 100]. Also, Detective Chambers confirmed that there was only one recording device present during Petitioner's interview, that the audio recording of Petitioner's interview had not been altered, and that the recording was a complete and accurate reflection of Petitioner's interview. [Doc. 1-20 at 69-70; Doc. 18-1 at 98, 176].

Petitioner's current habeas counsel retained the services of a "tape expert," James Griffin, to analyze Petitioner's recorded interview with law enforcement. [Doc. 1-20 at 38, 44]. Griffin did not speak to Detective Chambers, Detective Walker, or Petitioner, prior to his analysis of the audio recording. [Id. at 60]. Griffin did not examine the actual tape recorder that was used to make the recording. [Id.].

Griffin determined that the recording device used to record Petitioner's interview was similar to a dictation device, where the tape is started and stopped automatically based on the volume level. [Id. at 61]. When the noise or conversation in the area around the recording device falls below a certain volume, such a device would stop automatically.

> [Id.]. Griffin also testified that such a "rudimentary" device could miss small portions of a conversation during this automatic start and stop process. [Id. at 61-62].
>
> During Griffin's analysis of Petitioner's recorded interview, it became apparent that the tape had been used by the detectives to record information concerning other cases prior to Petitioner's interview. [Id. at 51-52]. Detective Chambers confirmed that the tape had been used prior to Petitioner's interview to record information concerning other cases, and that they had deliberately taped over another interview to record Petitioner's interview. [Id. at 70]. Griffin believed that there were instances of "over-recording" during Petitioner's interview and in the other portions of the recording not related to Petitioner's case. [Id. at 51-53]. Griffin documented two "over-recording" portions of Petitioner's interview, one on side A for 1.76 seconds, and the second on side B for 0.52 seconds. [Id. at 53-54, 60].
>
> Griffin also testified that he believed that the recording of Petitioner's interview was stopped twice, once on each side of the tape, for an undetermined length of time. [Id. at 56, 62]. Prior to the tape being stopped on side B, Petitioner was asked by one of the detectives if he wanted a drink of water. [Id. at 63]. After the tape was resumed on side B, Griffin heard one of the detectives state, "turn the tape over." [Id. at 57]. Griffin believed during this portion of the recording he heard a "fumbling, handling, mechanical noise," which he believed to be consistent with the operation of a tape recorder. [Id.].

[Doc. 16-10 at 26-29].

Having correctly set forth the Strickland standard previously in its order, [id. at 14-16], the state habeas court first found that counsel's performance as to this issue was not deficient because counsel thoroughly examined the audiotape, discussed it at

length with petitioner, attacked the voluntariness of the interview, and considered having the tape analyzed by an expert, but, after numerous conversations with petitioner whose sole contention was that law enforcement threatened him while the tape was not running, petitioner made the decision not to have the tape analyzed as it "would only serve to confirm Detective Chambers' testimony," [id. at 30-31]. The court also noted that petitioner never informed counsel that there was a second recording device in the room, that portions of his recorded interview were deleted or altered, or that he believed the recording was not a fair and accurate recording of his interview. [Id. at 31]. Thus, the court concluded that counsel thoroughly addressed this issue based on the information petitioner provided him and that his decision not to call an expert was reasonable based on his belief that it could not strengthen petitioner's claim regarding the alleged threat. [Id. at 31].

The court also found that petitioner had failed to establish prejudice because, even if counsel had hired an expert like Griffin, petitioner did not show that the audio tape would have been suppressed or that the outcome of his trial would likely have been different. [Id. at 31-32]. Petitioner presented no evidence that anything was said during the two alleged "over-recordings," and speculation is insufficient to establish prejudice. [Id. at 32]. Griffin's testimony regarding the two stops of the audio tape

only reinforced Detective Chambers' testimony that the tape had been stopped at least once. [Id.]. Finally, the court noted that "any beliefs proffered by Griffin about the existence of a second recording device are based on his opinion and speculation, and in direct contradiction to law enforcement testimony." [Id.]. Thus, even if Griffin's testimony had been presented to the trial court, it "would have been subject to a credibility determination," and "[s]uch speculative testimony by a witness who was not present during Petitioner's interview . . . does not establish a reasonable probability that the outcome of Petitioner's trial or appeal would have been different." [Id. at 32-33].

iii. Analysis

Contrary to petitioner's assertion, Griffin's testimony at the habeas hearing did not conclusively establish that the state altered the audiotape or failed to disclose a second recording. Griffin's testimony was based on his having examined and listened to the audiotape, but his testimony that the tape was altered based on what he heard was not indisputable. Indeed, Detective Chambers, who was present during petitioner's interview, testified that there was only one recording device in the room and that the tape had not been altered. The undersigned cannot find that the state habeas court's decision to credit Detective Chambers' testimony over Griffin's was

unreasonable.[7] See Marshall v. Lonberger, 459 U.S. 422, 434 (1983) ("28 U.S.C. § 2254 gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."). Additionally, Detective Chambers' testimony is in accord with what petitioner told his attorneys. [Doc. 1-19 at 51, 142]. Petitioner never told his attorneys that there was another recording device in the room or that the tape was not an accurate reflection of his interview other than his contention that the detectives threatened him with the death penalty when the recorder was stopped . [Id. at 50; Doc. 1-21 at 9-10]. "The reasonableness of a trial counsel's acts, including lack of investigation . . . , depends 'critically' upon what information the client communicated to counsel." Chandler v.

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[7] To the extent petitioner asserts a due process claim premised on the alleged altered tape and second recording, the state habeas court's findings that these allegations were premised on speculation have some support in the record and have not been rebutted by clear and convincing evidence, and therefore, the record does not support a finding of bad faith on the part of the state, which is necessary to establish a due process claim. See Wheelock v. Kernan, No. C 05-3878 PJH, 2012 WL 359750, at *17-18 (N.D. Cal. Feb. 2, 2012) ("[T]here is no due process violation unless there is bad faith conduct by the police in failing to preserve potentially useful evidence. . . . Negligent failure to preserve potentially useful evidence is not enough to establish bad faith and does not constitute a violation of due process.") (citations omitted); see also Castillo v. United States, No. 07 Civ. 2976, 2010 WL 3912788, at *7 (S.D. N.Y. Sept. 8, 2010) (holding that "mere speculation about the existence of undisclosed evidence . . . does not warrant habeas relief") (citation omitted).

United States, 218 F.3d 1305, 1324 (11th Cir. 2000) (en banc) (citing Strickland, 466 U.S. at 691).

Moreover, even if the tape recorder was stopped more than once or another tape recorder had been in the room, this does not establish bad faith or that the state altered evidence because the state habeas court could reasonably have concluded that the evidence simply demonstrated that Detective Chambers did not recall these details.[8] It certainly does not conclusively show that the audiotape was not an accurate reflection of petitioner's interview or that law enforcement threatened petitioner when the tape was not running. Petitioner's speculation that a second tape could have confirmed that law enforcement threatened him is insufficient to entitle him to habeas relief.[9] See Johnson v. Alabama, 256 F.3d 1156, 1187 (11th Cir. 2001) (concluding

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[8] At trial, Detective Chambers testified that the tape was stopped once to turn it over and that he did not recall "another reference to the tape stopping." [Doc. 18-1 at 100]. At the habeas hearing, Detective Chambers again testified that, to his knowledge, the tape was stopped only once, but stated that it was possible that the tape "was stopped and started again for some other reason." [Doc. 1-20 at 69].

[9] Petitioner's contention that the detectives deliberately stopped the recorder in order to threaten him with the death penalty underscores the speculativeness of his assertion that a second recording would be any different than the recording produced to him. If the detectives deliberately turned off the recorder to conceal that the alleged threat was made, it would have defeated their purpose to continue recording the interview and alleged threat on a second recording device. Thus, even had petitioner shown that there was a second recording device in the interview room, it is entirely

that petitioner's speculation that missing evidence "would have been helpful" is insufficient to show that he is entitled to federal habeas relief).

In sum, the undersigned cannot find that the state habeas court's conclusions that counsel was effective and that petitioner did not show prejudice were "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 131 S. Ct. at 786-87. Thus, the state habeas court's rejection of this ground is entitled to deference pursuant to § 2254(d). See id. at 785; Williams, 529 U.S. at 404-05, 412-13; Johnson, 643 F.3d at 911.

2. Firearms Expert's Testimony

Petitioner contends that his due process rights to a fair trial were violated because the state's firearms expert, Bernadette Davy, falsified reports.[10] [Doc. 7 at 35-

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speculative that the second recording would have captured the alleged threat.

[10] In his reply brief, petitioner asserts for the first time that counsel was ineffective for failing to obtain this information. [Doc. 27 at 24]. Petitioner did not raise this assertion in his petition, [Doc. 1 at 16-17], provide argument in support of it in his initial brief, [Doc. 7 at 72-79], or present it to the state habeas court, [Doc. 1-4 at 47-52]. Accordingly, the Court will not address this argument. See Rule 2(c), Rules Governing Habeas Corpus Cases Under Section 2254 ("The petition must ... specify all the grounds for relief available to the petitioner."); Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1342 (11th Cir. 2005) ("arguments raised for the first time in a reply brief are not properly before a reviewing court") (citation omitted); Martens v. Sec'y,

37, 74-79]. At petitioner's 2006 trial, Davy, an expert in the field of forensic firearms examination, testified that, in December of 1996, she was assigned to perform testing on the Beretta handgun, a magazine, and two shell casings recovered from the victim's fire damaged home. [Doc. 18-4 at 8-9, 14, 19, 27]. Davy further testified that, due to the serious heat damage the items had sustained, she was unable to determine if the bullets or casings were fired from the Beretta handgun. [Id. at 11-12, 14, 22-24]. Davy also testified that she had no evidence that the Beretta handgun, magazine, or casings were linked to petitioner or to anyone else. [Id. at 31]. According to Davy, she performed every possible test on the Beretta handgun and could do nothing different if she had the weapon now. [Id. at 32].

Approximately three months after petitioner filed his appellate brief and one month before the Supreme Court of Georgia issued its decision affirming his conviction, Davy resigned her position with the GBI when a customary peer review revealed that she had intentionally fabricated data on a firearms worksheet that was part of an official crime lab case file. [Doc. 1-18 at 248-49, 258-59, 266-67; Doc. 1-35 at 30-39]. Specifically, Davy only conducted ten trigger pulls on a six-shot revolver

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Dep't of Corr., No. 8:08-CV-248-T-30MAP, 2009 WL 2948518, *1 (M.D. Fla. Sep. 14, 2009) (claims raised in the reply that were not raised in the petition will not be considered).

in violation of GBI policy, which requires twelve trigger pulls. [Doc. 1-18 at 258]. After the case was sent back to Davy to conduct the appropriate number of trigger pulls, she falsely indicated on her worksheet that she had done so, when in fact she never retook possession of the weapon. [Id. at 258-59]. The GBI subsequently reexamined about 170 to 175 of Davy's cases dating back to 2000 or 2001 and found minor deviations in about 20 to 25 of those cases. [Id. at 252-253]. They did not reevaluate petitioner's case. [Id. at 253]. Additionally, George Herrin, Jr., Deputy Director of the GBI in charge of the crime lab, testified that Davy had previously been disciplined for giving her password to a contract employee and for threatening her direct supervisor . [Id. at 242, 245-48]. Mr. Herrin did not state when these incidents occurred and testified that he did not notify any district attorneys or defense lawyers about them. [Id.].

The state habeas court found that petitioner had procedurally defaulted this claim by not raising it on direct appeal and, assuming that he could establish cause given the timing of Davy's resignation, he had not established prejudice. [Doc. 16-10 at 34-37]. Because petitioner could not have raised this claim on direct appeal, the undersigned will address its merits.

Petitioner argues that the state failed to disclose "valuable impeachment evidence" concerning Davy, namely the circumstances of her resignation and the GBI's findings regarding "deviations" in other cases. [Doc. 7 at 74-76]. Petitioner also contends that the state should have provided him a copy of Davy's personnel file, which would have revealed other "serious infractions." [Id. at 76, 78]. Petitioner maintains that this information "should call into question the entirety" of Davy's testimony and that expert testimony presented at the habeas hearing shows that Davy testified falsely at petitioner's trial that the Beretta handgun could not be tested. [Id. at 77].

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). Under Brady:

> The nondisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." . . .
>
> "Giglio[11] error, a species of Brady error, occurs when 'the undisclosed evidence demonstrates that the prosecution's case included

[11] Giglio v. United States, 405 U.S. 150 (1972).

> perjured testimony and that the prosecution knew, or should have known, of the perjury.'" . . . To prevail on a Giglio claim, a petitioner must establish that "(1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material i.e., that there is 'any reasonable likelihood' that the false testimony 'could ... have affected the judgment.'" . . . This standard of materiality is equivalent to the . . . "harmless beyond a reasonable doubt" standard. . . .

Ford v. Hall, 546 F.3d 1326, 1331-32 (11th Cir. 2008) (first alteration in original) (citations omitted). The Eleventh Circuit has held:

> The materiality prong is easier to establish with Giglio claims than with Brady claims. For Giglio purposes, "the falsehood is deemed to be material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'"

Brown v. Head, 272 F.3d 1308, 1317 (11th Cir. 2001) (citation omitted).

Petitioner has not shown that Davy testified falsely in his case. The expert who testified at petitioner's habeas hearing was an arson investigator who had evaluated evidence obtained from a fire, but had no firearms expertise. [Doc. 1-18 at 200, 235-36]. Thus, the state habeas court reasonably concluded that he was not qualified to testify that the Beretta handgun could have been tested. [Id. at 235]. Petitioner also has not demonstrated that the prosecutor had any knowledge of Davy's failure to follow GBI rules. Davy's resignation and the GBI's subsequent discovery of her "deviations" in other cases occurred after petitioner's trial had concluded.

Additionally, petitioner has not shown that Davy's other "infractions" occurred prior to his trial or that the prosecution had reviewed, or even had access to, Davy's personnel file.

Moreover, petitioner has not shown that Davy's testimony had any impact on the jury's verdict. In fact, Davy testified favorably for the defense that her inability to test the evidence prevented her from linking it to petitioner. [Doc. 18-4 at 22-23, 31]. The Georgia Supreme Court did not even reference either Davy's testimony or the Beretta handgun in its summary of the evidence that it found "sufficient to authorize a rational trier of fact to find [petitioner] guilty of murder beyond a reasonable doubt." Davis, 676 S.E.2d at 216-17. Rather, that court noted petitioner's statement to police that he knew the victim had been shot, when, "at that time, the police did not know [the victim] had been shot due to the charred condition of his body." Id. at 217. Therefore, petitioner has not shown prejudice, and he is not entitled to relief on this ground. See Ford, 546 F.3d at 1331-32; Brown, 272 F.3d at 1317.

D. Grounds Three, Four, Six, Seven, and Eleven: Counsel's Assistance Regarding the Missing Evidence

In these grounds, petitioner apparently challenges the state habeas court's resolution of his claims that his attorneys were ineffective for failing to: (1) fully

investigate the exculpatory nature of the missing evidence individually to prove bad faith; (2) investigate the lost evidence to prove bad faith; (3) investigate or raise the violation of petitioner's due process right to the preservation of evidence created under state law and administrative rules; (4) object to the loss of exculpatory evidence; (5) raise the unfair prejudice in the loss of certain evidence and the use of that evidence at trial; and (6) raise the violation of petitioner's right to cross examine the witnesses against him recognized by Crawford. [Doc. 7 at 39-61, 63-66, 79-80].

1. State Habeas Court's Decision

The state habeas court made the following pertinent findings of fact, which are supported by the record as noted:

> Morris was originally retained to represent Petitioner in 1996, within hours of the commencement of the Atlanta Police Department's investigation. [Doc. 1-19 at 4-5]. Morris spent hundreds of hours working on Petitioner's case before getting the criminal charges against Petitioner dismissed in 1997. [Id. at 5, 84].
>
> Approximately 10 years later when Petitioner's criminal case was reopened, Morris was retained once again and spent over 100 additional hours preparing the case for trial. [Id. at 5, 84-85]. Morris retrieved his old case file, discussed trial strategy and divided duties with co-counsel, hired an investigator to track down witnesses, met with Petitioner many times, interviewed "scores" of witnesses, traveled to the crime scene, utilized the services of expert witnesses, received discovery from the state, reviewed discovery with Petitioner, developed a viable trial theory, conducted legal research, filed various motions, and discussed the case

with multiple other individuals who might be able to offer advice or insight into various witnesses. [Id. at 6-9, 41-44, 85-87, 90]. Morris characterized Petitioner as an "active" client, involved with every aspect of the case, adamantly wanting to proceed to trial. [Id. at 85-87].

Steel entered the case approximately four or five weeks prior to Petitioner's jury trial. [Id. at 106]. Steel dedicated a "tremendous" number of hours to Petitioner's defense, putting everything else aside to thoroughly prepare the case for trial. [Id. at 107]. Both Steel and Morris utilized the services of various private investigators to assist with Petitioner's defense. [Id. at 108]. Steel also brought in additional experts to review all the evidence in Petitioner's case. [Id. at 109].

Subsequent to Petitioner's indictment in 2006, Morris became aware that a significant amount of evidence had been lost or destroyed over the past 10 years. [Id. at 10]. Morris thoroughly researched the applicable law and legal standards involving lost or destroyed evidence, discussed this research with co-counsel, and on March 3, 2006, filed an "Emergency Motion to Dismiss the Indictment for Violation of the Defendant's Right to Due Process Based upon the State's Destruction of Evidence." [Id. at 10-11, 88; Doc. 26-9 at 7-19].

Morris extensively litigated the missing evidence issue prior to trial by making every conceivable legal argument and providing case law in support of his arguments. [Doc. 1-19 at 11, 13, 16-17]. Morris argued that, due to the state's disposal of numerous pieces of evidence, Petitioner was prejudiced, in that he was unable to "make use of exculpatory evidence and to test evidence to determine its exculpatory nature;" therefore, Petitioner's constitutional due process rights were violated, including his right to a fair trial and the guaranties of fairness as recognized by the courts. [Id. at 15-18; Doc. 26-9 at 9-17].

[In his motion to dismiss,] Morris specifically enumerated each critical piece of lost evidence[, including a Beretta handgun that the state believed to be the murder weapon, a bullet that allegedly caused the

victim's death, a projectile casing, a tassel from a hat, two gas cans retrieved from different locations, a plastic bag, a shotgun, a knife and caller ID box,] and presented argument as to why each piece of lost evidence prejudiced Petitioner. [Doc. 26-9 at 8-12]. In addition, Morris argued that the "bad faith" and gross negligence of law enforcement in destroying or losing so many critical pieces of evidence prevented Petitioner from further demonstrating the exculpatory nature of such evidence. [Id. at 12-17]. Finally, Morris argued that even if Petitioner could not show "bad faith," this should not preclude the dismissal of the indictment on due process grounds, as the critical nature of the evidence to the defense would prevent Petitioner from receiving a fair trial. [Id. at 14-15].

Morris and Steel believed that they developed the apparent exculpatory nature of this lost evidence and the prejudice Petitioner suffered on account of this lost evidence through cross-examination and argument, and believed that calling an expert to further explain this to the jury would have been unhelpful. [Doc. 1-19 at 27, 60, 117-18, 127-28]. In an attempt to further investigate this lost evidence, counsel spoke with individuals from the Fulton County District Attorney's Office and multiple law enforcement officials, consulted with the former head of the property room of the Atlanta Police Department, and had their investigator look into any witnesses whom may have handled such lost evidence." [Id. at 38; Doc. 1-39 at 38; Doc. 1-41 at 39-41; Doc. 16-12 at 1].

. . . [D]uring the jury trial, counsel cross-examined various witnesses, including Investigator Rick Chambers, the lead detective on the case, regarding Atlanta Police Department and Georgia Bureau of Investigation standard operating procedures for maintaining the integrity and chain of custody of evidence, specifically in unsolved cases. [Doc. 17-16 at 58-60; Doc. 17-17 at 9-11; Doc. 17-19 at 21-23, 48, 56; Doc. 18-1 at 120-35, 138-41; Doc. 18-2 at 60, 70-73]. Counsel also established that multiple pieces of evidence were lost or destroyed in violation of law enforcement standard operating procedures. [Doc. 18-1 at 121-23, 125,

127, 131-35, 138-41]. Morris was able to get Investigator Chambers to admit that if the fingerprints . . . had been preserved, they could have provided further information helpful to the investigation. [Id. at 136-37].
. . .

Following the trial court's denial of Petitioner's motion to dismiss the indictment, [Doc. 26-10 at 14-15], counsel moved to prohibit any reference at trial to any piece of lost or destroyed evidence and presented legal authority to support their position. [Doc. 1-19 at 18; Doc. 16-29 at 19-23, 32-35, 52]. Following the court's denial of counsel's motion, counsel requested and was granted a continuing objection with regards to any references to the lost evidence made at trial. [Doc. 16-29 at 52]. At trial, references to lost or destroyed evidence, i.e., a gas can and Olympic bag, were made by certain witnesses, including Investigator Chambers and Megan Bruton, the ex-wife of Petitioner. [Doc. 17-2 at 58; Doc. 18-1 at 36]. Morris noted his continuing objection on the record when the state admitted a photo of the gas can and referenced the Olympic bag. [Id.].

During Petitioner's jury trial, in regards to the murder weapon, it was established that the Beretta handgun[, serial number L43964Z,] belonged to the victim, and that the handgun, projectiles, and casings recovered from the crime scene were so damaged, by either the fire or the water used to extinguish the fire, that no forensic examinations could be conducted. [Doc. 17-1 at 66-69; Doc. 17-19 at 36-37; Doc. 18-1 at 181-82; Doc. 18-4 at 9-12, 23-24, 32]. In addition, various other pieces of evidence, including the two gas cans, shotgun, flashlight, and keys, were tested for the presence of fingerprints; however, no identifiable prints could be obtained. [Doc. 17-19 at 11-16, 40]. Fingerprints were successfully lifted from the outside of the victim's vehicle and determined not to match Petitioner's fingerprints. [Id. at 42-43].

Don Samuel was retained a few weeks after the jury trial to represent Petitioner post-trial and on direct appeal. [Doc. 1-18 at 8]. Samuel talked with co-counsel, met with Petitioner's parents, read "everything" associated with the case including all transcripts, issued

"open records" requests and subpoenas for various standard operating procedures from law enforcement agencies involved in Petitioner's case, attempted to locate lost pieces of evidence, subpoenaed witnesses to testify at the motion for new trial hearing, subpoenaed chain of custody records, and successfully obtained standard operating procedures from various agencies. [Id. at 9-10, 60-68, 71]. Samuel also had extensive contact with Petitioner, including personal meetings with Petitioner and numerous phone conversations, and Petitioner actively assisted counsel with helpful ideas of how to pursue the lost evidence issues. [Id. at 9-10].

Counsel filed an amended motion for new trial on July 31, 2007, and a motion for new trial hearing was held on January 11, 2008. [Doc. 1-25 at 22-52; Doc. 1-26 at 1-42; Doc. 26-45 at 22-30; Doc. 26-47 at 21]. Counsel also submitted a brief and a supplemental brief in support of their amended motion for new trial. [Doc. 26-47 at 32-40; Doc. 26-48; Doc. 26-49 at 1-31; Doc. 26-50 at 9-20]. The lost evidence issue was the central focus of post-trial proceedings, but other issues were raised as well. [Doc. 1-18 at 9]. Counsel argued that Petitioner had satisfied the standards set forth in California v. Trombetta, 467 U.S. 479 (1984), and Arizona v. Youngblood, 488 U.S. 51 (1988), or alternatively, that those legal standards should be changed. [Doc. 1-18 at 25].

In preparation for the motion for new trial hearing, counsel subpoenaed chain of custody records to demonstrate "breaks" in the chain of custody, which resulted in the lost evidence. [Id. at 66]. Counsel also issued "open records" requests and subpoenas for various agencies' standard operating procedures and records to demonstrate "bad faith" on the part of those agencies or, in the alternative, to actually locate the lost evidence. [Id. at 31-32, 66-68]. Counsel received some of the standard operating procedures from the various agencies. [Id. at 71]. Counsel made additional efforts to obtain other standard operating procedures, but their attempts were unsuccessful. [Id. at 71-72].

At the motion for new trial hearing, counsel called multiple witnesses to testify, in order to demonstrate "bad faith" through the

> multiple breaches in standard operating procedures by law enforcement in mishandling the lost or destroyed evidence. [Doc. 1-25 at 31-52; Doc. 1-26 at 1-40]. Counsel specifically addressed the fingerprint card, the Beretta handgun, the shotgun, and three miscellaneous bags of evidence, to show these critical pieces of evidence were exculpatory and lost or destroyed in "bad faith." [Doc. 1-25 at 34, 36-39; Doc. 26-45 at 26]. Counsel tendered standard operating procedure manuals from the DeKalb Police Department and DeKalb Fire Department into evidence at this hearing. [Doc. 1-25 at 50-52].
>
> After the court denied Petitioner's motion for new trial[, Doc. 26-50 at 23-29], counsel filed a notice of appeal on October 8, 2008, and subsequently submitted an "Appellant's Brief" to the Supreme Court of Georgia, raising the issues he believed to be the most viable and meritorious on appeal. [Doc. 1-18 at 79-80; Doc. 1-32 at 2-50; Doc. 1-33; Doc. 1-34 at 1-31; Doc. 26-1 at 23-25]. In this brief, counsel addressed 55 critical pieces of lost or destroyed evidence, in arguing that law enforcement's breach of standard operating procedures and chain of custody protocols, demonstrated "bad faith," thereby, violating Petitioner's due process rights, i.e., unfairly prejudicing Petitioner and preventing him from receiving a fair trial. [Doc. 1-34 at 7-22]. Counsel also addressed various applicable legal standards, citing numerous cases and authorities to support their positions. [Id.]. Finally, counsel, through citation of favorable cases from other jurisdictions, requested that the Supreme Court of Georgia consider changing the applicable legal standard by eliminating the requirement of "bad faith" and implementing additional factors to consider in lost evidence cases. [Id. at 18-22].

[Doc. 16-10 at 6-14 (footnotes omitted)].

After correctly setting forth the Strickland standard, [id. at 14-16], the state habeas court found that petitioner had not shown deficient performance by counsel or prejudice, [id. at 16-25]. As to petitioner's claims that his attorneys failed to fully

investigate the exculpatory nature of each piece of missing evidence to prove bad faith, the court concluded that counsel's performance was not deficient, reasoning that:

> Counsel identified the lost or missing evidence as a central issue in Petitioner's defense, and thoroughly investigated, researched, and litigated the lost evidence issue, both pre-trial and at trial, and also identified and raised the issue on direct appeal. At every stage of the proceedings in Petitioner's criminal case, counsel identified multiple, specific pieces of missing or lost evidence, thoroughly developed the exculpatory nature of many different pieces of missing or lost evidence, and demonstrated how law enforcement violated their standard operating procedures by losing or misplacing so many pieces of evidence.

[Id. at 17]. The court then found that counsel reasonably chose not to call an expert to further develop the exculpatory nature of the missing evidence based on counsel's reasonable beliefs that he throughly addressed this issue through cross-examination and argument and that the prejudice resulting from the lost evidence was obvious without expert testimony. [Id. at 17-18]. The court also found that counsel sufficiently addressed law enforcement's breaches of various standard operating procedures and chain of custody protocols, without admitting actual copies of those documents, by (1) obtaining Detective Chambers' admissions during cross-examination that evidence was lost and that standard operating procedures were not followed, (2) admitting some standard operating procedures during the hearing on the motion for a new trial, and (3)

presenting legal argument to show why violations of these procedures demonstrated bad faith. [Id. at 18].

Next, the state habeas court found that petitioner had not shown prejudice based on his allegation that counsel insufficiently investigated the lost evidence issue. [Id. at 19-22]. The court concluded that petitioner had not shown that William Dodd's testimony at the habeas evidentiary hearing that the gas can could have been recovered and traced and that the Berretta handgun could have been tested "would have helped further establish the existence of 'bad faith,' . . . [or] changed the outcome of his trial or appeal." [Id. at 19-20]. The court stated that, in order to establish a due process violation, petitioner had to show both that the lost evidence had an "apparent exculpatory value" and that law enforcement acted in "bad faith." [Id. at 19-20]; see also Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (holding "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law"). The court did not credit Dodd's testimony that the Beretta handgun could be tested because (1) it "was based solely on his examination of photographs of the weapon," (2) his expertise was in the field of fire analysis and not firearms, and (3) it was contradicted by Davy's testimony. [Doc. 16-10 at 20]. The court also found that petitioner had not shown

"how the procurement of additional standard operating procedures or the admission of standard operating procedures at trial would have likely changed the outcome of the trial or appeal as counsel thoroughly demonstrated law enforcement's violations of standard operating procedures and attempted to show 'bad faith' through such violations." [Id. at 21]. The court then noted, as to the lost fingerprint card, that the exculpatory nature of this evidence was brought out at trial through witness testimony and that the only fingerprints found did not match petitioner's fingerprints. [Id.]. The court cited Pryor's testimony at the evidentiary hearing that (1) each fingerprint examiner had discretion in deciding whether to run fingerprints through the AFIS, and (2) nothing in his report regarding petitioner's case indicated that the fingerprints were of AFIS quality. [Id. at 21-22]; see also [Doc. 1-17 at 72, 76, 79; Doc. 1-18 at 117, 119; Doc. 1-24 at 11]. The court also noted that "the fingerprints were compared with at least two other individuals, in addition to petitioner, with negative results." [Doc. 16-10 at 22]; see also [Doc. 1-24 at 14]. The court found that petitioner had not shown that the fingerprints were of AFIS quality and that, even if counsel had made further arguments concerning law enforcement's failure to run the fingerprints through AFIS, petitioner could not show that such an argument would have helped prove "bad faith" or would have affected the outcome of the trial or appeal. [Doc. 16-10 at 22].

The court next addressed petitioner's contention that counsel should have cited state and administrative laws that law enforcement allegedly violated to support petitioner's due process claims. [Id. at 22-23]. The court concluded that petitioner had not shown "how the substance of any of these Code sections[, which do not alter the federal Constitution's protections, was] substantially different from the constitutional arguments counsel made on behalf of Petitioner." [Id. at 23]. The court found, therefore, that petitioner "failed to show prejudice as he [could not] show . . . a reasonable probability that, had counsel propounded any additional arguments pursuant to these state statutes, then 'bad faith' would have been established under the federal constitutional test and the outcome of the trial or appeal would have been different." [Id.].

As to petitioner's claim that counsel failed to subpoena and obtain certain chain of custody records for the fingerprint card to determine whether law enforcement maliciously destroyed the card, negligently lost it, or disposed of it in accordance with standard operating procedures, the court found that petitioner had not shown prejudice because he did not offer any such records that would have shown bad faith had counsel presented them at trial or on appeal and because he could not rely on speculation. [Id. at 24]. The court then found that the record belied petitioner's claim that counsel

should have argued that he was unfairly prejudiced by the state's use of the lost evidence at trial, since counsel did raise that argument. [Id. at 24-25].

Lastly, the court addressed petitioner's contention that counsel was ineffective for failing to raise a Crawford claim regarding the lost evidence. [Id. at 25]. The court concluded that Crawford's bar to the admission of out-of-court statements that are testimonial in nature and are not subject to cross-examination did not apply because petitioner did not (1) "contend that certain witnesses testified without counsel being afforded the opportunity to cross-examine them about the lost evidence" or (2) "challenge the admission of any testimonial, out-of-court statements concerning the lost evidence." [Id.].

2. Analysis

Petitioner first argues that the state habeas court's decision was unreasonable because evidence presented at the evidentiary hearing showed that his due process rights were violated because the lost evidence was potentially exculpatory and because law enforcement acted in bad faith by intentionally not following standard operating procedures or Georgia law on the preservation of evidence. [Doc. 7 at 39-60]. However, as discussed earlier, petitioner did not raise an independent due process claim on these bases in the grounds listed in his state habeas petition; rather, he argued

that his attorneys provided him ineffective assistance in connection with the lost evidence issue. [Doc. 1-3 at 7-9, 41-55; Doc. 1-4 at 1-39]. Accordingly, the issue before this Court "is whether the state [habeas] court's application of the Strickland standard was unreasonable." Harrington, 131 S. Ct. at 785. As such, the question under this "double deference" standard is not whether petitioner's due process rights were actually violated, but whether "'there is any reasonable argument that counsel satisfied Strickland's deferential standard'" in presenting petitioner's due process claim. Johnson, 643 F.3d at 911 (quoting Harrington, 131 S. Ct. at 788).

i. Ineffecitve Assistance of Counsel Claims

Petitioner asserts that counsel's "assumption" that the prejudice resulting from law enforcement's violations of standard operating procedures for preserving the evidence was self-evident amounted to "ineffective assistance per se." [Doc. 7 at 54]. However, having reviewed the trial transcript, including counsel's cross-examinations and arguments regarding the missing evidence, the Court finds that counsel made the prejudice to petitioner "obvious." See [Doc. 16-29 at 19-23, 32-35, 52; Doc. 17-2 at 58; Doc. 17-17 at 9-11; Doc. 17-19 at 21-23, 48, 56; Doc. 18-1 at 36, 120-41; Doc. 18-2 at 70-73; Doc. 19-3 at 41; Doc. 19-4 at 20-22, 41-46]. Thus, there is a "reasonable argument" that counsel's decision not to present additional proof regarding law

enforcement's violation of standard operating procedures satisfied the Strickland standard.

Petitioner faults counsel for not arguing that law enforcement's alleged failure to follow state law regarding the preservation of evidence violates the Due Process Clause. [Doc. 7 at 63-64]. The state habeas court concluded, based on the evidence before it, that petitioner failed to show that these additional arguments, which are not significantly different from the constitutional arguments raised by counsel, would have changed the outcome of petitioner's trial or appeal. Petitioner presents no argument to meet his burden to show that the state habeas court's decision on this point was unreasonable.

Petitioner next contends that counsel was ineffective for not arguing that petitioner was unfairly prejudiced by the admission of the missing evidence at trial, particularly since Bruton was allowed to testify regarding the bag and gas can found in the victim's car. [Doc. 7 at 64-66]. This contention is not supported by the record. Counsel moved the trial court to bar the state from introducing photos of the missing evidence, including the bag and gas can, or referring to that evidence because it would prejudice petitioner and prevent him from receiving a fair trial. [Doc. 16-29 at 19-23, 32-35]. The trial court denied counsel's motion, but granted his request for a

continuing objection with regard to the missing evidence. [Id. at 52]. During Bruton's testimony, counsel noted his continuing objection on the record when the state admitted a photo of the gas can and referenced the bag. [Doc. 17-2 at 58].

As to the lost fingerprint card, petitioner presented no evidence to show that the fingerprints were actually of AFIS quality. Thus, petitioner's contention that the fingerprint card could have provided evidence favorable to the defense, other than the fact, which was brought out at trial, that they did not match petitioner's fingerprints, is purely speculative. See McKee v. Fischer, No. 01 Civ. 8046(GEL), 2002 WL 472053, *2 (S.D. N.Y. 2002) (finding no prejudice where original fingerprint evidence was destroyed before trial since "defendants had the benefit of the principal exculpatory value of the missing evidence, as it was stipulated that the fingerprints at the crime scene did not match theirs, and they received the additional benefits of a full airing before the jury of the facts concerning the destruction of the evidence, and of an instruction to the jury permitting the jurors to draw an adverse inference against the prosecution from the loss of the original evidence."). As previously noted, speculation that missing evidence "would have been helpful" is insufficient to establish a Strickland violation. Johnson, 256 F.3d at 1187.

Petitioner also reasserts the argument he presented in his state habeas petition that counsel was ineffective for failing to raise a Crawford claim regarding the lost evidence. [Doc. 7 at 79-80]. Petitioner contends that he has a constitutional "right to confront the evidence," which was violated when witnesses were allowed to describe the missing evidence and link it to petitioner even though he did not have an opportunity to examine or test the evidence. [Id. at 80]. The Confrontation Clause bars the admission of out-of-court statements that are testimonial in nature unless the witness "was unavailable to testify [at trial], and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54. The missing evidence in this case consisted of physical objects, not testimonial, out-of-court statements. Additionally, the witnesses who testified at trial regarding the lost evidence were subject to cross-examination. Petitioner does not cite, and the Court has not found, any case law applying the Confrontation Clause to missing physical evidence. Accordingly, the state habeas court reasonably concluded that counsel was not ineffective for failing to raise this argument.

Petitioner essentially argues that counsel could have done more, but, even if so, this does not demonstrate constitutionally ineffective assistance. "Different lawyers have different gifts; . . . the trial lawyers, in every case, could have done something

more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" Chandler, 218 F.3d at 1313 (citation omitted). "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." White v. Singletary, 972 F.2d 1218, 1220 (11th Cir. 1992). "Even if counsel's decision . . . appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" Dingle v. Sec'y for Dep't of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007) (citation omitted). Nothing that counsel either did or did not do in this case was "patently unreasonable."

Having thoroughly reviewed the record and considered petitioner's arguments, the Court cannot find that the state habeas court's conclusions that counsel was effective in connection with the lost evidence issue and that petitioner did not show prejudice were "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 131 S. Ct. at 786-87. Thus, the state habeas court's rejection of these

grounds is entitled to deference pursuant to § 2254(d). See id. at 785; Williams, 529 U.S. at 404-05, 412-13; Johnson, 643 F.3d at 911.

ii. Due Process Claims

As noted earlier, petitioner maintains that he presented substantive due process claims regarding the lost evidence to the state habeas court, despite the fact that the grounds for relief listed in the state habeas petition asserted only ineffective assistance of counsel claims regarding the lost evidence. See [Doc. 1 at 12-17; Doc. 7 at 14-80]. However, even were petitioner's due process claims concerning the lost evidence found to be cognizable, his claims fail. "Lost evidence does not automatically deny a defendant his or her right to due process." United States v. Price, 298 F. App'x 931, 937 (11th Cir. 2008). Rather, "[t]he loss of evidence by the government is a denial of due process only when the defendant shows that the evidence was likely to significantly contribute to his defense." United States v. Lanzon, 639 F.3d 1293, 1300 (11th Cir. 2011) (quotations and citation omitted).

Due process claims based on lost or destroyed evidence are evaluated under the Supreme Court's decisions in California v. Trombetta, 467 U.S. 479, 489 (1984), and Arizona v. Youngblood, 488 U.S. 51 (1988). "Fairly read, Trombetta and Youngblood frame a dichotomy between evidence that is apparently exculpatory and evidence that

is no more than potentially useful." Magraw v. Roden, 743 F.3d 1, 8 (1st Cir. 2014); Waterhouse v. Sec'y, Dep't of Corr., No. 8:12-CV-298-T-30MAP, 2012 WL 503842, at *9 (M.D. Fla. Feb. 15, 2012). Courts recognizing this dichotomy "have concluded that (1) the destruction of 'apparently exculpatory' evidence does not require a showing of bad faith but that (2) if the evidence is only 'potentially useful,' a bad-faith showing is required." United States v. Hinton, CR No. 2:07cr14-SRW, 2007 WL 2670038, at *3 (M.D. Ala. Sept. 10, 2007) (citations omitted).

Thus, under the Trombetta standard, the lost "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Trombetta, 467 U.S. at 489. In other words, petitioner must present some evidence to show (1) that "the exculpatory value" of the lost evidence was apparent to law enforcement prior to its loss and (2) that law enforcement intentionally lost the evidence in order "to prevent disclosure of evidence favorable to the defense." Phillips v. Woodford, 267 F.3d 966, 987 (9th Cir. 2001). However, where lost or destroyed evidence was only potentially useful, as opposed to apparently exculpatory, "the failure to preserve this 'potentially useful evidence' does not violate due process 'unless a criminal defendant can show bad faith on the part of

the police." Illinois v. Fisher, 540 U.S. 544, 547-48 (2004) (quoting Youngblood, 488 U.S. at 58); Waterhouse, 2012 WL 503842, at *9.

In Youngblood, the Supreme Court reasoned:

> requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Id., 488 U.S. at 58. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Id. at 57 n*. "Bad faith is present if the officer [lost or] destroyed the evidence 'in a calculated effort to circumvent the disclosure requirements established by Brady v. Maryland.'" United States v. Cruz, 508 F. App'x 890, 901 (11th Cir. 2013) (per curiam) (quoting Trombetta, 467 U.S. at 488). "[T]o show bad faith, Petitioner must prove 'official animus' or a 'conscious effort to suppress exculpatory evidence.'" Jones v. McCaughtry, 965 F.2d 473, 477 (7th Cir. 1992) (citations omitted).

In addition to the fingerprint evidence and the handgun, which were discussed earlier in this Report and Recommendation, petitioner argues that the following

missing evidence was "potentially exculpatory":[12] (1) the gas can found in the victim's car, which petitioner speculates could have been "traced to its original source of purchase or possession" to support petitioner's alibi defense, [Doc. 7 at 38, 57]; (2) a plastic bag found in the victim's car, which petitioner argues he could have examined to contradict testimony that it belonged to him, [id. at 60]; and (3) torn clothing found on petitioner's back fence that could have been tested and may have supported petitioner's contention that an unknown assailant, after assaulting petitioner at his home, "had to go over or by a fence in the back of [petitioner's] property," [id. at 39; Doc. 1-19 at 47]. However, petitioner's claims regarding the potential exculpatory value of this evidence amount to "no more than 'mere speculation,'" which is insufficient to support a due process claim. United States v. Jobson, 102 F.3d 214, 219

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[12] Petitioner asserts that the lost fingerprints, gas can, plastic bag, handgun, magazine clip, shell casings, and bullet recovered from the victim had apparent exculpatory value because, had the items been preserved. they could have been examined, tested or traced, and the results may have exonerated him. [Doc. 7 at 56-60]. However, petitioner's argument illustrates that the evidence was only potentially useful, not apparently exculpatory, and he has not shown that law enforcement actually knew of any apparent exculpatory value in this evidence prior to its loss. See United States v. Turner, 287 F. App'x 426, 432 (6th Cir. 2008) (concluding that where there was nothing to indicate "that the exculpatory nature of the evidence should have been apparent to the government, only that more tests 'might have exonerated' [the defendant]," the evidence qualified "as 'potentially useful' under Youngblood"). Thus, his arguments are evaluated under the Youngblood standard.

(6th Cir. 1996) (citation omitted). Moreover, even accepting petitioner's contention that the evidence was potentially useful, he has failed to establish a due process violation because he has not demonstrated bad faith.[13]

Petitioner argues that the following demonstrated law enforcement's bad faith: the "deplorable condition" of the evidence room, the alteration of evidence by the state, the failure to follow standard operating procedures,[14] the violation of state statutes and regulations regarding maintaining evidence, the withholding of evidence, and the attempted cover-up of evidence.[15] [Doc. 7 at 44-54]. However, "the 'mere fact that the government controlled the evidence and failed to preserve it is by itself insufficient

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[13] Although the state courts did not directly address the precise due process issues that petitioner seeks to present to this Court, the Georgia Supreme Court found on direct appeal that there was "no evidence that the State acted in bad faith" and noted that "careless, shoddy and unprofessional investigatory procedures . . . [do] not indicate that the police in bad faith attempted to deny [petitioner] access to evidence that they knew would be exculpatory." Davis, 676 S.E.2d at 220. Additionally, the state habeas court cited Youngblood in its discussion of counsel's handling of the lost evidence issue, and made no finding of bad faith. [Doc. 16-10 at 20].

[14] Although petitioner asserts that this failure was intentional, [Doc.1-4 at 7], there is no record evidence to support that assertion.

[15] The alteration and withholding of evidence refers to petitioner's arguments regarding the tape recording of his interview, which were discussed earlier, and the alleged cover-up of evidence is addressed in the next section of the Report and Recommendation. For the reasons discussed in those sections of the Report and Recommendation, petitioner has not shown bad faith on these grounds.

to establish bad faith.'" Riggs v. Williams, 87 F. App'x 103, 106 (10th Cir. 2004) (citation omitted). "When the government is negligent, or even grossly negligent, in failing to preserve potentially exculpatory evidence, bad faith is not established." Monzo v. Edwards, 281 F.3d 568, 580 (6th Cir. 2002); see also United States v. Femia, 9 F.3d 990, 995 (1st Cir. 1993) (finding that "the district court clearly erred in finding a due process violation because [the evidence was] destroyed due to the government's gross negligence, not bad faith").

The "deplorable condition" of the evidence room may amount to government negligence, or even gross negligence, but that is insufficient to demonstrate bad faith. Additionally, "although numerous cases permit an inference of good faith from evidence of compliance with departmental policies, no authority has been offered to support [petitioner's] assertion that the negative inference holds true; i.e., that failing to adhere to departmental policies constitutes evidence of bad faith."[16] United States v. Vera, 231 F. Supp. 2d 997, 1001-02 (D. Or. 2001) (rejecting defendant's argument that officer's failure to "adhere to state, federal, and agency requirements"

[16] Petitioner's reliance on United States v. Elliott, 83 F. Supp. 2d 637, 647 (E.D. Va. 1999), is unpersuasive because that case involved the intentional destruction of evidence contrary to policy, not lost or misplaced evidence. Moreover, the Elliott court recognized that a showing that the government failed to follow standard procedure does not "*ipso facto* establish bad faith." Id.

demonstrated bad faith). Indeed, the failure to follow standard procedures may "stem from a good-faith mistake as well as something more sinister." United States v. Farmer, 289 F. App'x 81, 86 (6th Cir. 2008). Petitioner has failed to present evidence of a sinister motive, as opposed to negligent behavior, on the part of law enforcement in connection with the condition of the evidence room and the failure to follow standard operating procedures, statutes, and regulations regarding maintaining evidence.

Petitioner has simply not met his burden to establish a due process violation. Petitioner has not shown that any apparently exculpatory evidence was lost or destroyed, and the Due Process Clause is not violated "where destroyed evidence was of only speculative exculpatory value." Jobson, 102 F.3d at 219(citation omitted). Even if the lost evidence was potentially useful, there is no indication in the record that the evidence was "deliberately [lost] to deprive petitioner of access to relevant evidence." Featherstone v. Estelle, 948 F.2d 1497, 1505 (9th Cir. 1991); United States v. Christian, 302 F. App'x 85, 87 (3rd Cir. 2008) (defendant failed to demonstrate bad faith where there was "no suggestion in the evidence that the police believed the missing latent print cards would have exculpated [defendant]; the loss of the print cards appears to have been nothing more than an unfortunate but innocent mistake.").

Because petitioner has not made the requisite showing of bad faith, he has failed to establish a due process violation based on the lost evidence.

E. Ground Five is New and, Thus, Procedurally Defaulted

In ground five, petitioner claims that the prosecution violated his right to due process by misconduct when Chris Harvey, an investigator with the Fulton County District Attorney's Office, had Linda Tolbert, a former Atlanta Fire Department employee, sign an affidavit denying that her signature was on the receipt for a U.P.S. package that contained the Beretta handgun. [Doc. 7 at 62-63]. Petitioner maintains that the affidavit was false and amounts to perjury, as evidenced by Tolbert's testimony at the evidentiary hearing. [Id. at 62]. Thus, petitioner's contends, "[t]his is *per se* evidence of the State's bad faith." [Id.].

The Court is unable to discern, which, if any, of petitioner's exhausted claims this ground raises. Rather, it appears to be a new claim. A claim not previously raised in state court is procedurally defaulted when it is clear that a state court would now find that it is "barred by [state] law" from considering the merits of the claim. Castille v. Peoples, 489 U.S. 346, 351 (1989). However, a petitioner can overcome a procedural default by showing "cause" for the default and resulting "prejudice" or that "a fundamental miscarriage of justice" will occur if the claim is not addressed. Mincey

v. Head, 206 F.3d 1106, 1135 (11th Cir. 2000). Georgia's rule against successive habeas petitions prohibits a Georgia court from considering claims in a second state habeas corpus petition that could have been raised in the first habeas petition. See O.C.G.A. § 9-14-51. Because this rule prevents a Georgia habeas corpus court from considering petitioner's ground five, it is procedurally defaulted. See Ogle, 488 F.3d at 1370-71. Petitioner has not alleged cause and prejudice or a fundamental miscarriage of justice with respect to this claim to excuse the procedural default. Accordingly, petitioner is not entitled to federal habeas relief with respect to ground five.

In any event, petitioner's assertion regarding Tolbert's affidavit and testimony is belied by the record. Tolbert testified that she signed the affidavit denying that it was her signature on the receipt for the U.P.S. package because, although it looked like her signature, it may not have been because other people sat at her desk and signed for packages and because the electronic signature on this package was not clear. [Doc. 1-17 at 155, 157-58]. She also testified that the signature on the receipt was, in fact, her signature and that her affidavit, which was prepared seven years after the event and stated that the signature was forged, "was a simple mistake." [Id. at 162, 164]. Tolbert did not testify that Harvey asked her to prepare the affidavit for some nefarious

purpose, and petitioner has not presented any other evidence to support his contention that there was a "cover-up" in connection with the affidavit. Thus, petitioner has not shown misconduct or "bad faith" based on Tolbert's mistaken affidavit.

III. CERTIFICATE OF APPEALABILITY

Under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, "the 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)." Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Section 2253(c)(2) of Title 28 states that a certificate of appealability ("COA") shall not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 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, 483-84 (2000) (internal quotation marks omitted). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, . . . a

certificate of appealability should issue only when the prisoner shows both 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." Jimenez v. Quarterman, 555 U.S. 113, 118 n.3 (2009) (internal quotations marks omitted) (citing Slack, 529 U.S. at 484).

Based on the foregoing discussion of petitioner's grounds for relief, the resolution of the issues presented is not debatable by jurists of reason, and the undersigned recommends that petitioner be denied a COA.

IV. CONCLUSION

For the reasons set forth above, petitioner's motion to supplement this petition, [Doc. 36], is **DENIED**, and **IT IS RECOMMENDED** that this 28 U.S.C. § 2254 petition, [Doc. 1], and a COA be **DENIED**, and that this action be **DISMISSED**.

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

SO ORDERED AND RECOMMENDED, this 21st day of May, 2014.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE

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