[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-11224

Non-Argument Calendar

WILLIAM BURKE,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-01096-AT

Before WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

William Burke, a Georgia inmate, appeals pro se the district court's denial of his 28 U.S.C. § 2254 habeas petition. Burke was convicted of felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Following unsuccessful challenges to his convictions on direct appeal and in collateral proceedings in Georgia state courts, Burke filed a habeas petition in the Northern District of Georgia, raising thirty-four claims of ineffective assistance of appellate counsel.[1] The district court denied Burke's petition with prejudice. But the district court granted him a certificate of appealability (COA) as to one claim: whether appellate counsel was ineffective for not raising trial counsel's failure to object when the trial court failed to charge voluntary manslaughter as a lesser included offense for felony murder.

After careful review, we affirm the district court's denial of Burke's § 2254 petition. We conclude that Burke has failed to show that he was prejudiced by appellate counsel's failure to raise an ineffective of assistance claim against trial counsel for failure to obtain a jury charge of voluntary manslaughter as a lesser included

[1] Burke also raised eight claims of ineffective assistance of trial counsel. Like the state habeas court, the district court found those eight claims to be procedurally barred.

offense of felony murder. Therefore, Burke cannot show a meritorious claim of ineffective assistance of counsel.

I. BACKGROUND

A. Proceedings in the Georgia Trial Court

In November 2012, a grand jury in DeKalb County, Georgia, indicted Burke for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. The charges stemmed from Burke shooting and killing Andrew Daly. Burke pleaded not guilty and proceeded to trial represented by Letitia Delan. Burke's first trial ended in a mistrial.

At the second trial, still represented by Delan, Burke testified that he did not intend to shoot anyone and did not know it was Daly he had shot. At the charge conference, the state proposed giving the jury a voluntary manslaughter instruction as a lesser included offense to malice murder. Burke objected, but the trial court overruled the objection. Ultimately, the jury found Burke not guilty of malice murder (or the lesser included charge of voluntary manslaughter) but found him guilty of felony murder, aggravated assault, and possession of a firearm during the commission of a felony. The trial court sentenced Burke to life imprisonment for the felony murder and aggravated assault plus a consecutive five-year term for the firearm count.

With new counsel, Burke moved for a new trial. Because Burke wanted to raise an ineffective of assistance of trial counsel claim, Burke's new counsel could not represent Burke due to a

conflict. In Georgia, if a defendant receives new counsel after the trial, but before direct appeal, then the defendant must bring any ineffective assistance of claims about trial counsel on appeal. Ga. Code § 9-14-48.

With new counsel, Burke amended his motion twice to include ineffective of assistance claims against Delan. The trial court conducted a hearing where Delan testified about the trial and the decisions about the trial strategy. After the hearing but before the trial court ruled on the motion for new trial, Burke obtained new counsel, Long Vo. Vo filed a third amended motion for a new trial focusing on the trial court's limitation of the voluntary manslaughter charge as a lesser included offense only to malice murder and not felony murder.[2] Vo did not request another evidentiary hearing.

The trial court denied Burke's motion for a new trial, finding that Burke's ineffective assistance of counsel claims were meritless. The trial court also found that it did not err in failing to charge the jury as to voluntary manslaughter as a lesser included offense for felony murder. Rather, the trial court explained there was no evidence that Burke acted upon a sudden and irresistible passion, which is required to support a voluntary manslaughter charge.

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[2] In Georgia, "the jury should be admonished that if it finds provocation and passion with respect to the act [such as aggravated assault] which caused the killing, it could not find felony murder, but would be authorized to find voluntary manslaughter." *Edge v. State*, 414 S.E.2d 463, 466 (Ga. 1992).

The trial court explained that because the facts remained the same for both murder charges, then the jury's rejection of voluntary manslaughter under malice murder meant the jury would have likely rejected voluntary manslaughter as an alternative for felony murder.

B. Direct Appeal and State Postconviction Proceedings

With Vo as his appellate counsel, Burke raised two issues about the jury charge and the verdict form concerning voluntary manslaughter. Burke did not raise any ineffective assistance of trial counsel claims. Burke argued "that the trial court improperly limited the jury's consideration of voluntary manslaughter to a lesser offense of only malice murder, both in its oral instructions and on the verdict form, so that the jury had no option to consider the lesser offense in relation to the felony murder charge." *Burke v. State*, 809 S.E.2d 765, 766 (Ga. 2018).

The Georgia Supreme Court sua sponte held that the evidence supported Burke's convictions. *Id.* at 767. The court also found that there was "no evidence to support a verdict that Burke was guilty of voluntary manslaughter." *Id.* at 769. Because no evidence supported the charge of voluntary manslaughter, the trial court did not err "in failing to give the jury the option to consider voluntary manslaughter as an alternative to felony murder." *Id.* Burke, proceeding pro se, petitioned the United States Supreme Court for certiorari, which was denied. *Burke v. Georgia*, 139 S. Ct. 294 (2018).

Proceeding pro se, Burke filed a state habeas petition raising thirty-three claims, including ineffective assistance of appellate counsel. Specifically, Burke alleged that his appellate counsel was ineffective for not bringing ineffective assistance claims about his trial counsel in his direct appeal proceedings. Burke and the Warden submitted written questions to Vo who provided written answers. At a hearing on Burke's petition, the state introduced Vo's written deposition, and Burke supplied documents to support his petition including letters between Burke and Vo.

The state habeas court denied Burke's petition. Specifically, the court found that the Georgia Supreme Court had decided that there was insufficient evidence to support a manslaughter charge, and the issue would "not be re-litigated." The court held that "appellate counsel was not deficient" in failing to request voluntary manslaughter and involuntary manslaughter charges, so Burke had "not shown that appellate counsel's actions likely fell below an objective standard of reasonableness" by failing to bring claims relating to the manslaughter arguments. Burke timely appealed, but the Georgia Supreme Court denied further review.

C. Federal Habeas Petition

Burke filed a § 2254 habeas petition, challenging his convictions and raising forty grounds for relief. Burke moved to amend his petition to add three claims, which the Warden opposed. The magistrate judge granted Burke leave to amend as to one appellate counsel ineffectiveness claim but denied the other two claims.

In a comprehensive report and recommendation, the magistrate judge recommended that Burke's petition be denied and that a COA be denied. Burke filed his objections. The district court adopted the report and recommendation and denied the petition. But the district court granted Burke a COA on the claim of whether Burke's appellate attorney rendered ineffective assistance by failing to argue that trial counsel was ineffective regarding the trial court's voluntary manslaughter charge.

Burke timely appealed. On appeal, Burke moved to expand his COA, which this court denied.

II. DISCUSSION

"We review *de novo* a district court's grant or denial of a habeas corpus petition." *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010). To warrant habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Burke must establish not only that his constitutional claim is meritorious, but also that the state court's adjudication of that claim:

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

28 U.S.C. § 2254(d).

The merits of Burke's ineffective assistance of counsel claim are "squarely governed" by the Supreme Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Williams v. Taylor*, 529 U.S. 362, 390 (2000). Under *Strickland*, Burke must show that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. Since a habeas petitioner must show both deficiency and prejudice, we may dispose of a *Strickland* claim based on a determination that a defendant has failed to show either prong without considering the other. *See id.* at 697. We do so in Burke's case.

We need not decide whether AEDPA deference applies to the state court's decision that Burke's allegations were insufficient because Burke has failed to show prejudice under even a de novo standard of review. *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review."); *see also Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1109–10 (11th Cir. 2012).

Deciding whether appellate counsel was ineffective "requires determining whether trial counsel was ineffective in the first place." *Butts v. GDCP Warden*, 850 F.3d 1201, 1204 (11th Cir. 2017). If trial counsel was not ineffective, then appellate counsel's failure to argue that trial counsel was ineffective could not have prejudiced Burke. *See Brown v. United States*, 720 F.3d 1316, 1335

(11th Cir. 2013) ("It is also crystal clear that there can be no showing of actual prejudice from an appellate attorney's failure to raise a meritless claim.").

So the question is whether the trial counsel ineffectiveness claim was meritorious. And here, the answer is no. The Georgia Supreme Court held that there was insufficient evidence to support the voluntary manslaughter charge and thus it was not error for the jury to not receive that charge. *Burke*, 809 S.E.2d at 769. Thus, Burke's trial counsel was not ineffective in failing to ask for the voluntary manslaughter charge as a lesser included crime for felony murder because the evidence did not support the charge. Further, his appellate counsel's failure to bring that claim did not prejudice Burke as there is not a reasonable probability it would have changed the outcome. *See Strickland*, 466 U.S. at 694.

III. CONCLUSION

For these reasons, we affirm the district court's denial of Burke's habeas petition.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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July 25, 2022

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 21-11224-AA
Case Style: William Burke v. Warden
District Court Docket No: 1:20-cv-01096-AT

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call T. L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

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

WILLIAM BURKE, Petitioner,	:	
	:	CIVIL ACTION NO.
v.	:	1:20-CV-1096-AT
AIMEE SMITH, Respondent.	:	

ORDER

Presently before the Court is the Magistrate Judge's Report and Recommendation (R&R) recommending that the instant habeas corpus petition be denied and the case dismissed. [Doc. 41]. Petitioner has filed his objections in response to the R&R. [Doc. 47].

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).

Plaintiff, currently incarcerated at Dooly State Prison in Unadilla, Georgia, has filed the instant 28 U.S.C. § 2254 petition for a writ of habeas corpus to challenge his October 3, 2014, convictions—imposed after a jury trial in DeKalb County Superior Court—for felony murder, aggravated assault, and possession of a firearm during the commission of a felony.[1] In his petition, Petitioner raises forty-one grounds for relief. In the R&R, the Magistrate Judge extensively reviewed Petitioner's claims and concluded that Petitioner is not entitled to relief. The majority of Petitioner's claims failed because he was unable to demonstrate that the state courts' denial of those claims was based on an unreasonable determination of fact or an unreasonable application of federal constitutional law under 28 U.S.C. § 2254(d).[2] The remainder of Petitioner's claims either (1) failed to state a claim for federal habeas corpus relief; (2) were conclusory, vague, or lacking in sufficient evidentiary support; or (3) were not rational given the record.

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[1] The aggravated assault conviction merged with the felony murder conviction. The trial court denied Petitioner's motion for a new trial, and the Georgia Supreme Court affirmed Petitioner's convictions and sentences. Burke v. State, 809 S.E.2d 765 (Ga. 2018). Petitioner filed a petition for a writ of habeas corpus in Dooly County Superior Court. That court denied relief. [Doc. 15-7]. The Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal the denial of habeas corpus relief. [Doc. 15-9].

[2] In the R&R, the Magistrate Judge provides a comprehensive discussion of the § 2254(d) standard, [Doc. 41 at 8-10], which this Court adopts.

Petitioner's seventy-nine pages of objections are not concise, and a great deal of his discussion simply restates his claims and arguments that he is entitled to relief, and the Magistrate Judge properly analyzed and rejected those claims and arguments. See Chester v. Bank of Am., N.A., 1:11-CV-1562-MHS, 2012 WL 13009233, at *1 (N.D. Ga. Mar. 29, 2012) ("[G]eneral objections to a magistrate judge's report and recommendation, reiterating arguments already presented, lack the specificity required by Rule 72 and have the same effect as a failure to object."). Petitioner also raises a double jeopardy claim for the first time. As Movant raises the claim for the first time in his objections, this Court declines to consider it. See Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009) ("[A] district court has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge."); see also United States v. Howell, 231 F.3d 615, 621 (9th Cir. 2000) (holding that district courts are not required to consider supplemental factual allegations presented for the first time in objections to a magistrate judge's report and recommendation).[3]

[3] In any event, because Petitioner's double jeopardy claim relates to the fact that he was tried for aggravated assault and felony murder supported by an aggravated assault, the claim is unavailing because, as mentioned above, the aggravated assault conviction merged with the felony murder conviction.

Petitioner also purports to incorporate by reference documents from his state habeas corpus proceedings, notably his application for a certificate of probable cause to appeal the denial of habeas corpus relief before the Georgia Supreme Court. However, "a party does not state a valid objection to an R&R by merely incorporating by reference previous filings." Hammonds v. Jackson, No. 13-CV-711-MHS, 2015 WL 12866453, at *6 n.2 (N.D. Ga. May 18, 2015); see also Jacobs v. Usner, No. CV 08-470, 2016 WL 4803917, at *1 (W.D. Pa. Sept. 14, 2016) ("When filing objections to a report and recommendation, underlying briefs may not be incorporated by reference."); Masimo Corp. v. Philips Elec. N.A. Corp., 62 F. Supp. 3d 368, 376 (D. Del. 2014) (holding that underlying briefs may not be incorporated by reference when filing objections to a report and recommendation); Morrison v. Parker, 90 F. Supp. 2d 876, 878 (W.D. Mich. 2000) ("Plaintiffs' general, nonspecific objections, purporting to incorporate by reference their earlier brief, are tantamount to no objection at all and do not warrant further review.") (citations omitted).

Accordingly, many of Petitioner's arguments and assertions in his objections are not entitled to this Court's review. A summary of the evidence presented at Petitioner's trial will facilitate the discussion of Petitioner's objections that are entitled to review. According to the Georgia Supreme Court,

> [t]he victim in this case was the boyfriend of [Petitioner]'s ex-girlfriend and landlord, Evangeline Sotus. [Petitioner] and Sotus had a long-term

romantic involvement before breaking up in early 2011. Sotus testified that she was concerned about [Petitioner]'s belligerence when he drank. After their break-up, [Petitioner] moved into the top level of Sotus's home. In the summer of 2012, Sotus met [Andrew] Daly, and the two became romantically involved. Sotus observed that the two men were civil to one another.

On November 20, 2012, Sotus traveled to New York. She informed [Petitioner] that Daly would be checking on her cats and had permission to be in the house. [Petitioner] and Daly apparently continued to be civil to one another; Daly even made breakfast for [Petitioner] the morning of November 25.

In phone conversations with Sotus later that day, [Petitioner] seemed to be intoxicated. At one point, [Petitioner] called Sotus and informed her that his ex-wife had died. She urged [Petitioner] to sober up, leading [Petitioner] to become belligerent and call and text her repeatedly. Sotus called Daly and warned him to stay away from her house, but Daly did not seem concerned, and said he wanted to go there to do laundry.

Meanwhile, [Petitioner] posted on Facebook that Sotus "was a total waste" when he needed her and that her boyfriends should "watch out." [Petitioner] called a friend, Gerald Landers, who noted that [Petitioner] seemed extremely intoxicated. [Petitioner] cut off their conversation, indicating that he had an unexpected visitor; Landers heard [Petitioner] say, "Who's there, who's there."

The lower-level tenant of Sotus's house, Valetta Anderson, heard footsteps above, then arguing and shouting. Anderson heard someone other than [Petitioner] say "motherf***er." She heard a "pop" sound, then someone falling. [Petitioner] promptly knocked on Anderson's door and asked her to accompany him upstairs to the main level, where she saw Daly lying on the floor. [Petitioner] told Anderson that Daly "came at" him and asked her to call 911.

Police who arrived at the home found Daly dead of a gunshot wound to the head. They observed nunchucks on the kitchen table and found a loaded revolver (that belonged to Sotus) underneath Daly's body.

> [Petitioner] told police, "I didn't mean to. He threatened me with some nunchucks." Law enforcement found another gun lying on a bed in [Petitioner]'s apartment.
>
> [Petitioner] testified at trial that he had no problem with Daly. [Petitioner] testified that on the night of Daly's death, he was in his own apartment when he heard a voice that he did not recognize yell from downstairs, "Hey, motherf***er, I know you're up there. You better come down or I'm coming to get your a**." When he went downstairs with his gun into the main level of the house, [Petitioner] testified, most of the lights were off and he saw only a hand holding nunchucks. [Petitioner] said he heard the person say, "Motherf***er, I'm going to kill you." He testified that he heard something like a chair or table move and thought the person was swinging the nunchucks at him, so he "threw up" his hands and "[t]he gun went off." [Petitioner] acknowledged taking that gun back up to his apartment before going to Anderson's apartment. He testified that he did not intend to shoot anyone and did not know the identity of the victim until Anderson told him it was Daly.

Burke v. State, 809 S.E.2d 765, 765-67 (Ga. 2018).

A significant number of Petitioner's claims and much of his discussion in his objections relate to the fact that, during Petitioner's trial and over his objection, the trial court gave the jury an instruction for the lesser included crime of voluntary manslaughter. However, the court limited the jury's consideration of voluntary manslaughter to the charge of malice murder and not felony murder in both its oral instructions and on the verdict form provided to jurors. As a result, the jury had no option to consider the lesser offense in relation to the felony murder charge.

In denying the motion for new trial, the trial court agreed with the prosecution's argument that the voluntary manslaughter instruction should not have been given at all because the evidence did not support a voluntary manslaughter conviction.

The Georgia Supreme Court agreed, holding "that the trial court committed no plain error in this regard because the evidence did not support a finding of voluntary manslaughter." Burke, 809 S.E.2d at 766. Under Georgia law, "[a] voluntary manslaughter charge is required when there is slight evidence that the defendant acted solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person," id. at 768 (quotation and citation omitted), and the Georgia Supreme Court concluded that there was no evidence of a serious provocation to require the manslaughter instruction.

The court's ruling was based on the state law of murder and manslaughter. A state law error as to jury instructions does not violate the federal constitution in the absence of a showing that the errant instruction resulted in a fundamentally unfair trial, Carrizales v. Wainwright, 699 F.2d 1053, 1054-1055 (11th Cir. 1987), or if (1) the instruction concerned an essential element of the offense, (2) the instruction operated to shift the burden of proof, and (3) the error shifting the burden was not harmless, Owens v. McLaughlin, 733 F.3d 320, 325 (11th Cir. 2013). Here, the error was arguably not of a constitutional magnitude as the evidence presented at Petitioner's

trial was sufficient for the jury to return a guilty verdict for felony murder such that the instruction could not be considered fundamentally unfair, and nothing about the instruction shifted the burden of proof. Petitioner raised direct claims regarding the trial court's instruction and the verdict form in his motion for a new trial and on appeal. Because the Georgia Supreme Court found no error in relation to the instruction, Plaintiff's claims that his trial counsel and his appellate counsel were ineffective for not effectively challenging the jury instruction fail because he cannot demonstrate that he was prejudiced by either counsel's failure to raise the issue. However, the Court does recognize why Defendant contends the trial court's sudden late rejection of a manslaughter jury charge as a lesser included offense, in the context of defendant's theory of the case and evidentiary presentation, was an error that was fundamentally unfair and therefore of constitutional magnitude if not effectively addressed by counsel.

In response to Petitioner's arguments, the fact that the trial court and the prosecution both changed their minds about whether the evidence supported a voluntary manslaughter conviction is not relevant in this proceeding. As noted, the Georgia Supreme Court determined that the instruction as given did not require reversal, and, as a result, Petitioner cannot demonstrate that he is entitled to relief under § 2254. Moreover, this Court cannot, as Petitioner urges, simply ignore the

Georgia Supreme Court's determination or view what happened during the trial in isolation. In order to demonstrate ineffective assistance of counsel under Strickland,[4] Petitioner must demonstrate prejudice, and prejudice can be determined only by exploring how the Georgia Supreme Court would have (or in this case, did) rule on the underlying claim. Accordingly, the Georgia Supreme Court's conclusion on the matter is central to this Court's evaluation of Petitioner's claim, and the Magistrate Judge did not err by considering how the Georgia Supreme Court ruled.

Petitioner's contentions that the instruction given during his trial "authorized the jury to reach a finding of guilt by a theory not supported by the evidence," [Doc. 47 at 10], and that the state habeas corpus court violated his ex post facto rights by relying on the Georgia Supreme Court's decision to deny his claims regarding the jury instruction, [id. at 11], are not logically supportable.

Petitioner also dedicates significant discussion in his objections to his claim that the trial court improperly admitted evidence of other crimes, wrongs, or acts under O.C.G.A. § 24-4-404(b) (hereinafter, "404(b) evidence"). Petitioner raised these claims in his state habeas corpus action, and the Magistrate Judge concluded that the state court's denial of those claims was reasonable under § 2254(d), that Petitioner had

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[4] Strickland v. Washington, 466 U.S. 668 (1984). For a comprehensive discussion of the Strickland standard, see the R&R, [Doc. 41], at 10-12.

not established that the trial court erred in admitting the evidence, and that some of Petitioner's claims regarding the 404(b) evidence were vague and conclusory. In his objections, Petitioner restates his arguments that he is entitled to relief, but he entirely fails to demonstrate that the Magistrate Judge erred in concluding that he is not entitled to relief.

Petitioner next objects to the Magistrate Judge's conclusion that he was not entitled to relief on his claim that his trial counsel was ineffective for failing to impeach witness testimony and that appellate counsel was ineffective for failing to raise an ineffective assistance of trial counsel claim on that issue. According to Petitioner, Evangeline Sotus testified regarding a 404(b) evidence event that occurred in 2010 after her husband's suicide, but Petitioner contends that her husband died in 2011. Also, a police witness testified that an interview he had with Petitioner was only audio recorded, but Petitioner states that the interview was also video recorded. The Magistrate Judge concluded that Petitioner has not shown a reasonable probability of a different outcome if his trial counsel and appellate counsel had raised these issues and that the state habeas corpus court conclusion that Petitioner was not entitled to relief was thus reasonable under § 2254(d). In response to Petitioner's assertions that the Magistrate Judge erred, this Court notes that the Magistrate Judge's statement that Petitioner had not cited to the relevant testimony by Sotus is not material to this

Court's determination on Petitioner's claims because it does not relate to the issue of prejudice—whether the outcome of Petitioner's trial and subsequent proceedings would have been different if trial counsel or appellate counsel had raised these claims. Additionally, while Petitioner is correct that a trial counsel's failure to impeach a witness can form the basis of a colorable ineffective assistance claim, it does not do so in this case because the impeachment evidence is not compelling, and Petitioner has not demonstrated the likelihood of a different outcome.

This Court further agrees with the Magistrate Judge regarding Plaintiff's claim that his trial counsel was ineffective for failing to demand that the victim's blood be tested for the presence of drugs. Petitioner asserts only scant evidence that the victim had consumed drugs, and he has not demonstrated beyond mere speculation that, even if it was established that the victim was under the influence, it would have affected the outcome of his trial. Other than his self-serving statements, Petitioner has presented no evidence that the victim used drugs or that drugs made the victim act violently, and he has failed to establish that evidence of the victim's drug use or intoxication would have been admissible under Georgia law. See Roseberry v. State, 553 S.E.2d 589, 591 (Ga. 2001) ("Evidence that impugns a victim's character cannot be admitted unless it has some factual nexus with the conclusion for which it is being offered. Sheer speculation is insufficient."); Moore v. State, 763 S.E.2d 670, 673 (Ga. 2014) (holding

that drug use/possession by murder victim not relevant to show self-defense and fear of bodily harm because nexus was speculative). As a result, Petitioner cannot demonstrate prejudice under Strickland, and he is not entitled to relief.

With regard to his claim that his trial counsel and appellate counsel were ineffective for failing to raise a claim that the evidence was insufficient to support his convictions, as discussed above, the Georgia Supreme Court determined that the evidence was sufficient, and Petitioner cannot demonstrate prejudice under Strickland. Also, Petitioner's proposed standard for measuring the sufficiency of the evidence—"that evidence proved the state's version or disproved every other hypothesis beyond a reasonable doubt as required in O.C.G.A. 24-14-6, nor is there overwhelming evidence of guilt," [Doc. 47 at 69]—is not correct. Rather, after a conviction, courts determining the sufficiency of the evidence need only determine whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). In that light, the evidence at Petitioner's trial was clearly sufficient.

Petitioner's cumulative error claim fails. "The cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right

to a fair trial, which calls for reversal." United States v. Baker, 432 F.3d 1189, 1223 (11th Cir. 2005) (internal quotation marks omitted). At most, Petitioner has identified one harmless error: that the trial court erred in instructing the jury on the lesser included offense of voluntary manslaughter because the evidence did not support the instruction. As there were not multiple established errors at Petitioner's trial to accumulate, he cannot establish cumulative error.

Having reviewed the R&R in light of Petitioner's objections, this Court concludes that the Magistrate Judge is correct. Accordingly, the R&R, [Doc. 41], is hereby **ADOPTED** as the order of this Court, and the petition is **DENIED**. This Court concludes that Petitioner has made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), but only with respect to his claim that appellate counsel was ineffective for not raising trial counsel's failure to object when the trial court failed to charge voluntary manslaughter as a lesser included offense for felony murder. Accordingly, a Certificate of Appealability is **GRANTED** with respect to that claim only.

Petitioner's motion for an extension to file his objections, [Doc. 45], is **GRANTED** nunc pro tunc, and Petitioner's objections are accepted as properly filed. The Clerk is **DIRECTED** to close this action.

IT IS SO ORDERED, this 22nd day of March, 2021.

AMY TOTENBERG
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11224-AA

WILLIAM BURKE,

Petitioner - Appellant,

versus

WARDEN,

Respondent - Appellee.

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

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

BEFORE: WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

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