[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14347
Non-Argument Calendar

D.C. Docket No. 1:19-cv-00251-CAP

WISDOM JEFFERY,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

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

(June 3, 2020)

Before JORDAN, ROSENBAUM, and NEWSOM, Circuit Judges.

PER CURIAM.

Wisdom Jeffery appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. The district court granted a certificate of appealability ("COA") on two issues: (1) whether trial counsel was ineffective for failing to present alibi testimony;

and (2) whether appellate counsel was ineffective for failing to raise a claim of trial counsel's ineffectiveness. After careful review, we affirm the denial of Jeffery's § 2254 petition.

I.

In December 2012, a Georgia state jury convicted Jeffery of murder and related crimes in connection with the August 2010 shooting death of his wife, Corrissa Friends Jeffery. According to the Georgia Supreme Court's opinion affirming the murder conviction, *see Jeffrey*[1] *v. State*, 770 S.E.2d 585, 586–87 (Ga. 2015), the trial evidence established the following.

Jeffery and the victim married in 2009, shortly after the victim gave birth to a daughter. The couple's relationship was tumultuous. Both Jeffery and the victim had accused each other of infidelity, and Jeffery was known to have beaten her. After an instance of domestic battery in June 2010, Jeffery was arrested and then released on bond with the condition that he have no contact with the victim.

On August 10, 2010, Jeffery contacted the victim's grandmother and told her that he believed the victim, whom he had not seen in a few days, was being unfaithful and their daughter had been conceived by another man. That night, shortly after midnight, police

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[1] Jeffery's last name appears alternatively as "Jeffrey" and "Jeffery" throughout the record. We use the spelling that appears in his federal petition for a writ of habeas corpus.

responded to a 911 call from the victim at her apartment and found Jeffery there. Jeffery was escorted away from the apartment. Approximately one hour later, police were again dispatched to the apartment in response to a second 911 call by the victim.

Although not mentioned by the Georgia Supreme Court, it appears undisputed that, as recounted by the state habeas court, during the second 911 call, the victim said, "Get the hell out the house. Get out the f—kin' house, Wisdom. Now. Get out of the house. Get out." The recording apparently concludes with the victim asking for an officer to be sent to her apartment, starting to give her address, and then screaming loudly before the phone cuts out. This 911 call occurred at 1:58 a.m.

When police arrived several minutes later, they discovered the victim dead in the bedroom and no one else present. The victim was shot three times by a pump-action shotgun. The victim's uncle testified that Jeffery owned a shotgun, which the uncle had seen at the apartment.

At approximately 3:00 a.m., Jeffery appeared at the home of a friend, Keisha McVick (also known as Keisha Dean), seeking food and shelter. McVick knew there had been "an incident" and did not allow Jeffery into her home, but she did give him food and a cell phone.

After the murder, Jeffery absconded. He was eventually located in Ohio approximately 18 months later, following a nationwide manhunt.

II.

After the jury verdict, Jeffery filed a motion for new trial. Before that motion was ruled on, Jeffery obtained new counsel—to whom we will refer loosely as "appellate counsel"—and filed an amended motion in August 2013, arguing that trial counsel provided ineffective assistance by failing to request a jury instruction on voluntary manslaughter. Following a hearing, the trial court denied the motion. Jeffery appealed, and the Georgia Supreme Court—aside from caveats not relevant to this appeal—affirmed. *See Jeffrey*, 770 S.E.2d at 715–19.

Jeffery next filed a petition for a writ of habeas corpus in state court, alleging ineffective assistance of trial and appellate counsel. He contended that trial counsel was ineffective for failing to locate, interview, and present alibi witnesses at trial, and that appellate counsel was ineffective for similar failures and for failing to raise a claim of ineffective assistance of trial counsel at the motion-for-new-trial stage or on appeal. He further asserted that the failure to present the alibi testimony at trial resulted in a miscarriage of justice.

The state habeas court held an evidentiary hearing on Jeffery's petition in May 2017. At the hearing, Jeffery called multiple witnesses, including Yetunde Vankole and Bianca Bailey, who placed him at another location at the time of the murder. The sequence of events, according to these witnesses, was as follows. At around 1:30 a.m. on August 11, Jeffery arrived at the home of Elite Noel. Jeffery spoke with several women

outside the home and, after borrowing a phone to make a call, requested a ride to another neighborhood, where McVick lived. Vankole agreed and drove him to that location accompanied by Bailey and two others. Vankole testified that they left at around 1:40 a.m. and arrived twenty minutes later. Bailey was less sure of the timing but offered similar testimony as Vankole. In other words, Vankole and Bailey's testimony placed Jeffery away from the victim's apartment at the time of the second 911 call at 1:58 a.m. Both Vankole and Bailey were unaware of the timing of the murder until 2015 or 2016, when they spoke with Jeffery's post-conviction attorney.

Trial and appellate counsel also testified at the hearing. According to trial counsel, Jeffery told counsel that he had received a ride from some individuals at Noel's house on the night of the murder. But trial counsel was unable to reach Noel, Jeffery did not identify the individuals who had given him a ride, and "[n]obody else knew who these people were." Trial counsel further stated that he had "asked everyone that [he] could reach and talk to" whether they were "with Wisdom during" the period around when the murder occurred, but only McVick stated that she had seen him.

Appellate counsel testified that he was not aware of any potential alibi witnesses until after he stopped representing Jeffery. Appellate counsel did not have specific memories about several aspects of his representation of Jeffery, deferring to what was in writing in his case file, but he was certain that neither Jeffery

nor others brought to his attention the names of potential alibi witnesses. He testified that "no one ever told me that there were potential, critical witnesses in this case that should have been used as an alibi or anything else."

The state habeas court denied Jeffery's petition. Addressing appellate counsel first, the court credited his testimony that he was not informed of the names of the purported alibi witnesses and concluded that he did not render ineffective assistance by failing to call alibi witnesses he was not aware of. Further, the court concluded that, even if appellate counsel were aware of these witnesses, their testimony would not have corroborated an alibi for Jeffery in light of other evidence at trial. Turning to trial counsel, the court found that this claim was procedurally defaulted under O.C.G.A. § 9-14-48(d), because it was not timely raised post-trial after Jeffery obtained new counsel and Jeffery had not established either cause or prejudice to excuse the default based on ineffective assistance by appellate counsel.

Following the Georgia Supreme Court's denial of his application for a certificate of probable cause to appeal, Jeffery filed a § 2254 habeas corpus petition in federal court. A magistrate judge prepared a report recommending that Jeffery's § 2254 petition be denied. Without addressing the procedural-default ruling, the magistrate judge concluded that trial counsel was not ineffective for failing to present the testimony of witnesses that he could not locate after a reasonable investigation, and that appellate counsel was not

ineffective for failing to call witnesses about which he was never informed. Over Jeffery's objections, the district court adopted the magistrate judge's recommendation and denied the § 2254 petition. The court granted Jeffery COAs on his claims.

III.

We begin with Jeffery's claim that trial counsel was ineffective for failing to investigate and present alibi witnesses at trial. The state habeas court concluded that this claim was procedurally defaulted under O.C.G.A. § 9-14-48(d). The district court, however, did not address the procedural-default ruling and denied the claim on the merits. Although it appears this decision to bypass the procedural-default ruling was permissible, *see* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."), we limit our analysis to the grounds stated in the state habeas court's ruling.[2]

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[2] To the extent necessary, we *sua sponte* expand Jeffery's COA on this claim to include the procedural question of whether this claim is procedurally defaulted. *See Harris v. Comm'r, Ala. Dep't of Corr.*, 874 F.3d 682, 688 (11th Cir. 2017) (*sua sponte* expanding a COA "to include whether the district court was correct in its procedural default ruling"); *McCoy v. United States*, 266 F.3d 1245, 1248 n.2 (11th Cir. 2001) (stating that COAs encompass "procedural issues which must be resolved before this Court can reach the merits" of the underlying claims).

Whether a claim is procedurally defaulted is a mixed question of fact and law that we review *de novo*. *Harris v. Comm'r, Ala. Dep't of Corr.*, 874 F.3d 682, 688 (11th Cir. 2017). A claim is procedurally defaulted where the state court applies an independent and adequate ground of state procedure to conclude that the petitioner's federal claim is barred. *Owen v. Sec'y, Dep't of Corr.*, 568 F.3d 894, 908 (11th Cir. 2009).

Here, the state habeas court applied Georgia's procedural default rule, § 9-14-48(d), which provides an adequate and independent state ground for denial of a habeas claim. *Ward v. Hall*, 592 F.3d 1144, 1175–76 (11th Cir. 2010). This rule states that, absent a showing of cause and prejudice or a miscarriage of justice, habeas corpus relief shall not be granted in connection with any claim that was not timely raised in accordance with Georgia procedural rules. O.C.G.A. § 9-14-48(d). This includes any claim of ineffective assistance of trial counsel not raised on appeal where the petitioner had new counsel after trial. *Id.*

Jeffery does not dispute that his claim of ineffective assistance of trial counsel is procedurally defaulted due to the state habeas court's application of § 9-14-48(d). He argues, however, that he can establish both cause for the default and prejudice.

A.

Federal review of a procedurally defaulted claim is available if a petitioner can show both "cause" for the default and resulting prejudice. *Harris*, 874 F.3d at

688. A "cause" is an objective factor external to the defense that impeded the effort to raise the claim properly in the state court. *Id.* "In order to establish prejudice to excuse a default, the petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different absent the constitutional violation." *Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 957 (11th Cir. 2016) (quotation marks omitted). Prejudice alone is not enough in the absence of a showing of cause. *Id.*

In Georgia, an attorney's error in failing to raise a claim at the motion-for-new-trial stage or on appeal may provide cause to excuse a procedural default, so long as that error meets the ordinary standard of constitutionally ineffective assistance. *Id.*; *Williams v. Turpin*, 87 F.3d 1204, 1210 (11th Cir. 1996) ("A criminal defendant has a constitutional right to effective representation by counsel at the motion for new trial stage of Georgia's Unified Appeal Procedure."). To make a successful claim of ineffective assistance of counsel, a petitioner must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The proper measure of attorney performance is reasonableness under prevailing professional norms. *Id.* at 688. The inquiry is "whether counsel's assistance was reasonable considering all the circumstances." *Id.* Our review is "highly deferential," presuming that counsel's performance was reasonable and making "every effort" "to eliminate the distorting effects of

hindsight . . . and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. "[B]ecause counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (*en banc*).

An attorney may render ineffective assistance under *Strickland* when he fails to investigate and present possible alibi testimony. *See*, *e.g.*, *Khan v. United States*, 928 F.3d 1264, 1278 (11th Cir.), *cert. dismissed*, 140 S. Ct. 339 (2019) (explaining that deficient performance may be shown where "defense counsel utterly failed to investigate potential witnesses or secure their testimony"). In *Code v. Montgomery*, for example, we concluded that counsel was ineffective when he knew the defendant's "exclusive defense was based on an alibi" but did not contact the two alibi leads the defendant had provided him and "terminated his investigation without determining whether the one witness he contacted could provide an alibi." 799 F.2d 1481, 1483–84 (11th Cir. 1986).

B.

In proceedings below, Jeffery pointed to appellate counsel's alleged ineffective assistance as the cause for the procedural default.[3] While he does not expressly

[3] Jeffery's argument on appeal that the procedural default is excused by ineffective assistance of trial counsel misunderstands

make that same argument on appeal, he separately contends, consistent with the second COA granted by the district court, that appellate counsel was ineffective for failing to "raise[] the issue of trial counsel's failure to properly investigate and present the alibi evidence" in the amended motion for a new trial or on appeal. Appellant's Br. at 26. Accordingly, Jeffery's claim of ineffective assistance of appellate counsel is, effectively, coterminous with the question of whether he has established cause and prejudice to overcome the procedural default of his claim of ineffective assistance of trial counsel.

Here, Jeffery has not established that appellate counsel was ineffective for failing to raise an ineffective-assistance claim against trial counsel for failing to investigate and present alibi testimony at trial. Although there is a circuit split as to whether the federal courts must defer to a state court's resolution of a claim of ineffective assistance of counsel in the cause-and-prejudice context, we need not resolve that dispute because Jeffery's ineffective-assistance-of-appellate-counsel claim fails even under *de novo* review. *See Sealey v. Warden, Ga. Diagnostic Prison*, 954 F.3d 1338,

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the inquiry. The state habeas court found that the ineffective-assistance-of-trial-counsel claim was barred due to Jeffery's failure to timely raise it after he obtained new counsel post-trial. *See* O.C.G.A. § 9-14-48(d). Therefore, he must point to some other external "cause" that justifies the failure to raise the issue at the proper time, not simply a compelling claim of ineffective assistance of trial counsel. *See Raleigh*, 827 F.3d at 957 (prejudice alone is not enough in the absence of a showing of cause).

1365 n.16 (11th Cir. 2020) (declining to resolve this conflict for the same reason).

Appellate counsel's performance was not deficient because there is no evidence that he knew or had reason to believe that there were potential alibi witnesses. The state habeas court credited appellate counsel's testimony that "no one ever told [him] that there were potential, critical witnesses in this case that should have been used as an alibi or anything else." *See Nejad v. Att'y Gen., State of Ga.*, 830 F.3d 1280, 1292 (11th Cir. 2016) ("Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review." (quotation marks omitted)). And nothing in the record contradicts that testimony. While *trial* counsel may have been aware of potential alibi witnesses, there is no evidence that he informed *appellate* counsel of these witnesses either orally or in writing. In addition, appellate counsel testified that Jeffery, in written and oral correspondence, never mentioned the names of potential alibi witnesses. Accordingly, this is not a case where counsel failed to pursue leads provided by the defendant or someone else. *See Code*, 799 F.2d at 1483–84; *see also Strickland*, 466 U.S. at 691 ("Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.").

Jeffery maintains that the alibi witnesses would have been discovered had appellate counsel conducted a "reasonable investigation." But he does not identify with any specificity what appellate counsel should

have done, but failed to do, to conduct such an investigation. Nor does the record support Jeffery's assertion. Jeffery contends that the Georgia Bureau of Investigation file "contained some of these alibi witnesses information and information that discredits the timeline set forth by the state at trial," but it does not appear that the contents of this file have been made a part of the record, so we do not know what information the file contained. Moreover, the GBI's lead investigator testified at the state habeas hearing that, in speaking to Noel and others during the investigation, he never heard the names of Jeffery's alibi witnesses Vankole and Bailey.

That a reasonable investigation would not necessarily have turned up the alibi witnesses is also supported by the state habeas court's factual findings with regard to trial counsel. According to the state habeas court, trial counsel was unable to get in touch with Noel, whose house Jeffery claimed he had received a ride from on the night of the murder, and trial counsel tried but was unable to obtain any information about the purported alibi witnesses from Jeffery or others. Jeffery has not shown that these findings, which were based on trial counsel's testimony, were unreasonable or clearly erroneous. And although we know that Jeffery's alibi witnesses were capable of being found, since they testified at the state habeas hearing, we do not know the circumstances of how they were located by post-conviction counsel. For that reason, we cannot simply infer that the failure to locate these witnesses

earlier was the result of an unreasonable investigation.

Without any showing that appellate counsel had reason to believe that there were potential alibi witnesses who were not called at trial, or that appellate counsel failed to take reasonable investigative steps that he did not take, we cannot say that Jeffery has overcome the presumption that appellate counsel's performance was reasonable. *See Chandler*, 218 F.3d at 1315. Accordingly, Jeffery has not established either cause to excuse the procedural default of his ineffective-assistance-of-trial-counsel claim or an independent claim of ineffective assistance of appellate counsel.

For these reasons, we affirm the district court's denial of Jeffery's § 2254 petition.[4]

AFFIRMED.

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[4] Jeffery's argument that the state habeas court's decision was based on an unreasonable determination of the facts in light of the evidence presented, *see* 28 U.S.C. § 2254(d)(2), appears to relate to the state habeas court's determination that the alibi witnesses' testimony was not sufficient to corroborate an alibi for Jeffery. Like the district court, we express some concern about that determination, but we ultimately need not address it because we affirm on alternative grounds.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WISDOM JEFFERY, Petitioner, v. NATHAN BROOKS, Warden, Respondent.	CIVIL ACTION NO. 1:19-CV-251-CAP

ORDER

(Filed Oct. 16, 2019)

This action is before the court on the report and recommendation ("R&R") of the magistrate judge [Doc. No. 8] and the petitioner's objections thereto [Doc. No. 10]. The R&R recommends denial of the petitioner's § 2254 habeas petition and the grant of a certificate of appealability ("COA") with respect to two specific issues.

In his § 2254 petition, the petitioner asserted a claim of ineffective assistance of counsel against both trial and appellate counsel based on the failure to call alibi witnesses. Pursuant to *Williams v. Taylor*, 529 U.S. 362 (2000), the magistrate judge reviewed the underlying state habeas court's decision on these claims. The Superior Court of Hancock County rejected the claims because it found that neither trial counsel nor appellate counsel were provided with the names of the alibi witnesses the petitioner has now brought

forward. The magistrate judge concluded that the petitioner failed to show the state habeas court erred, and therefore, recommended that deference is owed to those findings.

In his first objection, the petitioner argues that the magistrate judge set the burden too high for the petitioner because he used the incorrect standard under *Williams v. Taylor*. Specifically, the petitioner objects to the magistrate judge's statement that an incorrect decision of a state court is still entitled to deference.

The R&R cites *Williams* as follows:

> In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court analyzed how federal courts should apply § 2254(d). To determine whether a particular state court decision is "contrary to" then-established law, this Court considers whether that decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. *Id.* at 405, 406. If the state court decision "identifies the correct governing legal principle" this Court determines whether the decision "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. This reasonableness determination is objective, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. *Id.* at 410. In other words, it matters not that the state court's application of clearly established federal law was incorrect so long as that misapplication was

> objectively reasonable. *Id.* ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). Habeas relief contrary to a state court holding is precluded "so long as fair-minded jurists could disagree on the correctness of the state court's decision." *Richter*, 562 U.S. at 102 (2011) (internal quotation marks omitted); *see Landers v. Warden, Atty. Gen. of Ala.*, 776 F.3d 1288, 1294 (11th Cir. 2015). In order to obtain habeas corpus relief in 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.

R&R at 5 [Doc. No. 8]. The magistrate judge correctly points out that the Supreme Court in *Williams* requires a federal habeas court to consider whether the state habeas court's decision was objectively reasonable. The petitioner agrees: "The standard is whether the state court's application of Supreme Court precedent is an objectively unreasonable decision." Objections at 2 [Doc. No. 10]. To the extent that the petitioner objects to the magistrate judge's inclusion of language from *Williams* regarding whether an "incorrect" decision may still be found "objectively reasonable," the objection is OVERRULED.

Next, the petitioner objects to the level of deference afforded to the state habeas court's order and

factual findings with respect to the claim of ineffective assistance of appellate counsel. In making this objection, the petitioner takes issue with the following quote included in the R&R that is from the state habeas court's order:

> This Court credits Mr. Steel's testimony that: "I could clearly tell you that no one ever told me that there were potential, critical witnesses in this case that should have been used as an alibi or anything else."

Objections at 3 [Doc. No. 10]. The petitioner argues that the quote is only a partial quote that has been taken out of context, and that the exchange during cross-examination of appellate counsel reveals that he has no memory of whether he knew about the alibi witnesses. The petitioner then contends: "The pointy [sic] that the state habeas court missed and the Report in turn, is that trial counsel was aware of these witnesses and did nothing."

The basis for the finding that appellate counsel's conduct with respect to the alibi witnesses did not fall outside the wide range of professional competent assistance was his lack of knowledge that alibi witnesses existed. While the petitioner argues that trial counsel was told of the alibi witnesses, he points to no evidence on the record to support his claim that appellate counsel knew or was told about them. Thus, in the absence of evidence that appellate counsel had any knowledge that there had ever been potential alibi witnesses, the finding that appellate counsel's failure to raise ineffective assistance of trial counsel regarding the alibi

witnesses was not deficient conduct is entitled to deference. The petitioner's objection on this issue is OVERRULED.

Finally, the petitioner objects to the magistrate judge's deference to the state habeas court's finding that the alibi witnesses he has identified would not have changed the outcome of the trial. However, the magistrate judge's deference to the state habeas court's finding was to the conclusion that trial counsel and appellate counsel were not ineffective for failing to call witnesses that they either did not know about or could not locate. The deference afforded by the magistrate judge did not go to the prejudice prong of the state habeas court's analysis. In fact, the magistrate judge points out that had the claims of ineffective assistance of counsel turned on the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), they may have been successful. Therefore, the magistrate judge recommended the grant of a certificate of appealability on the claims of ineffective assistance of trial and appellate counsel. Accordingly, the petitioner's objections regarding deference to the finding of prejudice has no merit and is OVERRULED.

Based on the foregoing, the R&R [Doc. No. 8] is ADOPTED as the order and opinion of this court.

SO ORDERED this 16th day of October, 2019.

/s/CHARLES A. PANNELL, JR.
CHARLES A. PANNELL, JR.
United States District Judge

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

WISDOM JEFFERY, Petitioner, v. NATHAN BROOKS, Respondent.	:	CIVIL ACTION NO. 1:19-CV-251-CAP-JKL

FINAL REPORT AND RECOMMENDATION

(Filed Sep. 4, 2019)

A. Background and Factual Summary

Petitioner, Wisdom Jeffery, proceeding with counsel, challenges via 28 U.S.C. § 2254, the constitutionality of his Clayton County convictions for malice murder, possession of a firearm during the commission of a crime, and aggravated assault. The parties have filed their briefs, and the matter is now ripe for consideration by the Court.

Petitioner was convicted after a jury trial, and the court imposed a life without parole sentence plus five years consecutive for the firearms violation. Petitioner appealed, and the Georgia Supreme Court generally affirmed Petitioner's convictions and sentences, but vacated in relation to the issue of which of Petitioner's convictions should be merged and which should be

vacated by operation of law. Jeffrey[1] v. State, 770 S.E.2d 585 (Ga. 2015).[2] After the remand, the trial court imposed a sentence of life without parole for murder, twenty years concurrent for aggravated assault, and five years consecutive for the firearms violation.

Petitioner next filed a petition for a writ of habeas corpus in Hancock County Superior Court. [Doc. 6-1]. After an evidentiary hearing, the court denied relief, [Doc. 6-3], and the Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal the denial of habeas corpus relief. [Doc. 6-5]. In generally affirming Petitioner's convictions, the Georgia Supreme Court provided an extensive description of the evidence presented at Petitioner's trial. Jeffrey, 770 S.E.2d at 586-87. Summarizing that discussion, Petitioner and his wife (the victim) had a tumultuous relationship, and Petitioner was known to have beaten her. Petitioner's wife had also obtained a restraining order requiring Petitioner to stay away from her. On the night of the murder, the victim called

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[1] Petitioner's last name appears alternatively as "Jeffrey" and "Jeffery" throughout the record. This Court employs the spelling that appears in the petition.

[2] The jury found Petitioner guilty of one count of malice murder, four counts of felony murder, four counts of aggravated assault and two counts of possession of a firearm during the commission of a felony. The Georgia Supreme Court concluded that the trial court had erred in merging certain counts for sentencing, as the four felony murder verdicts should not have been merged with the malice murder as they stood vacated by operation of law, and the four underlying felonies were improperly merged into the felony murder verdicts. Jeffrey, 770 S.E.2d. at 588.

911, and responding police found Petitioner asleep at the victim's apartment and escorted him from the property. Approximately an hour later, the police were again dispatched to the apartment and found the victim dead from multiple shotgun blasts. After visiting a friend's home seeking shelter, Petitioner absconded and was arrested eighteen months later in Ohio, having changed his appearance.

Although not mentioned by the Georgia Supreme Court, it appears undisputed that right around the time of her death, the victim made another 911 call. According to the state habeas corpus court:

> In the call, the victim said, "Get the hell out the house. Get out the f – kin' house, Wisdom. Now. Get out the house. Get out." The recording concludes with the victim asking for an officer to be sent to her apartment, starting to give the 911 operator her address, and then screaming loudly and the phone being hung up. Officers responded soon thereafter and found the victim dead of gunshot wounds and no one else in the apartment.

[Doc. 6-6 at 5-6].

B. Legal Standard

Pursuant to 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus on behalf of a person held in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. Id. § 2254(a). This power is limited, however.

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). As to those claims that have been "adjudicated on the merits in State court proceedings," a habeas corpus petition "shall not be granted with respect to [such a] claim . . . unless the adjudication of the claim"

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

This standard is "difficult to meet," Harrington v. Richter, 562 U.S. 86, 102 (2011), and "highly deferential," demanding "that state-court decisions be given the benefit of the doubt," Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (citation and internal quotation marks omitted), and requiring the petitioner to carry the burden of proof, Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citing Visciotti, 537 U.S. at 25). In Pinholster, the Supreme Court further held

> that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a

> decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court.

Id.; see also Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003) (holding that state court decisions are measured against Supreme Court precedent at "the time the state court [rendered] its decision.").

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court analyzed how federal courts should apply § 2254(d). To determine whether a particular state court decision is "contrary to" then-established law, this Court considers whether that decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. Id. at 405, 406. If the state court decision "identifies the correct governing legal principle" this Court determines whether the decision "unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. This reasonableness determination is objective, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. Id. at 410. In other words, it matters not that the state court's application of clearly established federal law was incorrect so long as that misapplication was objectively reasonable. Id. ("[A]n unreasonable application of

federal law is different from an incorrect application of federal law."). Habeas relief contrary to a state court holding is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." Richter, 562 U.S. at 102 (2011) (internal quotation marks omitted); see Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1294 (11th Cir. 2015). In order to obtain habeas corpus relief in 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.

In his petition, Petitioner raises two claims of ineffective assistance of counsel. The standard for evaluating claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). The analysis is two-pronged, and the Court may "dispose of the ineffectiveness claim on either of its two grounds." Atkins v. Singletary, 965 F.2d 952, 959 (11th Cir. 1992); see Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffectiveness claim . . . to address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

Petitioner must first show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The court must be "highly deferential," and must "indulge in a strong presumption that counsel's conduct falls within the

wide range of reasonable professional assistance." Id. at 689. "Given the strong presumption in favor of competence, the petitioner's burden of persuasion—though the presumption is not insurmountable—is a heavy one." Fugate v. Head, 261 F.3d 1206, 1217 (11th Cir. 2001) (citation omitted). As the Eleventh Circuit has stated, "[t]he 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." Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc). Rather, the inquiry is whether counsel's actions were "so patently unreasonable that no competent attorney would have chosen them." Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir. 1987). Moreover, under Strickland, reviewing courts must "allow lawyers broad discretion to represent their clients by pursuing their own strategy," White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992), and must give "great deference" to reasonable strategic decisions, Dingle v. Sec'y for Dep't of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007).

In order to meet the second prong of the test, Petitioner must also demonstrate that counsel's unreasonable acts or omissions prejudiced him. Strickland, 466 U.S. at 694. That is, Petitioner "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," id., requiring "a substantial, not just conceivable, likelihood of a different result." Cullen v. Pinholster, 563 U.S. 170, 190 (2011) (quotation and citation

omitted). The two-prong, performance/prejudice standard of ineffective assistance of counsel articulated in Strickland is likewise applicable to claims of ineffective assistance of appellate counsel. See Smith v. Robbins, 528 U.S. 259, 285 (2000).

C. Discussion

The undersigned has reviewed the pleadings and exhibits and finds that the record contains sufficient facts upon which the issues may be resolved. As petitioner has not made the showing required by 28 U.S.C. § 2254(e)(2) to entitle him to an evidentiary hearing, the undersigned finds that no evidentiary hearing is warranted, and the case is now ready for disposition.

1. Grounds One and Two—Petitioner's Claim that Trial and Appellate Counsel were Ineffective Regarding Potential Alibi Witnesses

In his two grounds for relief, Petitioner contends that his trial counsel was ineffective for failing to call certain alibi witnesses at his trial and that appellate counsel was ineffective for failing to raise this issue in Petitioner's motion for a new trial and on appeal. In denying relief on these claims, the state habeas corpus court described the evidence presented at the state habeas corpus hearing as follows:

> Petitioner presented the testimony of Yetunde Vankole and Bianca Bailey to this Court, whom he contends could have established an

alibi defense. Ms. Vankole and Ms. Bailey testified that, in August of 2010, they resided at the house on High Grove Road (where Petitioner's vehicle was eventually recovered) with Chevette Jones, a woman named Elite Noel, and Ms. Noel's young son. Ms. Vankole and Ms. Bailey testified that, early on the morning the victim died, they were at the High Grove Road house with Ms. Jones and a girl named Shani. They testified that Petitioner arrived at the High Grove Road [house] at approximately 1 a.m. or 1:30 a.m, and all four of them drove Petitioner to a neighborhood off Campbellton Road, dropping him off some time around 1:45 a.m. or 2 a.m. They testified that they stayed there that night, in that it was their residence.

At the time of the victim's murder, Ms. Vankole, Ms. Bailey, Ms. Jones, and Shani all knew Petitioner by name and he knew them by name.

Petitioner next presented the testimony of Issa Miller. Ms. Miller testified that she lived a couple of houses down from the High Grove Road house, and that—on the night of the victim's murder—she spoke to her husband (who was at her home) at approximately 1:30 a.m. and heard Petitioner asking him for a ride.

Petitioner also presented the testimony of Yolanda and Manny Haley. Ms. Haley testified that Ms. McZick came to her house on the night the victim was killed but she did not know at what time, and that "I don't know

> why or I don't recall why" Ms. McZick came to her house. Mr. Haley's memory was stronger: he learned from Ms. Haley that Ms. McZick's visit to their residence had to do with Petitioner's case.
>
> Agent Spurlock became aware of the High Grove Road house because he found Petitioner's vehicle there later in the day the victim was murdered. In an attempt to uncover potential witnesses, Agent Spurlock met and spoke with Elite Noel twice and spoke with her brother, Sammy Johnson, about who lived at the High Grove Road house. Ms. Noel and Mr. Johnson indicated that they were the only ones who lived there or stayed there. Agent Spurlock also spoke with Ms. McZick. Ms. McZick informed Agent Spurlock that Petitioner arrived at her house between 3:30 and 3:40 a.m. on August 11.

[Doc. 6-6 at 7-9 (citations to the record omitted)].

The state court also made the following findings of fact regarding trial and appellate counsel.

> Attorney Jim Michael was retained to represent Petitioner prior to his preliminary hearing and handled the case through the trial. Mr. Michael has been licensed to practice law in Georgia since 1995, and has practiced criminal defense almost exclusively. During his career, he estimated that he had handled approximately 50 felony jury trials. During Mr. Michael's conversations with Petitioner, Petitioner informed Michael "that he had gone

to a location and that he had gotten a ride from some individuals" to Ms. McZick's house. However, Petitioner informed Mr. Michael that he did not "know who these people were," and said he could not provide him with those names. After discussing the case with several other individuals, Mr. Michael concluded that "[n]obody else knew who these people were. Nobody gave me any names nobody gave me any contact information." Mr. Michael's repeated attempts to get in touch with Elite Noel were fruitless in light of it having been almost two years since the incident date when he began representing Petitioner. Mr. Michael spoke with Mr. and Ms. Haley, and also Ms. Miller about whether anyone was with Petitioner close-in-time to the victim's murder; however, no one was able to provide any names of any such individual. Had they provided such names, Mr. Michael would have met and spoke with those individuals, vetted them, and—if he found them credible—call[ed] them as witnesses at trial. Mr. Michael was, however, able to speak to Ms. McZick, who—identical to what she informed Agent Spurlock approximately two years prior—informed him that Petitioner came to her house at approximately 3:30 a.m. to 4 a.m. on August 11.

Attorney Brian Steel represented Petitioner on appeal. Mr. Steel has been licensed to practice law in Georgia since 1991 and practices criminal defense. In Mr. Steel's varied career, he has handled a multitude of felony jury trials, including death penalty cases, and more

> than 200 appeals in Georgia alone, many of them in murder cases. Neither Petitioner, nor anyone on Petitioner's behalf, brought to Mr. Steel's attention the names of Ms. Vankole, Ms. Bailey, Ms. Jones, or an individual named "Shani." This Court credits Mr. Steel's testimony that: "I could clearly tell you that no one ever told me that there were potential, critical witnesses in this case that should have been used as an alibi or anything else." Had Mr. Steel been made aware of the existence of those individuals, he would have vetted them to determine whether Petitioner had a viable alibi defense, and—if he found it credible—would have subpoenaed them to testify at Petitioner's motion for new trial.

[Doc. 6-6 at 9-11 (citations to the record omitted)].

After identifying the proper standard for evaluating claims of ineffective assistance of counsel under Strickland discussed above, the state court made the following conclusions with respect to Petitioner's claim of ineffective assistance of appellate counsel.

> Petitioner has not carried his burden to satisfy Strickland. He has not shown that appellate counsel's performance was deficient in any of the instances alleged, nor has he established the requisite prejudice.
>
> An attorney cannot be ineffective for "failing" to call a potential alibi witnesses of whom the attorney is not informed. Lewis v. State, 755 S.E.2d 156 (Ga. 2014). . . . This Court has credited Mr. Steel's testimony that he was not

informed of the names of Petitioner's supposed "alibi" witnesses. Because he was not aware of their existence, he was not ineffective for not calling them at the motion for new trial.

Further, an attorney is not ineffective because he does not call additional witnesses whose vague testimony cannot corroborate his client's alibi. Palmer v. State, 560 S.E.2d 11 (Ga. 2002). . . . This Court finds that, when viewed in tandem with the evidence at trial, the testimony of Ms. Vankole and Ms. Bailey would not have established an alibi. Six years after the victim's murder, Ms. Vankole and Ms. Bailey testified that they saw Petitioner sometime around 1:00 a.m. to 1:30 a.m., then drove him to a neighborhood [off] Campbellton Road (which was Ms. McZick's neighborhood), dropping him off sometime between 1:45 a.m. and 2 a.m. However, the victim in her second 911 call at 1:58 a.m.—mere moments before her death—clearly and unequivocally addressed her attacker as "Wisdom," and told her attacker several times that he needed to "get out the house," before she began screaming. Further, evidence at trial established that the victim's apartment was a mere two miles from the High Grove Road house. Finally, Ms. McZick testified that she spoke with Yolanda Haley between 2:15 and 2:30 a.m., at which point she learned there had been an "incident" or "altercation" between Petitioner and the victim. Ms. McZick also testified that Petitioner arrived at her residence between 3:30

> a.m. and 4 a.m.—not between 1:30 and 2 a.m., as Vankole and Bailey indicated.
>
> Additionally, Agent Spurlock, close-in-time to the victim's murder—met and spoke with Ms. McZick, who indicated that Petitioner arrived at her residence between 3:30 a.m. and 4 a.m. on August 11. Ms. McZick corroborated this timeline to Mr. Michael almost two years later, and then at trial.
>
> Ms. McZick's statements to authorities happened close-in-time to the murder; Ms. Bailey's and Ms. Vankole's testimony are the byproduct of memories almost seven years old.
>
> In light of the testimony adduced at trial, this Court finds that the testimony of Ms. Vankole and Ms. Bailey is not sufficient to corroborate an alibi for Petitioner. Hence, even had Mr. Steel known of the witnesses, the Court finds that they would not have corroborated an alibi. Petitioner's claim of ineffective assistance of appellate counsel provides no basis for relief.

[Id. at 11-14].

The state court further concluded that Petitioner's claim of ineffective assistance of trial counsel based on his failure to call the alibi witnesses was procedurally barred and that Petitioner could not establish cause and prejudice to excuse the default because he failed to establish that his appellate counsel had been ineffective and because, as the court discussed above, the

state court concluded that the alibi witness testimony was not convincing. [Id. at 14-15].

Petitioner contends that the state court's conclusion is not entitled to deference under § 2254(d). However, Petitioner's arguments focus mostly on the state court's finding of no prejudice by attempting to demonstrate that the alibi evidence that he presented at the state habeas corpus hearing was (1) consistent with other evidence indicating that someone other than Petitioner killed the victim and (2) established a reasonable probability that, had that evidence been presented at Petitioner's trial, the outcome of the trial would have been different. Petitioner has not, however, made a convincing argument that the state court erred in concluding that trial counsel and appellate counsel were not ineffective for failing to call witnesses that they either did not know about or could not locate. Petitioner's argument on that issue is limited to the following: "It was professionally unreasonable for trial counsel to not investigate these witnesses and the circumstances of the alibi. His failure to do so prevent [sic] him from calling the witness presented at the habeas evidentiary hearing at trial." [Doc. 1-1 at 22]. The undersigned concludes, however, that the state court's conclusion that appellate counsel cannot be faulted for failing to call witnesses about which he was never informed was reasonable both in light of the facts and as an application of law as discussed by the United States Supreme Court.

The undersigned recognizes that the state habeas corpus court concluded that Petitioner's ineffective

assistance of counsel claim was unavailing because it was procedurally barred and did not specifically hold that trial counsel was not deficient for failing to present the testimony of witnesses that he could not locate. However, the state court found that (1) Petitioner informed trial counsel that he did not know who the potential alibi witnesses were, (2) none of the other people that trial counsel talked to could provide him contact information regarding the potential alibi witnesses, (3) had he been provided with contact information, trial counsel would have met and spoke with the witnesses and called them to testify if their testimony would have been helpful. Based on the testimony presented at the state habeas corpus hearing, none of these findings are unreasonable in light of the evidence presented, and as Petitioner has failed to present clear and convincing evidence to the contrary, this Court must presume that the state court's findings are correct. 28 U.S.C. § 2254(e)(1). Based on those findings, this Court must conclude that trial counsel was not ineffective for failing to present the testimony of witnesses that he could not locate after a reasonable investigation.

In Holley v. Secretary, Florida Department of Corrections, 719 Fed. Appx. 962 (11th Cir. 2017), the Eleventh Circuit confronted a materially identical claim. Trial counsel testified at Holley's state post-conviction hearing that he could not locate an alibi witness. Id. at 968-69. "The state court found this testimony credible, and . . . [t]he district court properly accepted the state court's credibility determination." Id. at 969 (citing

Baldwin v. Johnson, 152 F.3d 1304, 1316 (11th Cir. 1998)). Based on the state court's findings, the Eleventh Circuit held that "it does not appear that counsel's performance fell below the wide range of competence demanded of attorneys in criminal cases." Id. As this Court is bound by the state court's findings of fact, the undersigned has no basis upon which to conclude that trial counsel was ineffective for failing to present witnesses that he could not find after making reasonable efforts to locate them.

Accordingly, the undersigned concludes that Petitioner has failed to demonstrate that his trial or appellate counsel was ineffective.

D. Certificate of Appealability

Having so held, however, the undersigned acknowledges some concern over this outcome. Notably, had Petitioner's claims turned on Strickland's prejudice prong, this Court might have concluded that the alibi evidence presented at the state habeas corpus hearing, which seems to indicate that Petitioner was miles away from the victim's home at the time of the murder, was sufficient to undermine confidence in the outcome of Petitioner's trial, especially in light of other evidence presented at Petitioner's trial that supported the theory that someone other than Petitioner killed the victim. The undersigned further credits—to a limited degree—Petitioner's arguments that the state habeas corpus court's analysis of his alibi evidence was somewhat confusing. Accordingly, pursuant to 28

U.S.C. § 2253(c)(2), the undersigned believes that a Certificate of Appealability should be granted on the issues of (1) whether trial counsel was ineffective for failing to present alibi testimony and (2) whether appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel for failing to present alibi testimony.

E. Conclusion

For the reasons stated, **IT IS RECOMMENDED** that the instant habeas corpus petition be **DENIED** and that this action be **DISMISSED**.

IT IS FURTHER RECOMMENDED that a COA be **GRANTED**. The Clerk is **DIRECTED** to terminate the referral to the undersigned.

SO RECOMMENDED, this 4th day of September, 2019.