Appendix # 6

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13335-J

BRIAN GREEN,

Petitioner-Appellant,

versus

CLINTON PERRY,
C. CARR,

Respondents-Appellees.

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

Before: GRANT and LAGOA, Circuit Judges.

BY THE COURT:

Brian Green has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's March 17, 2021, order denying a certificate of appealability, leave to proceed *in forma pauperis*, and leave to strike the "Premature Appeal," all in his appeal from the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition and motion for reconsideration. Upon review, Green's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Appendix # 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13335-J

BRIAN GREEN,

Petitioner-Appellant,

versus

CLINTON PERRY,
C. CARR,

Respondents-Appellees.

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

ORDER:

Brian Green moves for a certificate of appealability ("COA"), to strike his "premature appeal," and *in forma pauperis* ("IFP") status, all on appeal from the denials of his 28 U.S.C. § 2254 habeas corpus petition and motion for reconsideration. To merit a COA, Green must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Green's motion for a COA is DENIED because he has failed to make the requisite showing, and his motion for IFP status is DENIED AS MOOT. Green's motion to strike his appeal is DENIED because his appeal is not premature, as his motion for reconsideration was denied.

/s/ Britt C. Grant
UNITED STATES CIRCUIT JUDGE

Appendix # 2

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

Brian Green,

Petitioner, Case No. 1:19-cv-03281

v. Michael L. Brown
United States District Judge

Clinton Perry,

Respondent.

_____/

ORDER

In July 2019, Petitioner Brian Green (a pro se prisoner) filed a federal habeas petition pursuant to 28 U.S.C. § 2254. In June 2020, the Magistrate Judge recommended denying the petition, dismissing this case, and denying a certificate of appealability. (Dkt. 22.) In July 2020, the Court adopted the Magistrate Judge's report and recommendation ("R&R"). (Dkt. 26.) Petitioner filed objections to the R&R a few days later. (Dkt. 28.) These objections were timely mailed but were belatedly entered on the docket, meaning they were not considered in the Court's disposition of this case. Petitioner has now filed a motion for reconsideration in which he asks the Court to reevaluate the R&R in the

light of his timely objections. (Dkt. 29.) The Court has done so. But the Court's conclusion remains unchanged. Petitioner has still not shown that the R&R was wrong or that he is entitled to relief. As a result, his objections are overruled and his motion for reconsideration is denied.

I. Legal Standard

A district judge has broad discretion to accept, reject, or modify a magistrate judge's proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 680 (1980). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the Report and Recommendation that is the subject of a proper objection on a de novo basis and any non-objected portion under a "clearly erroneous" standard. "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive or general objections need not be considered by the district court." *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988).

II. Discussion

As discussed in detail in the R&R, Petitioner was convicted of armed robbery and kidnapping after a jury trial in Douglas County Superior Court. The court sentenced him to life in prison. The Georgia

Court of Appeals affirmed Petitioner's convictions. *Green v. State*, 714 S.E.2d 646 (Ga. Ct. App. 2011). After unsuccessfully seeking habeas corpus relief in state court, Petitioner filed the instant 28 U.S.C. § 2254 petition for a writ of habeas corpus.

In the R&R, the Magistrate Judge determined that most of Petitioner's claims are procedurally defaulted because (1) he did not raise the claims in state court and would now be prevented from doing so, or (2) the state habeas court itself concluded that the claims were procedurally barred. *See Hill v. Jones*, 81 F.3d 1015, 1022 (11th Cir. 1996). The Magistrate Judge further concluded that Petitioner failed to demonstrate cause and prejudice or actual innocence to overcome the default of those claims. With respect to the two claims that were not defaulted, the Magistrate Judge found that this Court must defer under Section 2254(d) to the state habeas corpus court's conclusion that the claims lack merit.

Petitioner's objections are fifty-six pages long and contain numerous misstatements and conclusory assertions. Petitioner mostly repeats his claim that his rights were violated in relation to his arrest and convictions. To the extent he specifically and nonconclusorily

challenges the Magistrate Judge's findings, his arguments fail. He first says the Magistrate Judge erred in concluding that his Claims 3(a), 3(c), 4(a), and 4(f) were not raised in state court. But Petitioner is wrong and misstates the claims he rose in state court. To take just one example, Claim 3(a) asserts that Petitioner's trial counsel was ineffective for failing to file a motion to suppress evidence seized from his vehicle. Petitioner says he presented this claim in state court — but the claim he actually presented was that his *appellate* counsel was ineffective for not raising the issue. All of Petitioner's unexhausted and procedurally defaulted claims, that he now says were raised in state court, relied on factual and legal theories that were different from the claims he raises here. The Magistrate Judge was therefore correct in her conclusion that the claims are defaulted.

Well, What is claim error 8 about in States Final order ?
They Didn't Read it.

Petitioner next argues that the Magistrate Judge erred in concluding that Petitioner's Claims 1, 2, 3(b), and 5 are procedurally defaulted. The Court again disagrees. The state habeas court clearly held that those claims were defaulted pursuant to O.C.G.A. § 9-14-48(d) and that Petitioner had failed to demonstrate cause and prejudice to lift the procedural bar. (Dkt. 12-5 at 7–11). "Federal courts may not review

a claim procedurally defaulted under state law if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, and the bar presents an independent and adequate state ground for denying relief." *Hill*, 81 F.3d at 1022. To the extent Petitioner says he can demonstrate cause and prejudice to overcome his default of Claims 1 and 3(a) because his appellate counsel was ineffective, the Magistrate Judge properly determined that this claim of ineffective assistance of appellate counsel is itself unexhausted and procedurally defaulted. (Dkt. 22 at 8). And to the extent Petitioner says Respondent admits he raised Claim 4(c)[1] before the state habeas court, he is simply wrong. (*Id.*)

Finally, in Claim 4(b), Petitioner contends that his appellate counsel was ineffective for failing to raise a meritorious Fourth Amendment argument on appeal. This Court acknowledges that the Magistrate Judge mischaracterized this claim at one point, mistakenly saying the claim asserted that appellate counsel failed to raise a claim of ineffective assistance of trial counsel regarding the Fourth Amendment

[1] In Claim 4(c), Petitioner contends that his appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to raise a Fourth Amendment argument.

claim — which is actually Petitioner's Claim 4(c). But the state habeas court ultimately reviewed the real Claim 4(b)[2] on its merits and determined that appellate counsel's testimony demonstrated that he made a reasonable strategic decision not to raise the Fourth Amendment issue because there was no likelihood of success on the issue. (Dkt. 12-5 at 15–16); *see id.* n.2. The state court's conclusion was reasonable, and Petitioner has failed to demonstrate it is not entitled to deference under § 2254(d).

HOW IS ERROR 10 NOT A REAL CLAIM the STATE RESPONDED IN FINAL ORDER. ERROR 9 AND 10. WHY DID FEDERAL COURT EVALUATE 1 ERROR ON Appellate COUNSEL DEALING WITH 4th AMEND WHEN STATE ADDRESSED 2 ERRORS 9 AND 10 ?

The Court has carefully reviewed Petitioner's objections. Nothing about them changes the Court's conclusion that the R&R was right and that Petitioner is not entitled to habeas relief. The Court thus denies Petitioner's motion for reconsideration.

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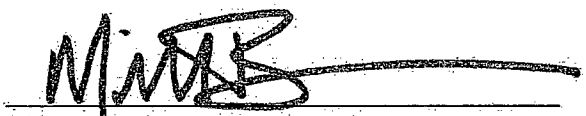
[2] Petitioner's Fourth Amendment claim is that Cobb County police improperly searched his vehicle and found a photograph of him that was later used by Clayton County in a photograph array shown to his victims. As determined by the state court, the police could just as easily have taken a photograph of Petitioner to use in their array, and the inevitable discovery doctrine or the independent source doctrine thus applies to defeat Petitioner's Fourth Amendment claim. *Nix v. Williams*, 467 U.S. 431, 443 (1984). The state court also noted that Cobb County Police made the purportedly illegal search, and Petitioner failed to demonstrate that Clayton County Police, who used the photograph, were aware of the illegal search such that the photograph should be excluded. (Dkt. 12-5 at 15–16).

III. Conclusion

Petitioner's Objections (Dkt. 28) are **OVERRULED** and his Motion for Reconsideration (Dkt. 29) is **DENIED**. Because this Court has already denied Petitioner a certificate of appealability, and because the Court sees no reasonable basis for an appeal, Petitioner's Application to Proceed In Forma Pauperis on Appeal (Dkt. 36) is also **DENIED**.

SO ORDERED this 21st day of October, 2020.



MICHAEL L. BROWN
UNITED STATES DISTRICT JUDGE

Appendix # 3

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

Brian Green,

Petitioner, Case No. 1:19-cv-03281

v. Michael L. Brown
United States District Judge

Clinton Perry and C. Carr,

Respondents.

_____/

ORDER

Petitioner Brian Green (a pro se prisoner) seeks a writ of habeas corpus and an evidentiary hearing on his habeas claims. (Dkts. 1; 21.) Respondent Christopher Carr (the Attorney General of Georgia) also moves to be dismissed as an improper party. (Dkt. 11.) The Magistrate Judge recommends denying Petitioner's habeas petition, denying Petitioner's motion for an evidentiary hearing, denying a certificate of appealability, and granting Respondent Carr's motion to dismiss. (Dkt. 22.) The parties filed no objections to these recommendations. The Court, therefore, conducts a plain error review of the record. *United States v. Slay*, 714 F.2d 1093, 1095 (11th Cir. 1983); *see Sengchanh v.*

Lanier, 89 F. Supp. 2d 1356, 1358 (N.D. Ga. 2000) ("If no objections are filed to the Report and Recommendation, it is reviewed for plain error only.").[1]

I. Background

In January 2009, a Douglas County jury convicted Petitioner of armed robbery and kidnapping. (Dkts 1 at 1; 12-7 at 56–59.) Petitioner appealed, but the Georgia Court of Appeals affirmed his convictions and the Georgia Supreme Court denied his petition for certiorari. (Dkts. 12-1; 12-2.) Petitioner then filed a habeas petition in the Superior Court of Chattooga County. (Dkts. 12-3; 12-4.) The superior court denied the petition. (Dkt. 12-5.) Petitioner again appealed, but the Georgia Supreme Court summarily denied his application. (Dkt. 12-6.)

A few months later, Petitioner filed his federal habeas petition in this Court, seeking relief under 28 U.S.C. § 2254. (Dkt. 1.) He asserts the following claims:

[1] The Court would reach the same conclusions expressed in this Order even on a de novo review.

(1) State officials seized evidence from Petitioner's vehicle and used it against him in violation of the Fourth Amendment.

(2) The trial court allowed the state's lead detective to participate in jury selection in violation of the Sixth Amendment and the Due Process Clause.

(3) Petitioner's trial counsel was constitutionally ineffective for failing to (a) file a motion to suppress evidence seized from Petitioner's vehicle; (b) object to the detective's participation in jury selection; and (c) object to the trial court's limitation of voir dire.

(4) Petitioner's appellate counsel was constitutionally ineffective for failing to (a) investigate Petitioner's case; (b) argue that evidence was seized from Petitioner's vehicle in violation of the Fourth Amendment; (c) argue trial counsel was ineffective for failing to raise the Fourth Amendment argument; (d) prevent Petitioner from being "deprived by a partial hearing"; (e) argue trial counsel was ineffective for failing to object to the detective's participation in jury selection; and (f) argue trial counsel was ineffective for failing to object to the trial court's limitation of voir dire.

(5) The trial court improperly limited voir dire by preventing Petitioner from asking prospective jurors "if they would be more likely to believe police officers who take the stand over any other witness."

(Dkt. 1 at 5–10, 16–18.)

II. Discussion

The Magistrate Judge found that claims 3(a), 3(c), 4(a), 4(c), 4(d), and 4(f) are procedurally barred because Petitioner (1) failed to raise them on direct appeal or in his state habeas petition and (2) has not established any excuse for that failure. (Dkt. 22 at 8.) The Court sees no

plain error in this determination. *See Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999) (finding (1) "[t]he failure to raise these claims to the state courts is a procedural default that bars federal habeas review of the claims," and (2) default may be excused only if petitioner "show[s] cause and prejudice for his procedural default or that failure to consider his claims will result in a fundamental miscarriage of justice").

The Magistrate Judge also found that claims 1, 2, 3(b), and 5 are barred because, although Petitioner asserted them in his state habeas petition, the state court "correctly determined [they] were procedurally defaulted because Petitioner did not raise them on direct appeal." (Dkt. 22 at 8–9); *see Howard v. Warden*, 2019 WL 1931866, at *1 (11th Cir. Mar. 29, 2019) (noting that, in Georgia, "[c]laims not raised on direct appeal are barred by procedural default"). The Magistrate Judge concluded that Petitioner failed to excuse this default as well. (Dkt. 22 at 8–9.) The Court sees no plain error in these findings. *See Tharpe v. Warden*, 898 F.3d 1342, 1346 (11th Cir. 2018) ("[F]ederal courts may not review a claim procedurally defaulted under state law if the last state court to review the claim states clearly and expressly that its judgment

rests on a procedural bar, and the bar presents an independent and adequate state ground for denying relief.").

Claims 4(b) and 4(e) are the only claims that were denied on the merits by the state habeas court. In these claims, Petitioner says his appellate counsel was ineffective for failing to argue that (1) state officials seized a photograph from Petitioner's vehicle and used it against him in violation of the Fourth Amendment, and (2) trial counsel was ineffective for not objecting to a detective's participation in jury selection. To prevail on a claim for ineffective assistance of counsel, a petitioner must show that counsel's conduct was "outside the wide range of professionally competent assistance" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984). When this deferential *Strickland* standard is "combined with the extra layer of deference that § 2254 provides [in federal habeas cases], 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).

The state habeas court previously found that claim (4)(b) did not establish a *Strickland* violation because (1) trial counsel did not preserve the Fourth Amendment issue for appeal, (2) state officials could still have obtained and used the photograph against Petitioner even if seizing it from his vehicle violated the Fourth Amendment, and (3) witnesses testified that they were not influenced by the photograph. (Dkt. 12-5 at 13–16.) The state habeas court also found that claim 4(e) failed because (1) "[i]t is clear from the trial transcript that counsel for the State conducted voir dire on behalf of the State," (2) nothing says a law enforcement officer cannot assist counsel during voir dire, and (3) "[t]he rule of sequestration . . . does not apply to voir dire" and, even if it did, a valid exception applied. (*Id.* at 9–10.) The Magistrate Judge found that the state habeas court's disposition of claims (4)(b) and 4(e) was not unreasonable. (*See* Dkt. 22 at 9–13.) The Court sees no plain error in that determination. *See Gissendaner v. Seaboldt*, 735 F.3d 1311, 1323 (11th Cir. 2013) ("[D]ouble 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.").

The Court also agrees with the Magistrate Judge that a certificate of appealability should be denied here. (Dkt. 22 at 13–15.) Petitioner has not shown 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).[2]

III. Conclusion

The Court **ADOPTS** Magistrate Judge Catherine M. Salinas's Final Report and Recommendation (Dkt. 22). Petitioner's Request for an Evidentiary Hearing (Dkt. 21) is **DENIED**, Respondent Christopher

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[2] The Magistrate Judge recommends denying Petitioner's motion for an evidentiary hearing because his substantive claims are procedurally barred or otherwise fail under Section 2254. (Dkt. 22 at 13.) The Court sees no plain error in that recommendation. *See, e.g.*, *Sears v. Chatman*, 2017 WL 2644478, at *8 (N.D. Ga. June 20, 2017) ("A habeas petitioner must satisfy section 2254(d) before he is allowed discovery or an evidentiary hearing on claims previously adjudicated on the merits in state court."). The Court also agrees that Respondent Carr (Attorney General of Georgia) is an improper party here and that his motion to be dismissed should thus be granted. (Dkt. 22 at 5); *see Robinson v. Berry*, 2020 WL 990008, at *1 n.1 (M.D. Ga. Feb. 28, 2020) ("[I]f the petitioner is currently in custody under a state court judgment, the petition must name as respondent the state officer who has custody," which is "the warden of th[e] facility" in which petitioner is incarcerated).

Carr's Motion to Dismiss (Dkt. 11) is **GRANTED**, this action is **DISMISSED**, and a certificate of appealability is **DENIED**.

SO ORDERED this 17th day of July, 2020.

MICHAEL L. BROWN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Brian Green, Petitioner, vs. Clinton Perry and C. Carr, Respondents.	CIVIL ACTION FILE NO. 1:19-cv-3281

JUDGMENT

This action having come before the court, Honorable Michael L Brown, United States District Judge, for consideration magistrate judges report and recommendation and defendant's motion to dismiss, and the court having adopted the report and recommendation granted said motion, it is

Ordered and Adjudged that the action be, and the same hereby is, dismissed.

Dated at Atlanta, Georgia, this 17th day of July, 2020.

JAMES N. HATTEN
CLERK OF COURT

By: s/D. Burkhalter
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
July 17, 2020
James N. Hatten
Clerk of Court

By: s/D. Burkhalter
Deputy Clerk

Appendix # 4

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

BRIAN GREEN, Petitioner,	:	PRISONER HABEAS CORPUS 28 U.S.C. § 2254
v.	:	
CLINTON PERRY, et al., Respondents.	:	CIVIL ACTION NO. 1:19-CV-03281-MLB-CMS

FINAL REPORT AND RECOMMENDATION

Petitioner Brian Green, confined at Macon State Prison in Oglethorpe, Georgia, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction in the Superior Court of Douglas County. (Doc. 1). Petitioner has paid the filing fee. Respondent has filed a response to the petition. (Doc. 10).

For the reasons stated below, it is **RECOMMENDED** that Respondent's motion to dismiss Christopher Carr as an improper respondent (Doc. 11) be **GRANTED**, the instant petition (Doc. 1) be **DENIED**, Petitioner's motion for an evidentiary hearing (Doc. 21) be **DENIED**, and this action be **DISMISSED**.

I. BACKGROUND

Following a jury trial, Petitioner was convicted of two counts of armed robbery and two counts of kidnapping and was sentenced to a total term of life

Wiggins v Smith 539 US 510 Wood v. Allen Read must quote something 558 US 290 562 US 86 2011

imprisonment.[1] (Doc. 1 at 1-2; Doc 12-7 at 61). On direct appeal, through new counsel, Petitioner argued that (1) he received ineffective assistance of counsel based on his trial counsel's failure to object to a jury instruction that allegedly expanded the indictment, and (2) the evidence was insufficient to prove the asportation element of the kidnapping offenses. *Green v. State*, 714 S.E.2d 646, 648 (Ga. Ct. App. 2011). The Court of Appeals of Georgia affirmed Petitioner's convictions. *Id.*; (Doc. 12-1).

In 2012, Petitioner filed a habeas corpus petition in the Superior Court of Chattooga County, followed by an amended petition. (Doc. 12-3; Doc. 12-4.) In his petition and amended petition, he raised the following claims (Grounds 1-4 and 5-15, respectively):[2]

(1) The State failed to prove the asportation element of the kidnapping offenses;

(2) Petitioner was arrested on warrants that did not comply with the Fourth Amendment;

(3) Petitioner's vehicle was removed from his driveway in violation of the Fourth Amendment;

(4) Photos were improperly removed from Petitioner's vehicle without a warrant;

[1] Petitioner was also convicted of making terroristic threats, but this charge was subsequently dismissed. (*See* Doc. 12-7 at 61).

[2] The state habeas court separately numbered the claims in the petition and amended petition. (*See* Doc. 12-5 at 3-4).

(5) The trial court erroneously allowed a detective to participate in jury selection;

(6) Trial counsel was ineffective because he did not object to the detective participating in jury selection;

(7) Appellate counsel was ineffective for not raising trial counsel's failure to object to the detective participating in jury selection;

(8) The trial court erred in limiting voir dire of prospective jurors;

(9) Appellate counsel was ineffective for not raising the trial court's error in limiting voir dire;

(10) The prosecutor engaged in misconduct by commenting on Petitioner's failure to testify;

(11) Petitioner was convicted by use of illegally obtained evidence;

(12) Trial counsel was ineffective for failing to subject the State's case to proper adversarial testing;

(13) Appellate counsel was ineffective by failing to raise Fourth Amendment issues;

(14) Appellate counsel was ineffective for not investigating trial counsel's pre-trial errors; and

(15) The prosecution engaged in misconduct by introducing improper similar transaction evidence.

(Doc. 12-3 at 5-6; Doc. 12-4 at 1-3). Following an evidentiary hearing, (Docs. 12-7 to -10), the state habeas court denied relief in June 2017, (Doc. 12-5). The Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause in April 2019. (Doc. 12-6).

Petitioner subsequently filed the instant § 2254 petition raising the following claims:

(1) Petitioner's vehicle was searched in violation of the Fourth Amendment, and illegally seized evidence was used to procure Petitioner's conviction;[3]

(2) The trial court erroneously allowed a detective to participate in jury selection;

(3) Trial counsel was ineffective for failing to

ERRORS IN BRIEF AND STATES

(a) file a motion to suppress evidence seized from Petitioner's vehicle;

(b) object to the detective's participation in jury selection; and

(c) object to the trial court's error in limiting voir dire;

(4) Appellate counsel was ineffective for failing to

(a) investigate Petitioner's case;

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(b) raise a meritorious Fourth Amendment argument on appeal;

(c) argue that trial counsel was ineffective for failing to raise the Fourth Amendment argument;

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(d) prevent Petitioner from being deprived of a full hearing;

(e) argue that trial counsel was ineffective for failing to object to the unfair jury selection; and

(f) argue that trial counsel was ineffective for failing to object to the limitation of voir dire; and

[3] Respondent interprets this claim to also include an allegation that the state trial court failed to give a hearing regarding the illegally seized evidence, but this appears to be related to the overall claim that the evidence was used in violation of the Fourth Amendment. (*See* Doc. 1 at 16; Doc. 10-1 at 3). To the extent this is a separate claim, such claim is unexhausted but procedurally defaulted. *See* O.C.G.A. § 9-14-51; *Ogle v. Johnson*, 488 F.3d 1364, 1370 (11th Cir. 2007).

(5) The trial court erred in limiting voir dire of prospective jurors.

(Doc. 1 at 5-10, 16-18).

II. DISCUSSION

A. Motion

Respondent moves to dismiss Christopher Carr, the Attorney General of the State of Georgia, as an improper respondent. (Doc. 11). Petitioner does not oppose this motion.[4] (*See* Doc. 16 at 14). Pursuant to Rule 2(a) of the Rules Governing Section 2254 Cases, "the state officer having custody of the applicant shall be named as the respondent." *See also* 28 U.S.C. § 2243 ("The writ, or order to show cause shall be directed to the person having custody of the person detained."). Thus, the warden of Petitioner's place of confinement, Clinton Perry—whom Petitioner has already named in his petition—is the proper respondent. Accordingly, it is **RECOMMENDED** that Respondent's motion to dismiss Christopher Carr as an improper respondent (Doc. 11) be **GRANTED**.

B. Merits

Before a federal court may grant a § 2254 petition, a state prisoner seeking federal habeas relief must first exhaust his state court remedies or show that a state corrective process is unavailable or ineffective to protect his rights. 28 U.S.C.

[4] Petitioner does not appear to have added Carr as a respondent in his § 2254 petition, and it appears that Carr may have been unintentionally added as a party during docketing. (*See* Doc. 1 at 1).

§ 2254(b)(1). To exhaust, the petitioner must present his claims, on direct appeal or collateral review, to the highest state court according to that state's appellate procedure. *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010). If the petitioner has not exhausted all of his claims in state court, the federal court must dismiss the petition without prejudice. *Lugo v. Sec'y, Fla. Dep't of Corr.*, 750 F.3d 1198, 1214 (11th Cir. 2014).

However, when a federal habeas petitioner raises unexhausted claims that would be procedurally barred in state court pursuant to state law, the federal court may "treat those claims now barred by state law as no basis for federal habeas relief. . . . The unexhausted claims should be treated as if procedurally defaulted." *Ogle v. Johnson*, 488 F.3d 1364, 1370 (11th Cir. 2007) (citations and internal quotation marks omitted). Doing so allows a federal court to "forego the needless judicial ping-pong" of requiring a petitioner to go to state court to exhaust a claim clearly barred by a state's procedural rules before returning to federal court. *Hittson v. GDCP Warden*, 759 F.3d 1210, 1260 n.56 (11th Cir. 2014) (internal quotation marks omitted).

Under Georgia law, "[a]ll grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition," and subsequent petitions may assert only grounds that "could not reasonably have been raised in the original or amended petition." O.C.G.A. § 9-14-51. That statute

"can and should be enforced in federal habeas proceedings against claims never presented in state court . . . ." *Chambers v. Thompson*, 150 F.3d 1324, 1327 (11th Cir. 1998). However,

> [a] federal court may still address the merits of a procedurally defaulted claim if the petitioner can show cause for the default and actual prejudice resulting from the alleged constitutional violation. . . . To show cause, the petitioner must demonstrate some objective factor external to the defense that impeded his effort to raise the claim properly in state court. . . . [I]f the petitioner fails to show cause, [the court] need not proceed to the issue of prejudice. . . . [I]n order to show prejudice, a petitioner must demonstrate that the errors at trial actually and substantially disadvantaged his defense so that he was denied fundamental fairness.

Ward v. Hall, 592 F.3d 1144, 1157 (11th Cir. 2010) (citations and internal quotation marks omitted). "[I]neffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). "[A] claim of ineffective assistance . . . generally must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Id.* at 452 (internal quotation marks omitted).

Alternatively, the petitioner may obtain federal habeas review of a procedurally defaulted claim if he presents "proof of actual innocence, not just legal innocence." *Ward*, 592 F.3d at 1157 (citation omitted). To demonstrate actual innocence, the petitioner must "support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial." *Schlup v. Delo*, 513 U.S.

298, 324 (1995). "[T]he petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327.

In the present case, Petitioner failed to comply with Georgia law because he did not present Claims 3(a), 3(c), 4(a), 4(c), 4(d), and 4(f) on direct appeal or state habeas review. To the extent that Petitioner claims ineffective assistance of appellate counsel to establish cause for the defaults, such claims are unexhausted. Therefore, Petitioner has not shown cause for his defaults, and the issue of prejudice need not be considered. Petitioner has also not presented proof of actual innocence. *See Ward*, 592 F.3d at 1157. Accordingly, these claims should be denied as procedurally defaulted.

With respect to Claims 1, 2, 3(b), and 5,[5] "[f]ederal courts may not review a claim procedurally defaulted under state law if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, and the bar presents an independent and adequate state ground for denying relief." *Hill v. Jones*, 81 F.3d 1015, 1022 (11th Cir. 1996).

[5] Claim 1 corresponds to Grounds 3 and 4, while Claims 2, 3(b), and 5 correspond to Grounds 5, 6, and 8, respectively, in the state habeas petition and amended petition. (*See* Doc. 12-3 at 5-6; Doc. 12-4 at 1-3; Doc. 12-5 at 8-11).

In the present case, the state habeas court correctly determined that these claims were procedurally defaulted because Petitioner did not raise them on direct appeal. (*See* Doc. 12-5 at 8-11). The court rested its decision on an independent and adequate procedural bar, and thus, Petitioner cannot obtain federal habeas review of these claims. *See Hill*, 81 F.3d at 1022. Petitioner neither shows cause and prejudice to excuse the default, nor presents proof of actual innocence. *See Ward*, 592 F.3d at 1157. Accordingly, because these claims are procedurally defaulted, Petitioner should be denied federal habeas relief as to these claims.

Finally, in Claims 4(b) and 4(e),[6] Petitioner alleges that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to raise the Fourth Amendment argument, and for failing to argue that trial counsel was ineffective for failing to object to the unfair jury selection, respectively. (Doc. 1 at 10). The state habeas court denied these claims on the merits. With respect to Claim 4(b), the court ruled that Petitioner failed to show that appellate counsel was ineffective because appellate counsel's decision not to argue that trial counsel was ineffective was reasonable. (Doc. 12-5 at 14-15). In particular, the court noted that appellate counsel testified at the habeas hearing that the photograph allegedly seized

[6] These claims correspond to Grounds 13 and 7, respectively, in the state habeas petition and amended petition. (*See* Doc. 12-4 at 1, 3; Doc. 12-5 at 9-10, 13-16).

in violation of the Fourth Amendment would have been admitted under the inevitable discovery doctrine. (*Id.* at 15). The court also ruled that, in addition to the inevitable discovery doctrine, the photograph at issue would likely have been admissible under the attenuation doctrine because the allegedly impermissible photograph had been included in a photographic lineup by another police department without any knowledge that the second police department knew that the photograph had been illegally seized. (*Id.* at 16).

To prevail on a claim of ineffective assistance of counsel, a prisoner must meet a two-part test established by *Strickland v. Washington*, 466 U.S. 668 (1984). First, he must show that "counsel's performance was deficient." *Khan v. United States*, 928 F.3d 1264, 1272 (11th Cir.), *cert. dismissed*, 140 S. Ct. 339 (2019). Counsel's performance is deficient only if it falls "below an objective standard of reasonableness." *Id.* (internal quotation marks omitted). "There is a strong presumption that counsel's conduct fell within the range of reasonable professional assistance, and, therefore, counsel's performance is deficient only if it falls below the wide range of competence demanded of lawyers in criminal cases." *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014). Second, a prisoner must show that he suffered prejudice as a result of counsel's deficient performance. *Id.* To establish prejudice, a prisoner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (internal quotation marks omitted). A court need not address both prongs if a prisoner makes an insufficient showing on one. *Id.* "Claims of ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under *Strickland*." *Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1300 (11th Cir. 2013) (internal quotation marks omitted).

In the § 2254 context, review of claims of ineffective assistance is "doubly deferential" and "asks only whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Gissendaner v. Seaboldt*, 735 F.3d 1311, 1323 (11th Cir. 2013) (internal quotation marks omitted). As a result, "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.* (internal quotation marks omitted).

The state habeas court's determination that appellate counsel was not ineffective in Claim 4(b) did not rest on an unreasonable interpretation of the facts or law. *See* 28 U.S.C. § 2254(d). According to appellate counsel's testimony, numerous witnesses identified Petitioner, police identified Petitioner's vehicle, Petitioner stipulated to the admission of fingerprints, and a codefendant testified against Petitioner. (Doc. 12-7 at 34-36). As a result, according to appellate counsel, even if the search of Petitioner's vehicle had been determined to be illegal, a

photograph of Petitioner would inevitably have been able to have been included in a photographic lineup. (*Id.* at 36). Furthermore, several people identified Petitioner in court and stated that they were not influenced by the photographic lineup. (*Id.*) Finally, appellate counsel explained that because trial counsel never moved to suppress the photograph, appellate counsel would have been limited to arguing ineffective assistance and would have had great difficulty in showing prejudice. (*Id.* at 37.) Based on this testimony, it was not unreasonable for the state habeas court to rule that appellate counsel was not ineffective for failing to argue that trial counsel was ineffective for failing to raise a Fourth Amendment issue. *See Khan*, 928 F.3d at 1272; *Gissendaner*, 735 F.3d at 1323. Furthermore, it was not unreasonable for the court to rule that the photograph at issue would likely have been admissible under the attenuation doctrine. *See Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016); (Doc. 12-5 at 16). Accordingly, Petitioner is not entitled to federal habeas relief as to this claim.

Turning to Claim 4(e), the state habeas court ruled that Petitioner failed to show that appellate counsel was ineffective because appellate counsel's decision not to argue that trial counsel was ineffective was reasonable. (Doc. 12-5 at 10-11). In particular, the court ruled that, contrary to Petitioner's argument that the lead detective assigned to investigate Petitioner's case was not allowed to participate in jury selection, there was no law prohibiting the detective from assisting the

prosecutor during jury selection, and it was clear from the trial transcript that counsel for the State conducted voir dire for the State. (*Id.* at 9-10; *see also* Doc. 12-7 at 101-23, 67-69 (voir dire)). The habeas court also noted that the rule of sequestration did not apply and that, even if the rule did apply, an exception allowed the lead detective to remain as a person essential to the presentation of the State's case. (Doc. 12-5 at 9-10).

The state habeas court's determination that appellate counsel was not ineffective in Claim 4(e) did not rest on an unreasonable interpretation of the facts or law. Petitioner does not cite any law in arguing why the lead detective should not have been allowed to assist the prosecutor during voir dire and merely asserts that the detective's presence unfairly prejudiced the jury selection process. Petitioner's arguments fall far short of showing that the state habeas court's decision was unreasonable. Accordingly, Petitioner is not entitled to federal habeas relief as to this claim.

Finally, Petitioner moves for an evidentiary hearing on his petition. (Doc. 21). As shown above, because Petitioner has not shown that he is entitled to relief, the motion should be denied.

III. CERTIFICATE OF APPEALABILITY

Pursuant to 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. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." Section 2253(c)(2) states that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." A substantial showing of the denial of a constitutional right "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim . . . a certificate of appealability should issue only when the prisoner shows both that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Jimenez v. Quarterman, 555 U.S. 113, 118 n.3 (2009) (citing *Slack*, 529 U.S. at 484) (internal quotation marks omitted).

It is **RECOMMENDED** that a certificate of appealability be **DENIED** because resolution of the issues presented is not debatable. If the district judge assigned to this case adopts this recommendation and denies a certificate of appealability, Petitioner is advised that he "may not appeal the denial but may seek

a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." 28 U.S.C. foll. § 2254, Rule 11(a).

IV. CONCLUSION

For the reasons stated above, it is **RECOMMENDED** that Respondent's motion to dismiss Christopher Carr as an improper respondent (Doc. 11) be **GRANTED**, the instant petition (Doc. 1) be **DENIED**, Petitioner's motion for an evidentiary hearing (Doc. 21) be **DENIED**, a certificate of appealability be **DENIED**, and this action be **DISMISSED**.

The Clerk is **DIRECTED** to terminate the referral to the undersigned.

SO RECOMMENDED, this 29th day of June, 2020.

Catherine Salinas

CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE

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

BRIAN GREEN, Petitioner,	:	PRISONER HABEAS CORPUS 28 U.S.C. § 2254
v.	:	
CLINTON PERRY, et al., Respondents.	:	CIVIL ACTION NO. 1:19-CV-03281-MLB-CMS

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

The Report and Recommendation of the United States Magistrate Judge, made in accordance with 28 U.S.C. § 636(b)(1), Federal Rule of Civil Procedure 72(b), and this Court's Local Rule 72, has been filed. The Clerk is **DIRECTED** to serve a copy of the Report and Recommendation, together with a copy of this Order, upon counsel for the parties and upon any unrepresented parties.

Within fourteen (14) days of service of this Order, a party may file written objections, if any, to the Report and Recommendation. *See* 28 U.S.C. § 636(b)(1)(C). If objections are filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district judge assigned to this case. If no objections are filed, the Report and Recommendation may be adopted as the opinion

and order of the District Court, and on appeal, the Court of Appeals will deem waived any challenge to factual and legal findings to which there was no objection, subject to interests-of-justice plain error review. 11th Cir. R. 3-1.

The Clerk is **DIRECTED** to submit the Report and Recommendation with objections, if any, to the district judge assigned to this case after the expiration of the above time period.

SO ORDERED, this 29th day of June, 2020.

Catherine Salinas

CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE