

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-11818

ANTHONY TAWON WILLIAMS,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 4:20-cv-00104-WMR

Appendix A

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Order of the Court

23-11818

ORDER:

Anthony Williams moves for a certificate of appealability in order to appeal the denial of his 28 U.S.C. § 2254 petition. His motion is **DENIED** because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). His motion for leave to proceed *in forma pauperis* on appeal is **DENIED AS MOOT**.

/s/ Charles R. Wilson

UNITED STATES CIRCUIT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

ANTHONY TAWON WILLIAMS,
GDC No. 1067934,
Petitioner,
v.

CIVIL ACTION FILE
NO. 4:20-cv-0104-WMR

TIMOTHY C. WARD. Comm'r Ga.,
Dep't of Corr.,
Respondent.

ORDER

This matter is before the Court on the Magistrate Judge's Final Report and Recommendation ("R & R") [Doc. 25], which recommends that Petitioner's pro se 28 U.S.C. § 2254 habeas corpus petition challenging his 2009 Bartow County conviction and sentence for felony murder be denied. No objection to the R & R has been filed.

I. LEGAL STANDARD

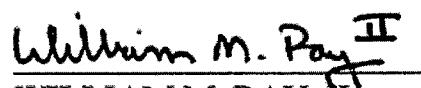
Under 28 U.S.C. § 636(b)(1), the Court reviews the R & R for clear error if no objections are filed by a party within 14 days after being served with a copy. If a party files objections, however, the Court must determine *de novo* any part of the

R & R that is the subject of a proper objection. *Id.* As no objection to the R & R has been filed in this case, the clear error standard applies.

II. CONCLUSION

After considering the Final Report and Recommendation [Doc. 25], the Court receives the R & R with approval and adopts its findings and legal conclusions as the Opinion of this Court. Accordingly, Plaintiff's § 2254 Petition is **DENIED**, and a Certificate of Appealability is **DENIED** pursuant to 28 U.S.C. § 2253(c)(2). 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." Rule 11(a) to the Rules Governing Section 2254 Proceedings. The Clerk is **DIRECTED** to close this file.

IT IS SO ORDERED, this 10th day of May, 2023.



WILLIAM M. RAY, JR.
UNITED STATES DISTRICT JUDGE

FILED IN CHAMBERS U.S.D.C ATLANTA
Date: Apr 11 2023
KEVIN P. WEIMER, Clerk
By: s/Karl Butler Deputy Clerk

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

ANTHONY TAWON WILLIAMS, :	PRISONER HABEAS CORPUS
GDC No. 1067934, :	<u>28 U.S.C. § 2243</u>
Petitioner <u>pro se</u> , :	
	:
v. :	
	:
TIMOTHY C. WARD, Comm'r, Ga., :	
Dep't of Corr., :	CIVIL ACTION NO.
Respondent. :	4:20-CV-0104-WMR-WEJ

FINAL REPORT AND RECOMMENDATION

Petitioner Anthony Tawon Williams, a state prisoner currently confined at Riverbend Correctional Facility in Milledgeville, Georgia, has filed a pro se 28 U.S.C. § 2254 habeas corpus petition challenging his 2009 Bartow County conviction and sentence for felony murder. (Pet. [1] at 1.) The matter is before the Court on the Petition, the state's Answer-Response, and petitioner's Reply. For the reasons stated below, **IT IS RECOMMENDED** that the § 2254 Petition be **DENIED** and that no certificate of appealability issue.

I. PROCEDURAL HISTORY

On May 19, 2009, a Bartow County grand jury returned an 8-count indictment against petitioner and one other individual charging petitioner with felony murder predicated on possession of cocaine with intent to distribute

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(“Count 1”), felony murder predicated on possession of cocaine (“Count 2”), felony murder predicated on cruelty to children in the second degree (“Count 3”), felony murder predicated on contributing to the deprivation of a minor (“Count 4”), cruelty to children in the second degree (“Count 5”), contributing to the deprivation of a minor (“Count 6”), possession of cocaine with intent to distribute (“Count 7”), and possession of cocaine (“Count 8”). (See Resp. Ex. 4 [16-4] at 242-50.) Petitioner proceeded to trial where the state adduced evidence that petitioner’s one-year-old daughter died after ingesting cocaine which petitioner and his codefendant, the child’s mother, possessed at their home with intent to distribute. See Williams v. State, 779 S.E.2d 304, 208 (Ga. 2015). The jury found petitioner guilty on all counts. See id. at 208 n.1. The trial court initially sentenced petitioner to four concurrent sentences of life imprisonment on each of the felony murder counts and merged the remaining counts into the corresponding felony murder counts. Id. However, the trial court subsequently entered two orders vacating petitioner’s sentences on Counts 2, 3, and 4, and merging the convictions into Count 1, leaving in place only the conviction and life sentence on Count 1 for felony murder predicated on possession of cocaine with intent to distribute. Id.; (see also Resp. Ex. 4 [16-4] at 191.)

Petitioner appealed and, relevant to the instant § 2254 proceedings, raised a claim that his conviction for felony murder predicated on contributing to the deprivation of a minor should be vacated. See Williams, 779 S.E.2d at 309. The Supreme Court of Georgia determined that this claim was moot because petitioner's conviction and sentence on this charge already had been vacated. Id. Ultimately, the Supreme Court of Georgia rejected all of petitioner's claims of error and affirmed his remaining conviction and life sentence. Id. at 313.

Petitioner filed a state habeas corpus petition in which he raised, inter alia, a claim that his appellate counsel was ineffective for failing to raise on direct appeal that trial counsel was ineffective for failing to object that contributing to the deprivation of a minor was an improper predicate for felony murder. (Resp. Ex. 1 [16-1] at 19.) Following an evidentiary hearing, the state habeas court entered a final order denying the state petition. (Resp. Ex. 2 [16-2].) The state habeas court credited appellate counsel's testimony that he conferred with petitioner and trial counsel, reviewed the record, and raised what he believed were the most meritorious issues for appeal. (See id. at 8.) Further, the state court emphasized that appellate counsel did raise the underlying issue on direct appeal, but that the Supreme Court of Georgia found this argument to be moot, and that petitioner could

not show any prejudice where the associated conviction and sentence already had been vacated. (Id. at 8-9, 10-11.)

Petitioner sought a certificate of probable cause (“CPC”) to appeal the denial of habeas relief, but he Supreme Court of Georgia denied his application. (See Resp. Ex. 3 [16-3] at 1.) The instant § 2254 petition followed.

II. 28 U.S.C. § 2254 PETITION

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). This is “a substantially higher threshold” than a determination that

the state court's decision was incorrect, and, as such, relief is not warranted if the federal court concludes that the state court's application of federal law was merely erroneous. Schriro v. Landrigan, 550 U.S. 465, 473 (2007).

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). 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).

A. Ground 1

In his first enumeration of error, petitioner argues that his appellate counsel was constitutionally ineffective for failing to challenge on direct appeal trial counsel's ineffectiveness for failing to object that the offense of contributing to the deprivation of a minor, in violation of O.C.G.A. § 16-12-1(b)(3), was an improper predicate for felony murder. (Pet. [1] at 8.) Specifically, petitioner contends that

the version of § 16-12-1(b)(3), (d.1)(1), and (e)(1) in effect in 2009 already created a distinct homicide offense punishable by one to five years' imprisonment for when the § 16-12-1 offense caused the death of a child, and, thus, was not a proper predicate for felony murder under state law. (Id. at 9-10.) Petitioner argues that this issue would have been meritorious on appeal, and, consequently, his appellate counsel was ineffective for failing to raise it. (Id.)

The state responds that the state habeas court's rejection of this claim was reasonable and is entitled to deference. (Resp. Br. [15-1] at 11.) The state emphasizes that counsel did raise the underlying issue on appeal, but that the state appellate court found the argument moot because petitioner's associated conviction on Count 4 already had been vacated by the trial court. (Id.) The state further argues that petitioner cannot show prejudice where the challenged conviction already had been vacated. (Id. at 13.)

Petitioner replies¹ that, under state law, the trial court's vacatur of the felony murder Counts 2, 3, and 4, automatically "unmerged" the underlying felonies such

¹ Petitioner also has filed a second, "supplemental" reply. (See Pet.'s Surreply [21].) "Neither the Federal Rules of Civil Procedure nor this Court's Local Rules authorize the filing of surreplies." Fedrick v. Mercedes-Benz USA, LLC, 366 F. Supp. 2d 1190, 1197 (N.D. Ga. 2005). Consequently, to the extent

that he is presently convicted but not sentenced with respect to the underlying contributing-to-the-deprivation-of-a-minor offense in Count 6. (Pet.'s Reply [30] at 3.) As a result, petitioner contends that the issue is not moot, and that the state habeas court's decision was based on an unreasonable determination of the facts. (Id. at 3, 6.) Petitioner asserts that there is no reason that his appellate counsel could not have made the same arguments that were later successful in Allan Ray Williams v. State,² 791 S.E.2d 55, 58 (Ga. 2016) (holding that contributing to the deprivation of a minor could not be used as a predicate offense for felony murder). (Id. at 6-7.) Petitioner further argues that he was prejudiced by appellate counsel's ineffectiveness because, if trial counsel had objected to the use of the O.C.G.A. § 16-12-1 offense as a felony murder predicate, the jury could have been presented with an option to consider the victim's death under the lesser homicide statute contained in O.C.G.A. §§ 16-12-1(b)(3), (d.1)(1), and (e)(1), rather than solely under the felony murder statute. (Id. at 7-8.) Petitioner contends that there was a

that petitioner's unauthorized Surreply presents additional facts or argument, rather than purely correcting scrivener's errors in his prior Reply, such arguments have not been considered by this Court.

² This decision will be referred to as "Allan Ray Williams v. State" to avoid confusion with the similarly styled decision of the Supreme Court of Georgia on petitioner's direct appeal.

reasonable likelihood that the jury would have convicted him of the lesser offense because the victim's death was an accident. (Id. at 7-8.)

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). 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. 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).

"The standards created by Strickland and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." Harrington v. Richter, 562 U.S. 86, 105 (2011). The Supreme Court has emphasized that the Strickland standard is a general one with a substantial "range of reasonable

applications” and that federal habeas courts “must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d).” See id. “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.

Here, the state habeas court correctly applied Strickland to petitioner’s claim of appellate counsel ineffectiveness, and its denial of this claim was not contrary to clearly established federal law. In particular, the state court noted that appellate counsel did, in fact, raise on direct appeal the core underlying argument that state law did not permit felony murder to be predicated on contributing to the deprivation of a minor, but the Supreme Court of Georgia deemed this claim moot and did not reach the merits. (See Resp. Ex. 2 [16-2] at 8-9); see also Williams, 779 S.E.2d at 309. Petitioner has not plausibly shown how raising the same claim couched within ineffective assistance of trial counsel would likely have led to a different outcome on appeal. Even if trial counsel had successfully demurred the felony murder charge in Count 4 prior to trial, he was still charged with three other counts of felony murder predicated on three other offenses, and the jury found him guilty of felony murder on all three of those alternate grounds. Moreover, petitioner could not show prejudice because his conviction and sentence on Count 4 were vacated

prior to his appeal, and appellate counsel was not ineffective for failing to raise a meritless ineffective assistance claim. See Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994) (noting that “it is axiomatic that the failure to raise non-meritorious issues does not constitute ineffective assistance”). Under these circumstances, the state habeas court’s denial of this claim was reasonable, particularly under the “double deference” accorded to ineffective assistance of counsel claims under § 2254(d). See Harrington, 562 U.S. at 105.

In his Reply, petitioner attempts to argue that his habeas challenge to his vacated conviction in Count 4 somehow still presents a live case or controversy. Cf. Ethredge v. Hail, 996 F.2d 1173, 1175 (11th Cir. 1993) (explaining that “[a] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.”). Petitioner’s arguments are unavailing. The simple fact of the matter is that petitioner is not presently incarcerated for felony murder predicated on contributing to the deprivation of a minor. Rather, as the state habeas court noted multiple times, petitioner is serving a single life sentence only for felony murder while in the commission of possession of cocaine with intent to distribute. (See Resp. Ex. 2 [16-2] at 13-14.) Petitioner’s Ground 1 does not warrant relief.

B. Ground 2

In his second enumeration of error, petitioner argues that his appellate counsel was ineffective for failing to challenge as plain error on direct appeal the trial court's jury instructions. (Pet. [1] at 9-10.) Petitioner contends that the trial court's jury instructions did not apprise the jury that the felony murder charge in Count 4 was improperly predicated on the contributing-to-the-deprivation-of-a-minor offense in Count 6, which was itself a distinct homicide offense. (Id.) Petitioner states that the jury was not properly instructed on contributing to the deprivation of a minor, and, as a result, was not able to adequately consider which homicide statute best fit the facts of the case. (Id.)

The state responds that Ground 2 is newly raised for the first time on federal habeas review and procedurally defaulted under Georgia's successive petition rule. (Resp. Br. [15-1] at 13-14.) The state further argues that petitioner has not shown cause and prejudice to overcome the default. (Id. at 16-17.)

Petitioner does not address the state's contention that this claim is unexhausted and procedurally defaulted in his Reply. (See generally Pet.'s Reply Br. [20].)

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 procedurally defaulted where the petitioner failed to 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).

Here, petitioner failed to present Ground 2 either on direct appeal or in his state habeas petition, and, consequently, the claim is unexhausted. Moreover, Ground 2 is procedurally defaulted because it 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 (providing that a petitioner generally waives any grounds not raised in his first habeas corpus petition); 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).

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. Bailey, 172 F.3d 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.

Petitioner has not identified any objective factor external to the defense that prevented him from exhausting this ground in state court. See id. Additionally, petitioner has not shown a fundamental miscarriage of justice because he has not presented new, reliable evidence of his factual innocence of the offense of conviction. See Ward v. Hall, 592 F.3d 1144, 1157 (11th Cir. 2010) (explaining that a fundamental miscarriage of justice exists “where a constitutional violation has probably resulted in the conviction of one who is actually innocent”); Schlup v. Delo, 513 U.S. 298, 324, 327 (1995) (holding that, 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”). Consequently, Ground 2 is procedurally defaulted and provides no basis for relief.

C. Ground 3

In petitioner’s third and final enumeration of error, petitioner argues that his equal protection rights were violated when the Supreme Court of Georgia denied his CPC application following the denial of habeas relief. (Pet. [1] at 10.) Namely, petitioner contends that he was treated disparately from the defendant in the Supreme Court of Georgia’s Allan Ray Williams decision, who successfully challenged on interlocutory appeal the portion of his indictment charging him with

felony murder predicated on contributing to the deprivation of a minor. (Id. at 10-11.) Petitioner argues that the Supreme Court of Georgia was obliged to find his counsel ineffective based on the same error. (Id. at 11.)

The state responds that Ground 3 fails to state a claim for federal habeas relief because it alleges errors in petitioner's state postconviction proceedings, which are not cognizable on federal habeas review. (Resp. Br. [15-1] at 17-18.)

Petitioner's Reply does not address the state's contention that Ground 3 is non-cognizable on federal habeas review. (See generally Pet.'s Reply Br. [20].) Instead, petitioner reiterates his arguments that he has presented facts establishing an equal protection violation based on disparate treatment. (Id. at 9-13.)

Under § 2254, a state prisoner may file a federal habeas petition only on the ground that he is in custody pursuant to the judgment of a state court in violation of the constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). Consequently, an alleged defect in a collateral proceeding does not state a basis for federal habeas relief. Alston v. Dep't of Corr., Fla., 610 F.3d 1318, 1325 (11th Cir. 2010); see also Carroll v. Sec'y, Dep't of Corr., et al., 574 F.3d 1354, 1365 (11th Cir. 2009) ("[A] challenge to a state collateral proceeding does not undermine the legality of the detention or imprisonment—i.e., the conviction itself—and thus habeas relief is not an appropriate remedy.").

Here, petitioner's Ground 3 alleges defects only in his state habeas corpus proceedings, which are not cognizable on federal habeas review. See Alston, 610 F.3d at 1325; Carroll, 574 F.3d at 1365. Ground 3 fails to state a claim for § 2254 relief. Accordingly, because none of the grounds presented warrant federal habeas relief, **IT IS RECOMMENDED** that the § 2254 petition be **DENIED**.

III. 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 Court 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 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 RECOMMENDED, this 11th day of April, 2023.


WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE

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