In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-10925

RUFARO CHRISTOPHER SMITH,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 2:20-cv-00190-RWS

ORDER:

Rufaro Smith moves for a certificate of appealability (COA), so that he may appeal the denial of his 28 U.S.C. § 2254 petition. Because he has failed to make a substantial showing of the denial of a constitutional right, his motion for a COA is DENIED. *See* 28 U.S.C. § 2253(c)(2).

/s/ Britt C. Grant

UNITED STATES CIRCUIT JUDGE

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

RUFARO CHRISTOPHER SMITH, GDC # 1081908, Petitioner, v. BRIAN ADAMS, Warden, Respondent.	: : : : : : : :	PRISONER HABEAS CORPUS 28 U.S.C § 2254 CIVIL ACTION NO. 2:20-CV-0190-RWS-JCF

ORDER AND FINAL REPORT AND RECOMMENDATION

Petitioner Rufaro Christopher Smith, an inmate at Smith State Prison in Glennville, Georgia, has filed a *pro se* 28 U.S.C. § 2254 petition challenging his 2013 Stephens County convictions and sentences for armed robbery, aggravated assault, and possession of a knife during the commission of a felony. (Doc. 1 at 1.) The matter is before the Court on the petition, the state's answer-response, and Petitioner's reply, and for consideration of Petitioner's motion for appointment of counsel. (Docs. 1, 10, 13, 16.) For the reasons stated below, Petitioner's motion for appointment of counsel is **DENIED**. Additionally, **IT IS RECOMMENDED** that the § 2254 petition be **DENIED** and that no certificate of appealability issue.

I. PROCEDURAL HISTORY

On September 4, 2012, a Stephens County magistrate issued two arrest warrants for Petitioner for armed robbery and aggravated assault, respectively. (Doc. 12-1 at 75-78.) The warrants provided that Officer Renwick Leverette appeared personally before the magistrate court and testified in support of the warrants. (See id.) In January 2013, a Stephens County grand jury indicted Petitioner for armed robbery ("Count 1"), aggravated assault ("Count 2"), and possession of a knife during the commission of a felony ("Count 3"). (Doc. 12-1 at 72-75.) Petitioner proceeded to trial.

The Court of Appeals of Georgia summarized the evidence adduced at trial as follows:

> [A]t approximately 2:00 a.m. on September 4, 2012, [Petitioner] entered a convenience store in Toccoa, pointed a pistol at the cashier, and told him to remove money from the cash register and place it in a bag. [Petitioner] threatened to kill the cashier if he did not act quickly. The cashier punched [Petitioner], the two struggled, and [Petitioner] tried to cut the cashier with a knife. The cashier suffered cuts to both of his hands when he grabbed the knife during this struggle. The cashier managed to make his way outside where he flagged down a police officer in a squad car approximately 40 to 50 feet from the store. The officer then drove in the direction of [Petitioner], who had exited the store shortly after the cashier.

> [Petitioner] ran behind the store and dropped some money as the officer pursued him. He was apprehended after he fell to the ground behind the store. The officer found money, a small black pistol, and a knife on the ground in front of his squad car. He also saw blood on [Petitioner] and on some of the money. The officer never lost sight of [Petitioner] from the moment he exited the store until he was apprehended. [Petitioner] was missing one sock when he was caught, and a sock matching the one he was wearing was found inside the store. DNA obtained from the knife found at the scene matched both [Petitioner's] and the cashier's DNA.

Smith v. State, No. A16A0833 at 1-2, (Ga. Ct. App. June 8, 2016) (unpublished). The jury convicted petitioner of all counts. (Doc. 12-1 at 122.) The trial court sentenced him to an aggregate sentence of life imprisonment. (Id. at 123.)

Represented by new counsel, Petitioner appealed, raising two claims for relief: (1) that there was insufficient evidence to convict him; and (2) that his trial counsel was ineffective for failing to object to improper comments made by the prosecution during opening and closing statements. (Doc. 12-2 at 192-204.) The Court of Appeals of Georgia affirmed Petitioner's convictions and sentences. See Smith, No. A16A0833 at 3-6.

Petitioner filed a *pro se* state petition for a writ of habeas corpus, enumerating four claims for relief:

1. his arrest warrants lacked probable cause;

2. the aggravated assault charge in Count 2 of the indictment was facially insufficient;

3. his appellate counsel was ineffective for:

   a. failing to challenge Petitioner's arrest warrants;

   b. failing to challenge the sufficiency of Count 2 of the indictment;

   c. failing to raise that trial counsel was ineffective for failing to challenge the prosecutor's "tainting of Petitioner's identity;"

   d. failing to raise that trial counsel was ineffective for failing to file a motion to suppress the robbery video;

   e. failing to raise that trial counsel was ineffective for failing to object to the admission of certain evidence;

   f. failing to raise that the prosecution suppressed material or exculpatory evidence; and

   g. failing to raise that trial counsel was ineffective for failing to strike a juror that knew petitioner and his family; and

4. the trial court erred in admitting evidence that his blood was present at the crime scene where the state failed to establish that the blood used for comparison purposes was Petitioner's.

(Doc. 11-2 at 5-6, 8.)

The state habeas court held an evidentiary hearing on the petition. At the state evidentiary hearing, Petitioner's appellate counsel testified that Petitioner wanted him to challenge his arrest warrants on appeal, but that he did not believe the issue

was viable based on his own research. (Doc. 12-1 at 11-12.) Specifically, appellate counsel believed that Petitioner's case was distinguishable from other cases involving cursory warrant affidavits because the officer testified in front of the magistrate court and was presumably questioned by the judge. (See id.) Appellate counsel further testified that he did not see a viable issue with the aggravated assault charge in the indictment or with any tainting of the victim's identification of Petitioner. (Id. at 13-15.)

Appellate counsel testified that trial counsel did object to the admission of a copy of the surveillance video, but the objection was overruled based on Georgia's new "best evidence rule" law and he did not see a viable appellate issue. (Id. at 15-16.) Appellate counsel did not see any merit in Petitioner's claim regarding the admission into evidence of a bag containing bloody money. (Id. at 16.) Appellate counsel also testified that he was not aware of any issues concerning the suppression of material or exculpatory evidence. (Id. at 17.) Finally, appellate counsel testified that he would have investigated voir dire issues, but voir dire was not transcribed, trial counsel did not make him aware of any voir dire issues, and he was not otherwise aware of any voir dire issues. (Id. at 18-20.)

The state habeas court entered a final decision denying Petitioner's state habeas corpus petition. (Doc. 11-3.) The state court dismissed grounds 1, 3, and 4 as procedurally defaulted under state law because Petitioner failed to raise them on direct appeal. (Id. at 15-17.) As to Petitioner's ineffective assistance of appellate counsel claim in Ground 3, the state court denied this claim on the merits, finding that (1) Petitioner's arrest warrants were supported by probable cause, (2) Count 2 of the indictment alleged all essential elements of aggravated assault, (3) it was not improper for the victim to view the surveillance video prior to trial, (4) the copy of the surveillance video was properly admitted because the original could not be obtained, (5) Petitioner's claim regarding the admission of a bag containing bloody money was speculative, (6) Petitioner did not introduce a copy of the purportedly exculpatory medical report, and, as a result, his assertions about its contents were speculative, and (7) Petitioner did not allege that Juror 44 was improperly empaneled. (Id. at 8-14.) Petitioner sought a certificate of probable cause to appeal the denial of habeas relief, but the Supreme Court of Georgia denied his application. (Doc. 11-4.)

Petitioner then filed a *pro se* extraordinary motion for new trial raising, in relevant part, claims analogous to Grounds 1, 3, and 4 of the § 2254 petition. (Doc. 11-5 at 1-4.) The state court dismissed Petitioner's extraordinary motion for

new trial as procedurally improper, noting that he or his counsel were aware of each of his enumerations of error either prior to or during trial, and the issues could have and should have been raised on direct appeal. (Doc. 11-6 at 2.) Petitioner appealed, and the Court of Appeals of Georgia dismissed his appeal. (Doc. 11-7 at 1.)

The instant § 2254 petition followed. (Doc. 1.) The state has filed an answer-response in opposition to the § 2254 petition. (Docs. 10, 11, 12.) Petitioner subsequently filed a brief that this Court has construed as his reply and considered in conjunction with the petition, although it reiterates the merits of his arguments and is not actually responsive to the state's response, as well as a motion for appointment of counsel. (See generally Doc. 13; Doc. 17.)

II. MOTION TO APPOINT COUNSEL

Petitioner has filed a motion for appointment of counsel, stating only that he was unrepresented in his state habeas corpus proceedings and that he would like an attorney to investigate his ineffective assistance of counsel claims. (Doc. 16 at 1.) The state opposes Petitioner's motion. (Doc. 17.)

There is no right to counsel in federal habeas corpus proceedings. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (there is no constitutional right to counsel when collaterally attacking a conviction or sentence). The Court may

appoint counsel to a person seeking collateral relief under § 2254, who is financially eligible, if it determines that the interests of justice so require. 18 U.S.C. § 3006A(a)(2)(B). Appointment of counsel in a civil case is "a privilege justified only by exceptional circumstances, such as the presence of facts and legal issues so novel or complex as to require the assistance of a trained practitioner." Kilgo v. Ricks, 983 F.2d 189, 193 (11th Cir. 1993).

Here, as discussed in more detail below, Petitioner's ineffective assistance of counsel claims are not so novel or complex as to require appointed counsel. See id. Moreover, Petitioner's filings demonstrate that he is capable of presenting the essential merits of his position to the Court. See id. ("The key is whether the *pro se* litigant needs help in presenting the essential merits of his or her position to the court."). Ultimately, Petitioner has not shown how his circumstances are materially different than those of other *pro se*, incarcerated litigants pursuing habeas claims.

Accordingly, **IT IS ORDERED** that Petitioner's motion for appointment of counsel is **DENIED**.

III. 28 U.S.C. § 2254 PETITION

A. Grounds 1, 3, & 4

In Ground 1 of his § 2254 petition, Petitioner argues that his arrest warrants lacked probable cause because the warrant affidavits failed to include the victim's name, the value of the property taken, the property owner's name, and were not issued at the time of his arrest. (Doc. 1 at 6.) In Ground 3, Petitioner alleges that he was deprived of his right to appeal because the state failed to provide his appellate counsel with trial transcripts that included voir dire. (Id.) In Ground 4, Petitioner claims that the state committed prosecutorial misconduct by withholding a material medical report from the day of the offense. (Id.)

The state responds that these claims for relief are unexhausted and procedurally defaulted under Georgia's successive petition rule. (Doc. 10-1 at 6-10.) Petitioner replies by reiterating the merits of his claims. (Doc. 13 at 3-7, 11-14.)

Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. 28 U.S.C. § 2254(b)(1). A federal claim is exhausted only if the petitioner fairly presents it to the state courts such that the state courts have the "opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim." Picard v. Connor, 404 U.S. 270, 277 (1971)

(quotation marks and alteration omitted). A claim is not fairly presented to the state courts if it is presented in a procedural context where the merits are not considered. Castille v. Peoples, 489 U.S. 346, 351 (1989).

A federal claim is procedurally defaulted where the petitioner failed to properly exhaust the claim in state court, and it is obvious that the unexhausted claim would now be barred under state procedural rules. Bailey v. Nagle, 172 F.3d 1299, 1302-03 (11th Cir. 1999). Procedural default may be excused, however, if the petitioner establishes (1) cause for, and actual prejudice from, the default; or (2) a fundamental miscarriage of justice. Id. at 1306. A petitioner establishes "cause" by showing that an objective factor external to the defense impeded an effort to properly raise the claim in the state court. Henderson v. Campbell, 353 F.3d 880, 892 (11th Cir. 2003). A petitioner establishes "prejudice" by showing that there is at least a reasonable probability that the proceeding's result would have been different. Id. A fundamental miscarriage of justice exists "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Ward v. Hall, 592 F.3d 1144, 1157 (11th Cir. 2010). To state a credible claim of actual innocence, a petitioner must present new reliable evidence that was not presented at trial showing

that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 324, 327 (1995).

Here, Petitioner presented claims analogous to Grounds 1, 3, and 4 of his § 2254 petition in his extraordinary motion for new trial. (Doc. 11-5 at 1-4.) The state court dismissed Petitioner's motion because the issues presented "could and should have been addressed and preserved for appeal either during the trial stages or when [Petitioner] timely participated in his first appeals," and could not form the basis of an extraordinary motion for new trial. (Doc. 11-6 at 2.); see also Brown v. State, 291 Ga. App. 518, 519, 662 S.E.2d 297 (Ga. Ct. App. 2008) ("An extraordinary motion for new trial cannot be based upon matters that were known to the movant in time for him to have asserted them in an ordinary motion for new trial or that could have been discovered in time by proper diligence."). Because Petitioner presented these claims in a procedural context where the merits were not considered, they were not "fairly presented" to the state courts and are unexhausted. See Castille, 489 U.S. at 351; Picard, 404 U.S. at 277.

Additionally, Grounds 1, 3, and 4 are procedurally defaulted because they would now be barred by state procedural rules restricting successive petitions. See Bailey, 172 F.3d at 1302-03; O.C.G.A. § 9-14-51; Chambers v. Thompson, 150 F.3d

1324, 1327 (11th Cir. 1998) (holding that Georgia's successive petition statute "can and should be enforced in federal habeas proceedings" against unexhausted claims). Petitioner has not alleged cause and prejudice to overcome the default, nor has he presented new, reliable evidence of his factual innocence of the crimes of conviction. See Bailey, 172 F.3d at 1302-03; Schlup, 513 U.S. at 324, 327. Grounds 1, 3, and 4 do not warrant relief.

B. GROUNDS 2 & 6

In Ground 2, Petitioner states that the aggravated assault charge in Count 2 of his indictment was fatally flawed because it did not set forth the elements of aggravated assault, did not allege that he acted with the requisite intent, and did not allege that he acted unlawfully. (Doc. 1 at 6.) In Ground 6, Petitioner argues that the trial court erred in admitting evidence about Petitioner's blood being found at the scene where the state did not establish that the blood it used for comparison was Petitioner's. (Id. at 11.)

The state responds that these claims are barred from federal habeas review because the state court found that they were procedurally defaulted under state law. (Doc. 10-1 at 10-12.) Petitioner reiterates the merits of his claims in reply. (Doc. 13 at 7-11, 32-34.)

Claims that state courts have held to be procedurally defaulted under state law cannot be addressed by federal habeas courts. Caniff v. Moore, 269 F.3d 1245, 1246 (11th Cir. 2001). While procedural default may generally be excused if the petitioner establishes cause and prejudice, when "[a] state court finds insufficient evidence to establish cause and prejudice to overcome a procedural bar, [a federal habeas court] must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption with clear and convincing evidence." Greene v. Upton, 644 F.3d 1145, 1154 (11th Cir. 2011) (quotation marks omitted).

Georgia law precludes state habeas review of any issue not preserved for collateral attack in a state court by timely objecting and raising the issue on appeal. O.C.G.A. § 9-14-48(d) (providing that habeas corpus relief shall not be granted unless the petitioner made a timely objection and otherwise complied with Georgia procedural rules on trial and on appeal, and, in the event that the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal); see also Devier v. Zant, 3 F.3d 1445, 1454-55 & n.21 (11th Cir. 1993) (citing O.C.G.A. § 9-14-48(d) and upholding a finding of procedural default on numerous claims); Waldrip v. Head, 620 S.E.2d 829, 835 (Ga. 2005) ("Claims not raised on direct appeal are barred by procedural default, and in order to

surmount the bar to a defaulted claim, one must meet the cause and prejudice test.") (quotation marks omitted).

Petitioner raised claims analogous to Grounds 2 and 6 of the § 2254 petition as Grounds 2 and 4 of his state habeas corpus petition, respectively. (Doc. 11-2 at 5-6.) The state habeas court rejected these claims as procedurally defaulted under state law because Petitioner failed to raise them on direct appeal. (Doc. 11-3 at 15-17). Additionally, Petitioner has not presented clear and convincing evidence to overcome the state court's factual determination that he did not show cause and prejudice to excuse the default. See Greene, 644 F.3d at 1154. Accordingly, Petitioner's Grounds 2 and 6 are barred from federal habeas review. See Caniff, 269 F.3d at 1246.

C. GROUND 5

In Ground 5, Petitioner argues that his appellate counsel was ineffective for failing to raise on direct appeal that:

(1) his arrest warrants were invalid;

(2) Count 2 of the indictment failed to allege a crime;

(3) his trial counsel was ineffective for failing to object and move for a mistrial due to the prosecutor's "tainting of Petitioner's identity;"

(4) his trial counsel was ineffective for failing to file a motion to suppress a copy of the video of the robbery;

(5) his trial counsel was ineffective for failing to object to the admission of certain evidence;

(6) the prosecution failed to disclose material or exculpatory evidence; and

(7) his trial counsel was ineffective for failing to strike a juror that knew Petitioner.

(Doc. 1 at 11.)

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 the judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). The Antiterrorism and Effective Death Penalty Act of 1996 "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." Butts v. GDCP Warden,

850 F.3d 1201, 1212 (11th Cir. 2017) (quotation marks omitted). A state court's factual findings are presumed correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). "[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding." Miller-El v. Cockrell, 537 U.S. 322, 324 (2003) (citation omitted). When the relevant state court decision is not accompanied by a reasoned opinion explaining why relief was denied, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "presume that the unexplained decision adopted the same reasoning." Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018).

The Sixth Amendment right to counsel includes the right to the effective assistance of competent counsel. McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970). To make a successful claim of ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). If the defendant makes an insufficient showing on the prejudice prong, the

court need not address the performance prong, and *vice versa*. Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000).

Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. See Strickland, 466 U.S. at 687-88. When analyzing a claim of ineffective assistance under § 2254(d), this Court's review is "doubly" deferential to counsel's performance. Harrington v. Richter, 562 U.S. 86, 105 (2011). Thus, under § 2254(d), "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

The same standard utilized by courts to analyze claims of ineffective assistance of trial counsel under Strickland also applies to appellate counsel. Smith v. Robbins, 528 U.S. 259, 285 (2000); Brooks v. Comm'r, Ala. Dep't of Corr., 719 F.3d 1292, 1300 (11th Cir. 2013). However, a petitioner does not have a right to have every possible argument raised on appeal, and it is up to appellate counsel to "'winnow[] out' weaker arguments[.]" Jones v. Barnes, 463 U.S. 745, 751-52 (1983) ("Experienced advocates since time beyond memory have emphasized the

importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.").

1. Arrest Warrants

Petitioner argues that his appellate counsel was ineffective for failing to challenge the validity of his arrest warrants on direct appeal. (Doc. 1 at 6.) Specifically, Petitioner argues that the affidavits supporting his arrest warrants were too generalized and lacking in detail to establish probable cause and did not specify how the officer came to know the information contained in the warrant affidavits. (Doc. 1 at 6; Doc. 13 at 16.) Petitioner further states that the arrest warrants did not include the victim's name, the address where the offenses took place, the value of the property taken, the name of the owner of the property, and were issued for "Roger Dale Norton." (Id.)

The state responds that the state court correctly determined that Petitioner's arrest warrants were supported by probable cause, and that determination is entitled to deference. (Doc. 10-1 at 13-14.) Petitioner replies by reiterating the merits of his claims. (See Doc. 13.)

The affidavits supporting Petitioner's arrest warrants read, in relevant part, as follows:

> Personally came Officer Renwick Leverette, who on oath says that, to the best of his knowledge and belief Rufaro Christopher Smith did, in the County aforesaid, commit the offense of . . . armed robbery in said County, between the hours of 0200 AM and 0230 AM and on 09-04-12 the place of occurrence of said offense being 47 Big A Road (Buddy's Quick Stop), Toccoa, Stephens Co. GA., and against the laws of the State of Georgia . . .
>
> Personally came Officer Renwick Leverette, who on oath says that, to the best of his knowledge and belief Rufaro Christopher Smith did, in the County aforesaid, commit the offense of . . . aggravated assault in said County, between the hours of 0200 AM and 0230 AM and on 09-04-12 the place of occurrence of said offense being 47 Big A Road (Buddy's Quick Stop), Toccoa, Stephens County, and against the laws of the State of Georgia . . . .

(Doc. 12-2 at 75-78.)

The Supreme Court has recognized that a criminal complaint consisting of "nothing more than the complainant's conclusion that the individuals named therein perpetrated the offense described in the complaint" cannot support a finding of probable cause by a judge or magistrate for the purpose of the issuance of an arrest warrant. Overton v. Ohio, 534 U.S. 982 (2001), quoting Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560 (1971). Here, the bare-bones affidavits underlying Petitioner's arrest warrants appear to fall within the category of complaints decried by the Supreme Court in Overton. However, unlike the warrants at issue in Overton, the officer who personally observed Petitioner fleeing the scene testified before the

magistrate court when obtaining Petitioner's arrest warrants. (See Doc. 12-1 at 11-12; Doc. 12-2 at 75-78.) Because it is not clear what other evidence or testimony the magistrate court may have considered before issuing the arrest warrants, the state court's conclusion that appellate counsel made a reasonable strategic decision not to raise a claim on direct appeal regarding Petitioner's arrest warrants was not contrary to clearly established federal law. See Barnes, 463 U.S. at 751-52.

Additionally, Petitioner has not shown prejudice where he does not assert that any evidence obtained solely incident to his arrest was introduced at trial or that his trial was otherwise affected by the alleged defects in the arrest warrants. See, e.g., Workman v. Cardwell, 471 F.2d 909, 910-911 (6th Cir. 1972) ("The District Court correctly ruled that Petitioner's challenge of the validity of the arrest warrant – absent any claim that Petitioner was thereby deprived of a fair trial – does not rise to the level of a constitutional claim cognizable in a federal habeas corpus proceeding. Petitioner does not assert that any evidence obtained incident to his arrest was introduced at trial or that his trial was otherwise affected by the asserted defect in the arrest warrant.") (citations omitted); Jackson v. McKaskle, 729 F.2d 356, 359 n.2 (5th Cir. 1984) ("The asserted deficiencies in the affidavit supporting the arrest

warrant are of no consequence as [the petitioner] was in no way prejudiced at trial by the resulting arrest."). Petitioner is not entitled to relief on this claim.

2. Sufficiency of the Indictment

Petitioner argues that his appellate counsel was ineffective for failing to challenge the sufficiency of the aggravated assault charge in Count 2 of the indictment. (Doc. 1 at 6.) Petitioner contends that Count 2 was fatally flawed because it did not allege that Petitioner acted with intent to murder, rape, or rob, or to inflict a violent injury, and did not allege that Petitioner committed aggravated assault unlawfully. (Doc. 1 at 6; Doc. 13 at 19-20.)

The state responds that the state habeas court properly determined that Count 2 of the indictment alleged all essential elements of aggravated assault. (Doc. 10-1 at 14.) Petitioner reiterates the merits of his claim in reply. (See Doc. 13.)

Count 2 of Petitioner's indictment provided that:

> And the Grand Jurors aforesaid . . . hereby charge and accuse Rufaro Christopher Smith with the offense of aggravated assault for the said accused, in the County of Stephens and State of Georgia, on or about the 4th day of September, 2012, did make an assault upon the person of Romeo Parker with a knife, an object which, when used offensively against a person, is likely to result in serious bodily injury by cutting him with said knife, contrary to the laws of said State. . .

(Doc. 12-1 at 74.) Under Georgia law, "aggravated assault based on the use of a deadly weapon requires only general criminal intent, and in such cases the indictment is not void for failing to expressly allege the criminal intent." See Adams v. State, 667 S.E. 2d 186, 191 (Ga. Ct. App. 2008) (quotation omitted). Petitioner's indictment was sufficient because Petitioner could not admit the charge and still be innocent of aggravated assault. See id. Appellate counsel was not ineffective for failing to raise a meritless challenge to the sufficiency of Count 2 of the indictment. See Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[I]t is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance."). The state court's denial of this claim was not contrary to clearly established federal law.

3. Prosecutorial Tainting of Petitioner's Identity

Petitioner asserts that his appellate counsel was ineffective for failing to raise that his trial counsel was ineffective for failing to object and move for a mistrial when the victim testified that he had viewed the robbery video with the prosecution the night before. (Doc. 13 at 21.) Petitioner contends that the victim's pretrial viewing of the video "tainted" his in-court identification of Petitioner. (Id. at 21-22.)

The state responds that Petitioner has not offered any authority supporting the proposition that it was improper for the victim to view the robbery video prior to trial and that, in any event, he has not shown prejudice because the evidence of Petitioner's identity adduced at trial was overwhelming. (Doc. 10-1 at 14-15.) Petitioner reiterates the merits of his claim in reply. (See Doc. 13.)

A pretrial identification and subsequent in-court identification may amount to a due process violation if the pretrial procedure was unnecessarily suggestive and conducive to irreparable mistaken identification. Stovall v. Denno, 388 U.S. 293, 302 (1967) (abrogated on other grounds by U.S. v. Johnson, 457 U.S. 537 (1982)). Reliability is the linchpin in determining the admissibility of identification testimony under the totality of the circumstances. Manson v. Brathwaite, 432 U.S. 98, 114 (1977). In determining whether an identification is reliable, a court must consider five factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

Here, Petitioner has not stated a credible claim that he was identified based on any impermissibly suggestive pretrial procedure, or that the victim's subsequent in-court identification was affected in any way by his viewing the surveillance video. Petitioner had clearly been identified long before the victim viewed the surveillance video the night prior to his trial testimony, and Petitioner has not shown that the video was conducive to mistaken identification. Cf. Stovall, 388 U.S. at 302. Moreover, Petitioner's identity was not in serious contention during his trial—the victim identified him at trial, he was apprehended immediately after the robbery by an officer who personally saw him flee the store, his sock was found in the store, his DNA was found at the scene, and the jury viewed surveillance video of the robbery that corroborated the victim's testimony. See Smith, No. A16A0833 at 3. The state court reasonably concluded that Petitioner's appellate counsel was not ineffective for failing to raise this issue.

4. Failure to Suppress the Copy of the Robbery Video

Petitioner argues that his appellate counsel was ineffective for failing to raise on direct appeal that his trial counsel was ineffective for failing to move to suppress the video of the robbery shown at trial. (Doc. 1 at 11; Doc. 13 at 24-25.) Petitioner states that the video was inadmissible under the "best evidence rule" because the

video shown at trial was not the original video, but a cell phone recording of the original surveillance feed. (Doc. 13 at 24-25.)

The state responds that trial counsel did object both prior to and during trial regarding the authentication of the robbery video, but that the trial court found that the cell-phone copy of the surveillance video was admissible because the original video could not be retrieved. (Doc. 10-1 at 15-16.) Petitioner replies by reiterating the merits of his claim. (See Doc. 13.)

Under Georgia law, the "best evidence rule" provides that, in order to prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required. O.C.G.A. § 24-10-1002. However, Georgia law outlines several exceptions to this general rule, including that "[t]he original shall not be required and other evidence of the contents of a writing, recording, or photograph shall be admissible if . . . [a]ll originals are lost or have been destroyed[.]" O.C.G.A. § 24-10-1004(1). There is no dispute that the original surveillance video could not be retrieved and was unavailable at the time of trial. Consequently, the state court reasonably concluded that Petitioner's appellate counsel was not ineffective for failing to raise a meritless challenge to the admission of a copy of the surveillance video. See Bolender, 16 F.3d at 1573.

5. Admission of Bags Containing Bloody Money

Petitioner contends that his appellate counsel was ineffective for failing to raise on direct appeal that his trial counsel was ineffective for failing to object to the admission into evidence of a brown bag that Officer David Sims testified held bloody money that was seized and sealed in his presence. (Doc. 1 at 11; Doc. 13 at 26.) Petitioner argues that this testimony was inconsistent with Officer Sims's written report stating that the money was returned to its owner immediately after the crime and that no evidence was introduced to show that the substance on the money was actually blood, or whose blood it was. (Doc. 13 at 26.)

The state responds that the bags were not opened at trial, and, as a result, Petitioner's assertions regarding the contents of the bags are speculative and do not warrant relief. (Doc. 10-1 at 13.) Petitioner replies by reiterating the merits of his claim. (See Doc. 13.)

The state court found that Petitioner's claim concerned dollar bills with blood on them that were placed into sealed evidence bags and admitted without objection at trial as State's Exhibits 12 and 13. (Doc. 11-3 at 7.) Petitioner has not articulated any coherent basis for why this evidence would be inadmissible, or how he was specifically prejudiced by its admission. See O.C.G.A. § 24-4-402 (providing that

relevant evidence is generally admissible). As a result, this ground is unsupported and conclusory and does not warrant relief. See Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991) (explaining that a petitioner is not entitled to federal habeas relief "when his claims are merely conclusory allegations").

6. Failure to Disclose Exculpatory or Material Evidence

Petitioner argues that the prosecution withheld exculpatory evidence—namely, a medical report from the day of the offense stating that Petitioner had no injuries. (Doc. 1 at 11; Doc. 13 at 13.) Petitioner asserts that this report refutes the state's DNA evidence by showing that his blood could not have been found at the scene and must have been planted by law enforcement. (Doc. 13 at 13.)

Petitioner attaches a September 4, 2012, Stephens County Emergency Medical Service ("EMS") report stating that EMS was dispatched to Buddy's Quick Stop to evaluate Petitioner, who had been arrested, to check for lacerations because "he ha[d] some blood on his hands." (Doc. 14-4 at 2.) The report states that "no apparent laceration[s] [were] noted on the hands[,]" and that Petitioner had "no apparent illness/injury." (Id. at 1-2.)

The state responds that, because Petitioner failed to introduce a copy of the alleged medical report in his state habeas proceedings, the state court properly denied

the claim because his assertions about the contents of the report were speculative. (Doc. 10-1 at 16-17.) The state also argues that Petitioner has not shown prejudice in light of the evidence adduced at trial. (Id. at 17.) Petitioner replies by reiterating the merits of his claim. (See Doc. 13.)

The state habeas court credited appellate counsel's testimony that he was unaware of any purported Brady[1] violations, and that neither trial counsel nor Petitioner told him anything which suggested that exculpatory or material evidence had been withheld. (Doc. 11-3 at 13; Doc. 12-1 at 17.) Moreover, it does not appear that the report is actually exculpatory, as it states that Petitioner had blood on his hands and does not contradict the state's evidence that his DNA was found at the scene and on the knife. (See Doc. 14-4 at 2.) Further, because the report concerned Petitioner's own medical condition on the day of the offense, the information contained in the report would have been known to Petitioner. See United States v. Griggs , 713 F.2d 672, 674 (11th Cir. 1983) ("Where defendants, prior to trial, had

---

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

within their knowledge the information by which they could have ascertained the alleged Brady material, there is no suppression by the government.").

Finally, Petitioner has not shown that he was prejudiced by any alleged suppression of this report. See Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999) (explaining that, to establish prejudice in regard to a Brady claim, the petitioner "must show that the items of evidence were material; that is, that 'had the evidence been disclosed to the defense, the result of the proceeding would have been different.'") (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). As discussed above, the evidence of Petitioner's guilt adduced at trial was overwhelming, even without the state's DNA evidence—he was identified by the victim, he was apprehended immediately after the robbery by an officer who saw him flee the store, his sock was found in the store, and the jury viewed surveillance video of the robbery. See Smith, No. A16A0833 at 3. Under these circumstances, Petitioner has not shown that the EMS report would have affected the jury's judgment. See Wright, 169 F.3d at 703. The state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law.

7. Failure to Strike a Juror

Petitioner argues that his appellate counsel was ineffective for failing to raise on direct appeal that his trial counsel was ineffective for failing to strike Juror 44, who knew Petitioner and his family, creating a conflict of interest. (Doc. 1 at 11; Doc. 13 at 28-29.)

The state responds that appellate counsel was not ineffective because voir dire was not transcribed, Petitioner did not bring the issue to counsel's attention, and Petitioner has not alleged that Juror 44 was improperly empaneled. (Doc. 10-1 at 17.) Petitioner reiterates the merits of his claim in reply. (See Doc. 13.)

The state habeas court credited appellate counsel's testimony that he would have looked into voir dire issues, but voir dire was not transcribed and neither trial counsel nor Petitioner gave him any information to suggest that there was any issue with Juror 44. (Doc. 11-3 at 13-14; Doc. 12-1 at 18-20.) Further, Petitioner has not alleged in any way that Juror 44 was improperly empaneled or that any juror misconduct occurred. Petitioner's unadorned assertion that a "conflict of interest" existed, without more, is speculative and does not warrant relief. See Tejada, 941 F.2d at 1559. The state court reasonably denied this claim.

Accordingly, because none of the claims in the § 2254 petition warrant relief, **IT IS RECOMMENDED** that the petition be **DENIED**.

IV. CERTIFICATE OF APPEALABILITY

Under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, a petitioner cannot appeal the final order in a habeas corpus proceeding "unless a circuit justice or a circuit or district judge issues a certificate of appealability ["COA"] under 28 U.S.C. § 2253(c)." Because reasonable jurists would not debate the resolution of the issues presented, **IT IS FURTHER RECOMMENDED** that a COA be **DENIED**. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). If the District Judge 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).

V. CONCLUSION

For the reasons stated above, **IT IS ORDERED** that Petitioner's motion for appointment of counsel [16] is **DENIED**.

IT IS RECOMMENDED that the 28 U.S.C. § 2254 petition [1] be **DENIED** and that no certificate of appealability issue.

The Clerk of Court is **DIRECTED** to terminate the referral to the undersigned United States Magistrate Judge.

SO ORDERED AND RECOMMENDED, this 12th day of July, 2021.

/s/ J. Clay Fuller
J. Clay Fuller
United States Magistrate Judge

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

RUFARO CHRISTOPHER SMITH,
GDC #1081908,
Petitioner,

v.

BRIAN ADAMS, Warden,
Respondent.

CIVIL ACTION NO.
2:20-CV-190-RWS

ORDER

This matter is before the Court on the July 12, 2021, Order and Final Report and Recommendation ("R&R") of Magistrate Judge J. Clay Fuller [Doc. 12] that Plaintiff's *pro se* habeas corpus petition pursuant to 28 U.S.C. § 2254 be denied and that no certificate of appealability issue.

In reviewing a Report and Recommendation, the district court "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); see also United States v. Schultz, 565 F.3d 1353, 1361 (11th Cir. 2009). In contrast, absent objection, the district judge "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate

[judge]," 28 U.S.C. § 636(b)(1), and "need only satisfy itself that there is no clear error on the face of the record" in order to accept the recommendation. Fed. R. Civ. P. 72, advisory committee note, 1983 Edition, Subdivision (b); Macort v. Prem, Inc., 208 Fed. Appx. 781, 784 (11th Cir. 2006) (quoting Diamond v. Colonial Life & Accident Ins., 416 F.3d 310, 315 (4th Cir. 2005)).

No objections have been filed despite Petitioner's request for additional time and being granted an additional 14 days to object [Docs. 23, 24]. Having carefully reviewed the record and the R&R, Judge Fuller's R&R [Doc. 12] is hereby approved and **ADOPTED** as the opinion and order of this Court. As such,

It is **ORDERED** that Petitioner's habeas petition [Doc. 1] is hereby **DENIED**.

The Court further finds that Petitioner has not satisfied the standard for issuance of certificate of appealability. Therefore, a certificate of appealability is **DENIED**.

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

SO ORDERED this 25th day of August, 2021.

Richard W. Story

RICHARD W. STORY
United States District Judge

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

RUFARO CHRISTOPHER SMITH, Petitioner,	:	
v.	:	CIVIL ACTION NO. 2:20-CV-0190-RWS
BRIAN ADAMS, Respondent.	:	

ORDER

Petitioner filed this 28 U.S.C. § 2254 habeas corpus action to challenge his October 2013 convictions, after a jury trial before the Stephens County Superior Court, for armed robbery, aggravated assault, and possession of a knife during the commission of a felony. On July 12, 2021, the Magistrate Judge entered a Report and Recommendation (R&R) recommending that the instant habeas corpus petition be denied and the case dismissed. [Doc. 21]. The Magistrate Judge determined that most of Petitioner's claims are procedurally barred and that the remainder of his claims either failed on their merits or that this Court must defer to the state court's determination that Petitioner is not entitled to relief under 28 U.S.C. § 2254(d). Despite the fact that this Court granted Petitioner's motion for additional time to file his objections, [Docs. 23, 24], Petitioner did not timely file objections, and, on August

25, 2021, this Court adopted the R&R, denied relief, and dismissed this action, [Doc. 25].

Petitioner next filed a motion for reconsideration, [Doc. 27], in which he claimed that the prison's COVID-19 quarantine had rendered it impossible for him to prepare his objections. He did not, however, present argument to establish that this Court should reconsider the denial and dismissal of his petition. This Court thus treated the motion as one seeking additional time to prepare his objections, and informed Petitioner that if he filed his objections by November 15, 2021, this Court would re-evaluate the R&R in light of those objections. On January 13, 2022, the Clerk received Petitioner's objections, which Petitioner dated November 12, 2021. [Doc. 29]. While skeptical that the objections are timely, this Court will give Petitioner the benefit of the doubt and perform the promised re-evaluation of the R&R.

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).

In his objections, Petitioner challenges each of the Magistrate Judge's conclusions, but he does so in a decidedly conclusory fashion. With respect to his Grounds 1, 3, and 4, which the Magistrate Judge determined were procedurally defaulted, Petitioner contends that the bar should be lifted based on his actual innocence. In attempting to show actual innocence, Petitioner "asserts that prima facie evidence exists in the records that proves his innocence, and but for appointed counsel's failure to reveal this truth at trial, it is more likely than not that no reasonable juror would have found him guilty." [Doc. 29 at 5]. However, Petitioner entirely fails to identify this purported evidence of innocence or point to where in the record that evidence might be. In fact, the evidence of Petitioner's guilt adduced at trial was overwhelming. He was identified by the victim, he was apprehended immediately after the robbery by an officer who saw him flee the store he had just robbed, his sock was found in the store, he was apprehended with bloody cash he had just stolen, and the jury viewed surveillance video of the robbery which included Petitioner's knife attack on the victim. [Doc. 11-1 at 3]. Given this record, to establish a claim of actual innocence Petitioner would have to present substantial and truly-compelling evidence, and it is clear that he has not done so. This Court thus

concludes that Petitioner has failed to overcome the procedural bar to his Grounds 1, 3, and 4.

In his Ground 2, Petitioner challenged the sufficiency of the indictment charging Petitioner with committing aggravated assault. In Ground 6, Petitioner challenged the trial court's admission of blood evidence linking him to the crime scene. The state habeas corpus court concluded that both claims were procedurally defaulted under state law, and the Magistrate Judge determined that the state court procedural default barred federal habeas corpus review of the claim. In his objection, Petitioner mostly reargues the merits of his claims. In an apparent effort to demonstrate cause and prejudice to overcome the default of his claim, he briefly argues without factual support that, but for the unreasonable failure of trial and appellate counsel to challenge the indictment, the outcome of his criminal trial would have been different. [Doc. 29 at 8]. The state habeas corpus court concluded that Petitioner had failed to demonstrate cause and prejudice to overcome the default of his Grounds 2 and 6, and this Court must defer to that determination unless Petitioner can establish it was unreasonable. See Butts v. GDCP Warden, 850 F.3d 1201, 1204 (11th Cir. 2017) (applying § 2254(d) deference to a state court's cause and prejudice determination). Petitioner's conclusory assertion of ineffective assistance of counsel fails to show that the state court's determination was unreasonable.

Finally, in his Ground 5, Petitioner raised several claims of ineffective assistance of appellate counsel. The Magistrate Judge determined that the state habeas corpus court's conclusion that Petitioner is not entitled to relief with respect to those claims was reasonable and thus entitled to deference under § 2254(d). The Magistrate Judge provided further discussion demonstrating that these claims also failed on their merits. In his objections, Petitioner merely reargues the merits of his claims without explaining how the Magistrate Judge erred. "[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." Chester v. Bank of Am., N.A., 1:11-CV-1562-MHS, 2012 WL 13009233, at *1 (N.D. Ga. Mar. 29, 2012). In any event, this Court has reviewed Petitioner's claims and concludes that the state habeas corpus court was correct in determining that Petitioner had failed to demonstrate that he was prejudiced by his appellate counsel's purported ineffectiveness. See generally Strickland v. Washington, 466 U.S. 668, 687 (1984).

Having reviewed the R&R in light of Petitioner's objections, this Court concludes that Petitioner has not demonstrated that this Court should vacate the order denying § 2254 relief and dismissing this action. This Court further concludes that Petitioner's objections likewise fail to demonstrate that he has made "a substantial showing of the denial of a constitutional right," and it thus remains clear that

Petitioner is not entitled to a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c)(2). Accordingly, Petitioner's objections, [Doc. 29], are **OVERRULED**.

IT IS SO ORDERED, this 3rd day of March, 2022.

RICHARD W. STORY
United States District Judge

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