IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11642-G

JASON PIERCE,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

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

ORDER:

Appellant's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Britt C. Grant
UNITED STATES CIRCUIT JUDGE

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JASON PIERCE,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

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

Before: GRANT and LUCK, Circuit Judges.

BY THE COURT:

Jason Pierce has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2 and 22-1(c), of this Court's July 22, 2020, order denying a certificate of appealability. Upon review, Pierce's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JASON PIERCE, Petitioner, v. NATHAN BROOKS, Warden, Respondent.	CIVIL ACTION NO. 1:19-CV-03410-JPB

ORDER

This matter comes before the Court on the Magistrate Judge's Final Report and Recommendation [Doc. 18] and Jason Pierce's ("Petitioner") Second Motion to Amend His Complaint [Doc. 23]. This Court finds as follows:

PROCEDURAL HISTORY

On July 26, 2019, Petitioner, who is currently serving two consecutive terms of life without parole and a consecutive term of twenty-five years, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 to challenge his convictions in Fulton County Superior Court for two counts of murder, one count of aggravated assault and one count of possession of a firearm by a convicted felon. [Doc. 1]. In his § 2254 petition, as amended, Petitioner raises the following nine claims for relief: (1) trial counsel provided him ineffective assistance by failing to (a) review discovery, (b) investigate a viable mitigation defense, (c) investigate a purported

Brady v. Maryland, 373 U.S. 83 (1963) violation, and (d) interview witnesses before advising Petitioner to not withdraw his guilty plea and agree to be resentenced; (2) trial counsel was ineffective for failing to explain the motion to reinstate the guilty pleas after having legally withdrawn them, resulting in Petitioner's unknowing and involuntary agreement to not withdraw the pleas and be resentenced; (3) the trial court violated Petitioner's constitutional rights when it found the existence of aggravating circumstances to sentence him to life without parole without notifying him of his right to have a jury make that determination; (4) the trial court erred in granting defense counsel's motion to vacate Petitioner's withdrawn guilty pleas and in reinstating his murder sentences because the motion to vacate was filed outside the term of court; (5) both trial counsel and the trial court failed to explain to Petitioner that entering a guilty plea would waive his right to the privilege against self-incrimination; (6) the State violated double jeopardy by objecting to allowing Petitioner to withdraw his guilty plea to the aggravated assault and firearm offenses; (7) Petitioner's guilty pleas were invalid because the State failed to disclose exculpatory evidence; (8) the prosecution committed misconduct by suppressing and destroying exculpatory evidence; and (9) the prosecution tampered with witnesses and prevented them from speaking with the defense.

On October 16, 2019, the Magistrate Judge issued her Final Report and Recommendation. [Doc. 18]. The Magistrate Judge recommended denying Petitioner's Petition for Writ of Habeas Corpus and dismissing the case. After the Magistrate Judge issued her recommendation, Petitioner moved to amend his complaint a second time. [Doc. 23].

ANALYSIS OF THE REPORT AND RECOMMENDATION

A district judge has broad discretion to accept, reject or modify a magistrate judge's proposed findings and recommendations. United States v. Raddatz, 447 U.S. 667, 680 (1980). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the Report and Recommendation that is the subject of a proper objection on a *de novo* basis and any non-objected-to portion under a "clearly erroneous" standard. Notably, a party objecting to a recommendation "must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988). It is reasonable to place this burden on the objecting party because "[t]his rule facilitates the opportunity for district judges to spend more time on matters actually contested and produces a result compatible with the purposes of the Magistrates Act." United States v. Schultz, 565 F.3d 1353, 1361 (11th Cir. 2009).

Plaintiff timely objected to the Report and Recommendation on November 14, 2019 [Doc. 23]. In his objections, Petitioner mostly reargues his claims, and this Court disagrees with his contention that the Magistrate Judge erred. This Court will address Petitioner's less frivolous arguments, and in order to do so, some background is necessary. Briefly summarizing the facts of Petitioner's crimes,[1] Shunea Allen, Patrice Lassiter and Monique Brown, who were college students in Atlanta, shared an apartment in East Point. Petitioner dated Ms. Allen and was also staying at the apartment. The night before the crimes, Petitioner accused Ms. Allen of cheating on him and the couple argued. The next morning, Petitioner resumed the argument and ultimately produced a gun and shot Ms. Allen in the face. Ms. Allen survived but pretended to be dead. Petitioner then shot and killed Ms. Lassiter and Ms. Brown and left the apartment. Ms. Allen positively identified Petitioner as did an East Point fire department employee who saw Petitioner leaving the apartment after the murders. The question of Petitioner's guilt is not at issue.

Also summarizing the rather protracted procedural history of the case, a more complete version of which appears in the Report and Recommendation [Doc.

[1] A more complete description is found in the transcript of Petitioner's plea hearing. [Doc. 14-8 at 305-07].

18 at 1-6, 19-20], prosecutors initially filed a notice of their intent to seek the death penalty. The prosecutors, however, withdrew the notice of intent and permitted Petitioner to plead guilty to the murders, the aggravated assault of Ms. Allen and possessing a firearm as a convicted felon. After his guilty pleas and sentencing, Petitioner appealed, and the Georgia Supreme Court generally affirmed but remanded the case to the trial court for resentencing because the judge failed to find the existence of aggravating factors as required by O.C.G.A. § 17-10-32.1 (since repealed), before imposing Petitioner's life-without-parole sentences. Pierce v. State, 717 S.E.2d 202, 205 (Ga. 2011).

When the trial judge convened what was supposed to be the resentencing hearing, [see, generally, Doc. 14-9 at ECF pp. 62-78], Petitioner's trial counsel at the time, August Siemon, informed the trial judge that he and Petitioner had a conflict because Petitioner was insisting on a course of action (withdrawing his guilty pleas) that Siemon could not, in good conscience, pursue. The trial judge permitted Siemon to withdraw from his representation based on that conflict and then granted Petitioner's *pro se* motion to withdraw his guilty pleas to the two murders (but not the aggravated assault and firearms charges which were not subject to the remand).

Thereafter, the prosecution reasserted its intent to seek the death penalty, and new counsel, Jerilyn Bell, was appointed to represent Petitioner. Bell immediately realized that the trial court had violated Petitioner's Sixth Amendment rights in granting the *pro se* motion to withdraw the guilty plea because the judge failed to give the warnings required by Faretta v. California, 422 U.S. 806, 835 (1975), before permitting Petitioner to represent himself. She ultimately reached a deal with Petitioner in which he agreed to let her file the motion to vacate the order allowing Petitioner to withdraw his plea in exchange for her pursuing a motion seeking dismissal because his continued prosecution violated his double jeopardy rights. Petitioner's case was transferred to a different judge, and that judge vacated the motion allowing Petitioner to withdraw his guilty plea, denied the double jeopardy motion and then resentenced Petitioner to two consecutive terms of life without parole after making the requisite findings of statutory aggravating factors. [Doc. 14-10 ECF pp. 54-127].

As is evident from a review of the transcript from Petitioner's state habeas corpus proceeding, [Doc. 14-6], as well as Petitioner's pleadings in this action, throughout this process Petitioner has believed and now strongly contends that he had a viable argument that he was guilty of voluntary manslaughter (rather than malice murder) of Ms. Lassiter and Ms. Brown. As both Siemon and, later, Bell

explained to Petitioner, because Ms. Lassiter and Ms. Brown were not a part of the argument between Petitioner and his girlfriend, Ms. Allen, there was no chance that a jury would find Petitioner guilty of voluntary manslaughter rather than murder.

Petitioner's voluntary manslaughter argument relates to his contentions that his counsel failed to properly research the evidence and discovery related to his case as well as his argument that the prosecution withheld Brady material. According to Petitioner, Ms. Allen told state investigators that Petitioner had exhibited paranoid behavior and other suspected mental disorders. Petitioner contends that prosecutors withheld evidence of that statement and that his counsel failed to talk to other witnesses who would have corroborated his claim that he suffered from a mental disorder, which would have purportedly strengthened his voluntary manslaughter argument. However, both Siemon and Bell were aware of Ms. Allen's statement regarding Petitioner's paranoia, see Parker v. Allen, 565 F.3d 1258, 1277 (11th Cir. 2009) (noting that there is no suppression of evidence under Brady "if the defendant knew of the [exculpatory] information or had equal access to obtaining it"), and they knew of other witnesses who would testify that Petitioner suffered from mental dysfunction. It is also clear that, contrary to his contentions otherwise, Petitioner's mental state was not sufficiently serious to raise

a viable defense to the murders that he committed. [Doc. 14-6 at ECF p. 62 (trial counsel testifying that the mental evaluation of Petitioner performed after his arrest did not uncover a significant mental disorder)]. At most, Petitioner's mental issues presented an issue that trial counsel could have used in mitigation at sentencing at the conclusion of a death penalty trial. Accordingly, this Court agrees with the Magistrate Judge that the state habeas corpus court's determinations that: (1) Petitioner's trial counsels were not ineffective; and (2) Petitioner failed to demonstrate that prosecutors withheld Brady material because trial counsels were aware of the statements that were supposedly suppressed. Based on this Court's de novo review of the record, it is equally clear that: (1) Petitioner is not entitled to relief with respect to his Ground 4 (claiming that the trial court erred in granting defense counsel's motion to vacate Petitioner's withdrawn guilty pleas because the motion was filed outside the term of court) because that claim does not raise a constitutional violation and is thus not cognizable under § 2254; (2) the record clearly demonstrates that the trial court explained to Petitioner that entering a guilty plea would waive his right to the privilege against self-incrimination, [Doc. 14-8 at ECF p. 302], and Petitioner is not entitled to relief with respect to his Ground 5; (3) Petitioner's Ground 6 claim of a double jeopardy violation is unavailing because, as noted by the Georgia Supreme Court, Pierce, 755 S.E.2d at

733, Petitioner's convictions were never overturned; and (4) Petitioner's Grounds 7 and 8 are procedurally barred.

With respect to Petitioner's Ground 3, in which he argues that his rights were violated in connection with the trial judge's finding of statutory aggravating circumstances in order to sentence him to life without parole, this Court agrees with the Magistrate Judge's determination that Petitioner's guilty plea had the effect of waiving such a challenge to his sentence. In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court held that a trial judge could not enhance a sentence beyond a statutory maximum[2] based on findings about the defendant or his crimes. Rather, such findings must be made by a jury. However, a claim under Blakely can be waived in a plea agreement, United States v. Rubbo, 396 F.3d 1330, 1335 (11th Cir. 2005), and it is undisputed that in his plea agreement with prosecutors, Petitioner agreed to accept sentences of life-without-parole in exchange for the prosecution's withdrawal of its notice of intent to seek the death

[2] Given the Georgia statutes applicable to Petitioner's sentence, it is debatable that the trial court imposed a sentence that was beyond the statutory maximum. Compare O.C.G.A. § 16-5-1 (1999) (person convicted of malice or felony murder "shall be punished by death or by imprisonment for life") with O.C.G.A. § 17-10-32.1(b) (if district attorney had given notice of intention to seek death penalty, and defendant subsequently pleads guilty, "the judge may sentence the defendant to death or life without parole . . . if the judge finds beyond a reasonable doubt the existence of at least one statutory aggravating circumstance").

penalty. [Doc. 14-10 at 113, 115]. Accordingly, this Court concludes that Petitioner has effectively waived his Blakely claim.

In summary, having carefully reviewed the record, this Court now holds that the Magistrate Judge's findings and conclusions are correct.

PETITIONER'S SECOND MOTION TO AMEND

Federal Rule of Civil Procedure 15, regarding the amendment of pleadings, applies to § 2254 petitions. See Mayle v. Felix, 545 U.S. 644, 655 (2005). Pursuant to Rule 15(a)(1):

> A party may amend [his] pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

Petitioner's motion to amend was filed more than twenty-one days after Respondent's answer and response to the § 2254 petition, and he is thus not entitled to amend his petition as a matter of right. When a party is not entitled to amend as a matter right under Rule 15(a)(1), then that "party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Generally, leave to amend under Rule 15(a)(2) is given freely. Saewitz v. Lexington Ins. Co., 133 F. App'x 695, 699 (11th Cir. 2005). However, this Court may deny leave to amend "in the exercise of its inherent power to

manage the conduct of litigation before it." Reese v. Herbert, 527 F.3d 1253, 1263 (11th Cir. 2008). "In making this determination, a court should consider whether there has been undue delay in filing, bad faith or dilatory motives, prejudice to the opposing parties, and the futility of the amendment." Saewitz, 133 F. App'x. at 699.

In his proposed amendment, Petitioner seeks to add claims that his trial counsel was ineffective for failing to seek to disqualify the Fulton County District Attorney because prosecutors suppressed Brady material.[1] As noted in the discussion above, however, this Court has concluded that Petitioner has failed to demonstrate that the state withheld Brady material. Accordingly, this Court concludes that Petitioner's proposed amendment is futile.

CONCLUSION

After reviewing the entirety of the Final Report and Recommendation and considering Plaintiff's objections, the Final Report and Recommendation is ADOPTED as the order of this Court and the petition is DENIED. Petitioner's

[1] In the opening sentences of his proposed amendment, Petitioner also mentions a claim that trial counsel was ineffective for failing to file a motion pursuant to McClesky v. Kemp, 481 U.S. 279 (1987) and Rower v. State, 264 Ga. 329 (1994). Petitioner further states that the death penalty was discriminatorily sought and applied. However, Plaintiff does not further discuss or provide arguments in support of these claims.

Second Motion to Amend [Doc. 20] is also DENIED. The Clerk is DIRECTED to close this action.

This Court further agrees with the Magistrate Judge that Petitioner has failed to raise any claim of arguable merit, and therefore a Certificate of Appealability is DENIED pursuant to 28 U.S.C. § 2253(c)(2).

SO ORDERED this 13th day of April, 2020.

J. P. BOULEE
United States District Judge

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

JASON PIERCE, Petitioner, v. NATHAN BROOKS, *Warden*, Respondent.	: : : : : : :	PRISONER HABEAS CORPUS 28 U.S.C. § 2254 CIVIL ACTION NO. 1:19-CV-3410-JPB-LTW

FINAL REPORT AND RECOMMENDATION

Petitioner Jason Pierce has filed this *pro se* 28 U.S.C. § 2254 petition to challenge his January 4, 2013 convictions in the Superior Court of Fulton County. This matter is currently before the Court on the petition (Doc. 1), as amended (Doc. 8), the answer-response (Doc. 12), and petitioner's reply (Doc. 15) and motions requesting discovery and an evidentiary hearing (Doc. 16) and to expand the record (Doc. 17). For the reasons that follow, petitioner's motions [16;17] are **DENIED**, and the undersigned **RECOMMENDS** that the petition be **DENIED**.

I. Procedural History

A Fulton County grand jury indicted petitioner "on September 28, 1999, for the murders of Patrice Lassiter and Monique Brown and the aggravated assault of Shunae Allen, as well as other offenses." *Pierce v. State*, 717 S.E.2d 202, 203 (Ga. 2011). *See also* (Doc. 14-7 at 184-88.) On August 7, 2000, the State filed a notice

to seek the death penalty, specifying certain statutory aggravating factors. (Doc. 14-7 at 190.) On December 17, 2003, petitioner entered a negotiated guilty plea to the two murders, the aggravated assault, and possession of a firearm by a convicted felon; and, on January 14, 2004, the trial court sentenced petitioner to consecutive terms of life imprisonment without parole for the murders, twenty years consecutive for aggravated assault, and five years consecutive for the firearm count. (*Id.* at 12-15, 184-88.) Attorneys Derek Jones and August Siemon represented petitioner at the time of his guilty plea and sentencing. (*Id.*)

The prosecutor summarized the factual basis for petitioner's plea as follows:

> The victims, Patrice Lassiter and Monique Brown, the two young ladies that were killed, and the surviving victim, Shunea Allean, had all grown up in the Boston area and had known [petitioner] for a number of years. . . . [T]hey'd all gone to high school together and had been friends while they were in high school. The surviving victim, Shunea Allen, and [petitioner] had a relationship of boyfriend/girlfriend. They were seeing each other during this time period.
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> . . . [T]he night before the murders took place[,] . . . Ms. Lassiter, Ms. Brown, Ms. Allen, [and petitioner] had gone to the movie . . . [and] returned to [an] apartment . . . in East Point[,] . . . and, apparently Shunae Allen and [petitioner] got into an argument or a discussion. . . . [Petitioner] believed that Ms. Allen was perhaps seeing someone else. They did have an argument that night. And according to Ms. Allen, the surviving witness, [petitioner] slept on the sofa that night and not in Ms. Allen's bedroom.

> The next morning as Ms. Allen and Ms. Brown and Ms. Lassiter were getting ready to start the day . . . Ms. Lassiter and Ms. Brown and Ms. Allen were all students here in Atlanta going to Clark-Atlanta University and Atlanta Metropolitan College - - they were getting ready to start the day. And according to Ms. Allen, [petitioner] came into her bedroom, again in an argumentative manner about her seeing someone else, and produced a gun and shot Ms. Allen in the face.
>
> Ms. Allen fell to the floor, . . . [petitioner] thought that Ms. Allen was dead. She fell to the floor and acted like she was dead. As [petitioner] left her room . . . she locked her bedroom door. And as [petitioner] went out into the hallway - - Ms. Lassiter and Ms. Brown had heard the gunshot - - apparently they came out into the hallway. At that time [petitioner] shot Ms. Lassiter. She was shot in the forehead and in the right hand as if she'd put her hand up to protect herself as she was shot in the head. And Ms. Brown was shot in the head also . . .
>
> [Petitioner] then left the apartment. Ms. Allen was able to dial 911. And as [petitioner] was leaving the apartment, he was observed by EMT personnel from the East Point Fire Department who were coming into the complex, he was observed leaving the area, and was later identified by one of the EMT's as the person they had seen leaving the area. Ms. Allen, of course, the surviving witness, was able to give the detectives in East Point a detailed statement about what had happened.

(Doc. 14-8 at 305-07.) Defense counsel confirmed that those were the facts as the defense understood them. (*Id.* at 308.)

Petitioner filed the following *pro se* motions between January 19, 2007, and October 29, 2007: a motion for appointment of counsel, a motion to vacate a void and illegal sentence, and a renewed motion for appointment of counsel. (Doc. 14-

7 at 82, 90-92, 97-100.) Petitioner also filed a *pro se* motion for an out-of-of time appeal on January 11, 2008, which the trial court summarily denied on February 28, 2008. (*Id.* at 101-14, 126.)

On January 25, 2010, petitioner filed a *pro se* motion to set aside the February 28, 2008 order. (*Id.* at 139-43.) On February 3, 2011, the trial court dismissed the motions for appointment of counsel and denied petitioner's motions to vacate a void and illegal sentence and to set aside the February 28, 2008 order. (*Id.* at 156-58.)

On February 16, 2011, petitioner filed a *pro se* appeal (*id.* at 175-76), and argued that the trial court erred in denying: him counsel to prosecute the motions for out-of-time appeal and to vacate a void and illegal sentence; his motion to set aside the order denying him an out-of-time appeal; and his motion to vacate a void and illegal sentence because the court did not make a specific finding of a statutory aggravating circumstance beyond a reasonable doubt before sentencing him to life without parole. *Pierce*, 717 S.E.2d at 203-05. The Georgia Supreme Court affirmed the denial of counsel; vacated the denial of petitioner's motion to set aside the February 28, 2008 order and remanded for the trial court to determine whether petitioner ever received notice of that order; and reversed the denial of petitioner's motion to vacate a void and illegal sentence with direction that the life without

parole sentences be vacated but that they may be reimposed if the trial court finds at lease one aggravating circumstance during resentencing. *Id.*

"On remand, and while still represented by counsel, [petitioner] moved to withdraw his guilty pleas as to all charges." *Pierce v. State*, 755 S.E.2d 732, 733 (Ga. 2014). The trial court granted the motion with regard to the two murder counts because those sentences had been vacated on appeal but denied the motion as to the remaining counts because those convictions and sentences were affirmed on appeal and petitioner had no statutory rights to withdraw those pleas. *Id.*

On September 24, 2012, the trial court allowed attorneys Simon and Jones to withdraw after Jerilyn Bell and Gladys Pollard filed appearances to serve as petitioner's counsel. (Doc. 14-12 at 31.) Petitioner, through new counsel, then "filed a motion for plea in bar based on double jeopardy seeking to preclude the State from continuing its prosecution of the charges for which [his] pleas had been withdrawn." *Pierce*, 755 S.E.2d at 733. After the State "again noticed its intent to seek the death penalty," petitioner moved "to vacate the trial court's order allowing him to withdraw his guilty pleas." *Id.* Following a hearing, the trial court denied petitioner's motion for plea in bar but granted his motion to vacate the order allowing him to withdraw his guilty pleas. *Id.* On January 3, 2013, the trial court resentenced petitioner on the remanded murder convictions to consecutive terms of

life without parole, having found the existence of the requisite aggravating statutory circumstances. (Doc. 14-10 at 125-28; Doc. 14-12 at 302-04.)

Petitioner filed a *pro se* notice of appeal, challenging only the order denying his motion for plea in bar. (Doc. 14-10 at 186.) On March 3, 2014, the Georgia Supreme Court affirmed the trial court's decision, concluding that there was no second prosecution because petitioner's own motion vacated the order authorizing the withdrawal of his guilty pleas.[1] *Pierce*, 755 S.E.2d at 733.

On April 9, 2014, petitioner filed a *pro se* habeas corpus petition in the Superior Court of Telfair County, raising the following grounds for relief: (1) trial counsel provided him ineffective assistance during the plea proceedings by failing to conduct pretrial investigation or review discovery that could have shown voluntary manslaughter; (2) trial counsel was also ineffective for failing to fully investigate the facts and law concerning double jeopardy before advising petitioner to enter a guilty plea and for filing a motion to vacate the order allowing petitioner to withdraw his guilty plea; (3) trial counsel operated under a conflict of interest when counsel filed and argued a *Faretta v. California*, 422 U.S. 806 (1975) claim,

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[1] Petitioner also raised ineffective assistance of counsel claims on appeal, but the Georgia Supreme Court ruled that such claims "must be pursued in an action for habeas corpus." *Pierce*, 755 S.E.2d at 734.

which caused the trial court to rule that petitioner's withdrawal of his guilty plea was void; (4) trial counsel was ineffective for failing to advise petitioner that entering a guilty plea would waive his right to the privilege against self-incrimination, and the trial court erred by reinstating petitioner's murder sentences outside the term of court; and (5) the prosecution failed to provide defense counsel a private investigative report that contained exculpatory evidence, and the trial court erred by finding aggravating circumstances without a jury determination. (Docs. 14-1; 14-2.) Following an evidentiary hearing on November 24, 2015, at which trial counsel testified, the state habeas court entered a written order denying the petition. (Doc. 14-2.) The Georgia Supreme Court denied petitioner a certificate of probable cause to appeal that ruling on August 27, 2018 (Doc. 14-4), then issued its remittitur on September 13, 2018 (Doc. 14-5).

In this § 2254 petition, as amended, petitioner argues that: (1) counsel provided him ineffective assistance by failing to (a) review discovery, (b) investigate a viable mitigation defense, (c) investigate a *Brady v. Maryland*, 373 U.S. 83 (1963) violation, and (d) interview witnesses before advising petitioner to not withdraw his guilty plea and agree to be resentenced; (2) counsel was also ineffective for failing to fully explain the *Faretta* motion to reinstate the guilty pleas after having legally withdrawn them, which resulted in petitioner's

unknowing and involuntary agreement to not withdraw the pleas and be resentenced; (3) the trial court violated petitioner's constitutional rights when it found the necessary aggravating circumstances to sentence him to life without parole without notifying him of his right to have a jury make that determination; (4) the trial court erred in granting defense counsel's motion to vacate petitioner's withdrawn guilty pleas and in reinstating his murder sentences where the motion to vacate was filed outside the term of court; (5) both counsel and the trial court failed to explain to petitioner that entering a guilty plea would waive his right to the privilege against self-incrimination; (6) the State violated double jeopardy by objecting to allowing petitioner to withdraw his guilty plea to the aggravated assault and firearm offenses; (7) petitioner's guilty pleas were invalid because the State failed to disclose exculpatory evidence; (8) the prosecution committed misconduct by suppressing and destroying exculpatory evidence; and (9) the prosecution tampered with witnesses and prevented the defense from speaking with them. (Doc. 1 at 6-7, 9-12, 14-15, 17-18, 32-94; Doc. 8.) Respondent argues that grounds (1)(c), (1)(d), (7), (8), and (9) are new and procedurally defaulted, ground (3) was waived by petitioner's guilty plea, ground (4) does not state a federal claim for relief, and the state courts' rejection of his remaining grounds warrants deference. (Doc. 12-1 at 7-35.) Petitioner replies, reasserting the merits of his grounds for relief. (Doc.

15.) Petitioner also seeks discovery, an evidentiary hearing, and to expand the record. (Docs. 16; 17.)

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). 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). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citations and quotation marks omitted).

In applying § 2254(d), a federal court first determines the "clearly established federal law" based on "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). The court then determines whether the state court decision is "contrary to" that clearly established federal law, i.e., whether the state court "applies a rule that contradicts the governing law set forth" in Supreme Court cases, or "confronts a set of facts that are materially indistinguishable" from a Supreme Court decision "and nevertheless arrives at a [different] result." *Id.* at 405-06.

If the federal court determines that the state court decision is not contrary to clearly established federal law, it then determines whether the decision is an "unreasonable application" of that law, i.e., whether "the state court identifies the correct governing legal principle" from the Supreme Court's decisions "but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. A federal court may not grant habeas 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 [objectively] unreasonable." *Id.* at 409, 411; *see Harrington v. Richter*, 562 U.S. 86, 101 (2011) ("For purposes of § 2254(d)(1), an *unreasonable* application

of federal law is different from an *incorrect* application of federal law." (quotations omitted)). In short, when a state court applies clearly established federal law to a claim, federal habeas relief is not available unless the petitioner shows that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

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.*

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 federal evidentiary hearing is warranted, and the case is now ready for disposition. Accordingly, petitioner's motions requesting discovery and an evidentiary hearing [16] and to expand the record [17] are **DENIED**.

B. Grounds (1)(a), (1)(b), and (1)(d): Counsel's alleged failure to review discovery, investigate a mitigation defense, and interview witnesses

Petitioner argued in ground one of his state habeas petition that trial counsel provided him ineffective assistance during the plea proceedings by failing to conduct pretrial investigation or review discovery that could have shown voluntary manslaughter. 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*, 562 U.S. 115, 118 (2011). "The pivotal question" before this Court "is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington*, 562 U.S. at 101. "This is different from asking whether defense counsel's performance fell below *Strickland's* standard." *Id.*

The *Strickland* analysis is two-pronged, but 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*, 562 U.S. at 105 ("'Surmounting *Strickland's* high bar is never an easy task.'" (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010))).

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.*

To succeed on a claim that a guilty plea was obtained as the result of ineffective assistance of counsel, a petitioner must show that the advice he received from counsel "fell below an objective standard of reasonableness" and "that there

is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 57, 59 (1985) (citations omitted). Petitioner has the burden of affirmatively proving prejudice. *Gilreath v. Head*, 234 F.3d 547, 551 (11th Cir. 2000). Additionally,

> the representations of the defendant, his lawyer, and the prosecutor at [a guilty plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Blackledge v. Allison, 431 U.S. 63, 73-74 (1977).

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*, 562 U.S. at 105). "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.

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

> . . . Trial counsel[, August Siemon], testified that in preparation for Petitioner's case, he reviewed all discovery with his co-counsel and appointed investigator. [(Doc. 14-6 at 57)]. Trial counsel testified that he made several trips to Boston, interviewed witnesses, interviewed teachers at Petitioner's high school, and spoke with Petitioner's family. [(*Id.*)]. Trial counsel testified that he was able to speak with the Brookline police officers regarding a drive by shooting that Petitioner was allegedly involved in. [(*Id.*)]. Trial counsel testified that he was also able to speak with the living victim, Shunae Allen, in the case as well. [(*Id.*)]. Trial counsel testified that Shunae Allen was an articulate and intelligent college student. [(*Id.* at 60)]. Trial counsel testified that Shunae Allen had known Petitioner for years and identified Petitioner as the shooter. [(*Id.*)].
>
> Trial counsel testified that he did not believe he could make a meritorious argument that Petitioner['s] actions constituted voluntary manslaughter as the evidence in the case showed that only Shunae Allen was involved in the argument with Petitioner and that the two victims killed were not a part of any dispute with Petitioner in any way. [(*Id.* at 58)]. Trial counsel testified that he discussed with Petitioner numerous times about why a claim of voluntary manslaughter was not a viable argument based on the facts of the case. [(*Id.*)]. Trial counsel testified that because he knew that he was going to need to discuss the voluntary manslaughter claim with Petitioner, he reviewed the statutory and case law relating to voluntary manslaughter, and reviewed the facts of the case "with an eye towards [a] voluntary manslaughter defense." [(*Id.* at 58-59)]. Even so, trial counsel did not believe that voluntary manslaughter would apply to the two women Petitioner killed, and even if it could be applied, it was trial counsel's opinion that no jury would have convicted Petitioner of voluntary manslaughter when there was an option to convict Petitioner of murder for the killing of the two women. [(*Id.* at 59)].

(Doc. 14-2 at 5-6.) After correctly setting forth the *Strickland* standard, the state habeas court found that petitioner had failed to show deficient performance by counsel because the record revealed that "trial counsel reviewed discovery, interviewed witnesses, and even travelled to Boston in order to investigate Petitioner's case" and that counsel also "reviewed the law and facts of the case as they related to a claim of voluntary manslaughter but found no viable claim that he could make for a charge of voluntary manslaughter." (*Id.* at 6-7.)

Petitioner has not met his burden to show that the state habeas court's decision was based on an unreasonable determination of the facts or that its rejection of petitioner's claim that trial counsel failed to adequately investigate the case, review discovery, and interview witness before advising him to plead guilty was contrary to, or involved an unreasonable application of, *Strickland*. *Argo v. Sec'y, Dep't of Corr.*, 465 F. App'x 871, 874-75 (11th Cir. 2012) (per curiam) ("We presume the state court's determination of the facts is correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence.") (citing 28 U.S.C. § 2254(e)(1)); *Pair v. Cummins*, 373 F. App'x 979, 981 (11th Cir. 2010) (per curiam) ("[T]he habeas petitioner bears the burden 'to show that the state court applied [the applicable clearly established federal law] to the facts of the case in an objectively unreasonable manner.'"). The state habeas court reasonably

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credited trial counsel's testimony concerning his preparation for petitioner's case and, based thereon, reasonably concluded that trial counsel provided petitioner constitutionally adequate assistance in investigating the case and in concluding that a voluntary manslaughter defense was not viable. Additionally, petitioner fails to show prejudice because he has not alleged what more counsel could have done that would have led him to proceed to trial, rather than to plead guilty in exchange for the State withdrawing its notice to seek the death penalty. Therefore, the state habeas court's rejection of grounds (1)(a), (1)(b), and (1)(d) is entitled to deference pursuant to § 2254(d). *See Harrington*, 562 U.S. at 101; *Williams*, 529 U.S. at 404-05, 412-13; *Johnson*, 643 F.3d at 911.

C. Grounds (1)(c) and (7): Counsel's alleged failure to investigate, and the State's alleged failure to disclose, exculpatory evidence

In ground five of his state habeas petition, petitioner argued that the prosecution failed to provide defense counsel a private investigative report that contained exculpatory evidence. The state habeas made the following pertinent findings of fact, which are supported by the record as indicated:

> Jacilyn Bell[, who represented Petitioner after the trial court allowed him to withdraw his guilty plea as to the murder counts,] testified that during her representation of Petitioner she filed a Brady[2] motion asking for any statements

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

made by any State witness that was inconsistent with the statements that had been previously filed. [(Doc. 14-6 at 22)]. Ms. Bell testified that there were some twenty or thirty specific requests within the Brady motion she filed. [(*Id.*)]. Ms. Bell testified that they had only reached the first state of making discovery requests, but because the trial court ruled there was a constitutional violation and they moved forward with sentencing, there was no need to move onto the next stage in making discovery requests. [(*Id.* at 26)]. Ms. Bell testified that she would have filed more specific Brady demands had the case continued forward to trial. [(*Id.*)].

(Doc. 14-2 at 17.) The state habeas court then concluded that petitioner had failed to show deficient performance by counsel because "Ms. Bell did file discovery motions and would have moved for further discovery had the case continued to trial" and because petitioner had not shown "that the prosecution did fail to provide all discovery in his case." (*Id.* at 18.)

Petitioner has not met his burden to show that the state habeas court's decision was based on an unreasonable determination of the facts or that its rejection of this *Brady* claim was contrary to, or involved an unreasonable application of, federal law. *See Argo*, 465 F. App'x at 874-75; *Pair*, 373 F. App'x at 981. In fact, petitioner has not shown that any exculpatory evidence actually existed which counsel did not investigate and the prosecution failed to disclose. Petitioner's speculation about what further investigation might have revealed is insufficient to show prejudice. *See Johnson v. Alabama*, 256 F.3d 1156, 1187 (11th Cir. 2001) (concluding that petitioner's "speculation" that missing evidence

"would have been helpful" is insufficient to show that he is entitled to federal habeas relief). Therefore, the state habeas court's rejection of petitioner's claim that the prosecution withheld, and counsel failed to discover, exculpatory evidence is entitled to deference pursuant to § 2254(d). *See Harrington*, 562 U.S. at 101; *Williams*, 529 U.S. at 404-05, 412-13; *Johnson*, 643 F.3d at 911.

D. Ground Two: Counsel's advice to not withdraw his guilty plea in order to avoid a possible death sentence

In ground two, petitioner argues that counsel ineffectively explained why petitioner should agree not to withdraw his guilty plea as to the murder counts. A brief recap of the protracted procedural history relevant to this ground is necessary here. After the trial court allowed petitioner to withdraw his guilty plea as to the murder counts, petitioner "filed a motion for plea in bar based on double jeopardy seeking to preclude the State from continuing its prosecution of the [murder] charges." *Pierce*, 755 S.E.2d at 733. The state then noticed its intent to seek the death penalty, which prompted petitioner, based on counsel's advice, to move to vacate the order allowing him to withdraw his guilty plea. *Id.* After a hearing, the trial court denied the motion for plea in bar and granted petitioner's motion to vacate the order allowing him to withdraw his plea. *Id.* Following resentencing,

petitioner appealed the denial of his motion for plea in bar, but the Georgia Supreme Court affirmed the trial court's denial of the motion. *Id.*

Petitioner also raised this claim in his state habeas petition. The state habeas made the following pertinent findings of fact, which are supported by the record as indicated:

> . . . Ms. Bell testified that once appointed to represent petitioner, she and her co-counsel sought to litigate the legality of the withdrawal of Petitioner's guilty plea due to the technical legal issues that occurred during the April 16th hearing when Petitioner was allowed to withdraw his guilty plea. [(Doc. 14-6 at 12)]. While researching and investigating the legal issue, Ms. Bell testified that her office was also investigating the facts of the case that could be used if the case had continued to trial or for mitigation purposes should a sentencing hearing have been held. [(*Id.*)]. Ms. Bell testified that there were a number of individuals from her office working on Petitioner's case other than herself including her co-counsel Emily Gilbert, a fact investigator, and a litigation investigator. [(*Id.* at 12-13)]. Ms. Bell testified that she reviewed the prior files in Petitioner's case, established a contact list, spoke with witnesses, and spoke with Petitioner's prior counsel. [(*Id.* at 13)]. Ms. Bell testified that she reviewed the discovery in Petitioner's case and made a general Brady demand that the State turn over any outstanding discovery that they had yet to turn over to the defense. [(*Id.* at 25)].
>
> Ms. Bell testified that the first objective in her representation of Petitioner was to vacate the April 16, 2012 order allowing Petitioner to withdraw his guilty plea. [(*Id.* at 13)]. Ms. Bell testified that it was their position that Petitioner was not represented by counsel at the April 16, 2012 hearing due to a conflict between Petitioner and August Siemon based on their differing opinions on how to proceed in Petitioner's case and what was in Petitioner's best interest, and thus the withdrawal of Petitioner's guilty plea was not legally valid. [(*Id.*

> at 13-14)]. Ms. Bell testified that both she and her co-counsel discussed the legality of the withdrawal of Petitioner's guilty plea with Petitioner. [(*Id.* at 16)]. Ms. Bell testified that they discussed with Petitioner that the first thing they needed to do in their representation of Petitioner was to litigate the legality of the withdrawal of Petitioner's guilty plea . . . [(*Id.*)]. Ms. Bell testified that they also filed thirty (30) or more additional motions other than the motion to vacate the withdrawal of Petitioner's guilty plea. [(*Id.*)]. Ms. Bell testified that she also formally adopted motions that Petitioner had filed pro se. [(*Id.*)]. Ms. Bell then testified that the trial court reviewed those motions in the order of how they would affect the case. [(*Id.*)].
>
> Ms. Bell testified that she met with Petitioner at the jail in order to obtain Petitioner's consent to file the motion to vacate the order allowing Petitioner to withdraw his guilty plea and that Petitioner did agree to allow counsel to go forward with that motion so long as counsel also argued his motions regarding the double jeopardy claims that he raised [in] his pro se motions which counsel adopted. [(*Id.* at 35, 51)]. Ms. Bell testified that the double jeopardy issues were raised, argued, and ruled adversely to Petitioner by the trial court. [(*Id.* at 35)].

(Doc. 14-2 at 8-9.) The state habeas court then concluded that petitioner had failed to show deficient performance by counsel because the record showed that petitioner "agreed with and consented to the filing of the motion to vacate the order to allow Petitioner to withdraw his guilty plea so long as counsel also argued the double jeopardy issue." (*Id.* at 10-12.)

Petitioner has not met his burden to show that the state habeas court's decision was based on an unreasonable determination of the facts or that its rejection of his claim that counsel provided him ineffective assistance in advising

him not to withdraw his guilty plea was contrary to, or involved an unreasonable application of, *Strickland*. *See Argo*, 465 F. App'x at 874-75; *Pair*, 373 F. App'x at 981. Counsel discussed with petitioner at length her recommendation to move to vacate the withdrawal of his guilty plea, and petitioner agreed with that recommendation and consented to filing the motion to vacate. Petitioner has simply not shown that counsel's advice or explanation was constitutionally deficient or that, had counsel more fully explained the motion to vacate, he would have insisted on proceeding to trial where he faced the death penalty. Therefore, the state habeas court's rejection of ground two is entitled to deference pursuant to § 2254(d). *See Harrington*, 562 U.S. at 101; *Williams*, 529 U.S. at 404-05, 412-13; *Johnson*, 643 F.3d at 911.

E. Ground Three: Judicial finding of aggravating circumstances

In ground three, petitioner alleges that the trial court violated his constitutional rights when it found the necessary aggravating circumstances to sentence him to life without parole without notifying him of his right to have a jury make that determination. However, petitioner's guilty plea, which "comprehend[s] all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence," *United States v. Broce*, 488 U.S. 563, 569 (1989),

waived this challenge to his sentence, *United States v. Murray*, 625 F. App'x 955, 958 (11th Cir. 2015) (per curiam).

F. Ground Four: Timing of the reinstatement of petitioner's murder sentences

In ground four, petitioner complains that the trial court should not have granted defense counsel's motion to vacate petitioner's withdrawn guilty pleas and reinstated his murder sentences because the motion to vacate was filed outside the term of court. "The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam) (quoting 28 U.S.C. § 2254(a)). "[F]ederal habeas corpus relief does not lie for errors of state law." *Id.* (citation omitted). Therefore, ground four fails to state a claim for relief.

G. Ground Five: Petitioner's right to the privilege against self-incrimination

Next, petitioner contends that both counsel and the trial court failed to explain to him that entering a guilty plea would waive his right to the privilege against self-incrimination. This claim is belied by the record, which shows that the trial court advised petitioner that, at a trial, he would "have the right to testify in [his] own behalf, or [he] would not have to testify, that would be [his] choice" and that he was giving up that right by pleading guilty. (Doc. 14-8 at 302-03.) Thus,

even if trial counsel failed to explain this right to petitioner before he pled guilty, the alleged failure "was cured by the [trial] court." *United States v. Wilson*, 245 F. App'x 10, 12 (11th Cir. 2007) (per curiam). Accordingly, petitioner is not entitled to relief on ground five.

H. Ground Six: Double jeopardy

Petitioner also contends that the State violated double jeopardy[3] by objecting to allowing petitioner to withdraw his guilty plea to the aggravated assault and firearm charges. The Georgia Supreme Court found that "there was not in this case a second prosecution," as petitioner's convictions were not overturned but were vacated and later reinstated on petitioner's own motion. *Pierce*, 755 S.E.2d at 733. Once again, petitioner has not met his burden to show that the Georgia Supreme Court's decision was based on an unreasonable determination of the facts or that its rejection of his double jeopardy claim was contrary to, or involved an unreasonable application of, federal law. *See Argo*, 465 F. App'x at 874-75; *Pair*, 373 F. App'x at 981. Accordingly, the state court's rejection of ground six is

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[3] The Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Fifth Amendment guarantee against double jeopardy is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

entitled to deference pursuant to § 2254(d). *See Harrington*, 562 U.S. at 101; *Williams*, 529 U.S. at 404-05, 412-13; *Johnson*, 643 F.3d at 911.

I. Procedural default of remaining grounds

"Pursuant to the doctrine of procedural default, a state prisoner seeking federal habeas corpus relief, who fails to raise his federal constitution[al] claim in state court, or who attempts to raise it in a manner not permitted by state procedural rules is barred from pursuing the same claim in federal court . . . ." *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994). Thus, 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).

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). An ineffective-assistance-of-counsel claim, if both exhausted and not procedurally defaulted, may constitute cause. *Hill v. Jones*, 81 F.3d 1015, 1029-31 (11th Cir. 1996); *Murray v. Carrier*, 477 U.S. 478, 489 (1986) ("[A] claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default."). If a

petitioner has not shown cause to excuse the procedural default, a federal court need not consider whether he can demonstrate actual prejudice from the alleged constitutional violation. *McCleskey v. Zant*, 499 U.S. 467, 502 (1991). A fundamental miscarriage of justice occurs when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496.

Petitioner did not present grounds (8) and (9), in which he alleges that the prosecution suppressed and destroyed exculpatory evidence, tampered with witnesses, and prevented the defense from speaking with those witnesses, to the state courts. 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. This rule prevents a Georgia habeas corpus court from considering these grounds, as well as grounds (1)(c), (1)(d), and (7) to the extent that they present issues that differ from the issues raised in grounds one and five of petitioner's state habeas petition. Accordingly, these grounds are procedurally defaulted. *See 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."); *Chambers v. Thompson*, 150 F.3d 1324, 1327 (11th Cir. 1998) (concluding "that a state habeas

court would hold [petitioner's] claims to be procedurally defaulted and not decide them on the merits, because they were not presented in his initial state habeas petition" and "that those claims [therefore] are procedurally barred from review in this federal habeas proceeding and exhausted.").

Petitioner cannot rely on ineffective assistance of counsel to excuse the procedural default because, as discussed above, petitioner's only exhausted ineffective assistance of counsel claims are not meritorious. *See Murray*, 477 U.S. at 489; *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11 th Cir. 2000) (only a meritorious ineffective assistance claim "may satisfy the cause exception to a procedural bar"). Petitioner has not alleged any other cause and resulting prejudice or a fundamental miscarriage of justice to excuse the procedural default. Accordingly, petitioner is not entitled to federal habeas relief with respect to grounds (8) and (9), as well as grounds (1)(c), (1)(d), and (7) to the extent that they present issues that differ from the issues raised in grounds one and five of petitioner's state habeas petition.

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 ["COA"] under 28 U.S.C. § 2253(c)." Rule 11

of the Rules Governing Section 2254 Cases "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing of the denial of a constitutional right "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (citations and quotation marks omitted). Where a habeas petition is denied 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 a COA is not warranted here.

IV. Conclusion

For the foregoing reasons, petitioner's motions [16;17] are **DENIED**, and the undersigned **RECOMMENDS** that the petition, as amended, and a COA be **DENIED**.

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

SO ORDERED AND RECOMMENDED, this 16 day of October, 2019.

LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE