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1. February 5, 2024 pg. 32-33

11TH Circuit Court of Appeals
Denial Decision

USCA 11 23-12070

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-12070

DONALD GENE BARNES,

Petitioner-Appellant,

versus

COFFEE CF WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 5:22-cv-00043-MTT-CHW

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ORDER:

Donald Barnes moves this Court for a certificate of appealability in order to appeal the denial of his 28 U.S.C. § 2254 petition. His motion for a certificate of appealability 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).

/s/ Andrew L. Brasher
UNITED STATES CIRCUIT JUDGE

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1. May 3, 2023 pg. 35 - 53

District Court for the Middle District of Georgia
Magistrate's Report and Recommendation
Habeas Corpus Denial Decision

Case No. 5:22-cv-43-MTT-CHW

2. May 31, 2023 pg. 54 - 55

District Court for the Middle District of Georgia
Habeas Corpus Denial Decision

Case No. 5:22-cv-43-MTT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

DONALD GENE BARNES,	:	
	:	
Petitioner,	:	
	:	
V.	:	
	:	**Case No. 5:22-cv-0043-MTT-CHW**
ANNETTIA TOBY, Warden	:	**Proceedings Under 28 U.S.C. § 2254**
Respondent.	:	**Before the U.S. Magistrate Judge**
	:	
	:	

REPORT AND RECOMMENDATION

Petitioner Donald Gene Barnes brought this federal habeas action under 28 U.S.C. § 2254 to challenge his February 2003 convictions in Houston County Superior Court for aggravated child molestation, distribution of obscene material, attempted aggravated child molestation, and enticing a child for indecent purposes. (Docs. 1, 9). Petitioner raises seven grounds for relief.

Petitioner has failed to show that state level resolution and consideration of his grounds were based on an unreasonable determination of the facts or that it was contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). Other grounds are procedurally defaulted such that Petitioner would not be able to raise them in a subsequent petition, and he has been able to show the requisite prejudice to allow the Court to consider them. It is therefore **RECOMMENDED** that Petitioner's Section 2254 petition be **DENIED**.

FACTUAL AND PROCEDURAL BACKGROUND

On February 13, 2003, after a jury trial in Houston County Superior Court, Petitioner was found guilty of aggravated child molestation, attempted aggravated child molestation, distributing obscene material, and enticing a child for indecent purposes for conduct involving two juveniles, B.B. and M.L. (Doc. 16-5, p. 1-8). Petitioner received a total sentence of 45 years to serve in the

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custody of the Georgia Department of Corrections. *See Barnes v. State*, A11A2123 (Ga. App., Jan. 11, 2012) (Doc. 15-13, p. 4-18); (Doc. 16-4, p. 40-43). At trial, Petitioner represented himself, and Attorney Robert Gurd served as stand-by counsel. *See, e.g.* (Doc. 16-5, p. 30-31, 42).

Plaintiff was appointed post-conviction and appellate counsel following his jury trial conviction. The first counsel, William Peterson, filed a motion for new trial and then withdrew. (Docs. 16-4, p. 29, 30; 16-5, p. 9-11). Petitioner's second appellate counsel, Jeffrey Grube, filed three amended motions for new trial and represented Petitioner at the hearing. (Docs. 16-5, p. 12-14, 15-20, 21-26; 16-12, p. 3-70). The motion for new trial hearing occurred approximately eight years after the trial due to a delay in the trial transcript preparation, which was caused by several factors including the death of the trial court reporter. *See* (Doc. 16-12, p. 9-12).

Following the denial of his motion for new trial, Petitioner, who continued to be represented by Attorney Grube, appealed to the Georgia Court of Appeals. (Docs. 16-5, p. 27; 16-12, p. 71-125). The appeal raised several enumerations of error. (Doc. 16-12, p. 82-83). First, Petitioner argued the trial court erred by failing to suppress evidence of Petitioner's identification through a photographic lineup. (*Id.*, p. 82). He also argued that the trial court erred by failing to suppress evidence from a computer that he argued was the product of an illegal search and seizure. (*Id.*) Petitioner asserted that he was entitled to a new trial because his inability to meaningfully participate in his defense violated his due process rights. (*Id.*) Petitioner challenged the sufficiency of the evidence to support his convictions. (*Id.*, p. 83). And finally, Petitioner argued that the trial court erred by failing to merge certain counts for sentencing purposes. (*Id.*). The Georgia Court of Appeals affirmed Petitioner's convictions in an unpublished opinion and later denied Petitioner's motion for reconsideration. (Docs. 15-13, p. 4-18; 15-14). However, Petitioner's case was

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remanded for resentencing for the offense of enticing a child for indecent purposes due to the trial court's clerical error. (Doc. 15-13, p. 18). Petitioner was resentenced on this count on May 7, 2012. (Doc. 15-15). He was represented by Mr. Grube at resentencing. (*Id.*)

Petitioner then challenged his conviction by filing a habeas corpus petition in the Superior Court of Chattooga County. (Doc. 16, p. 1-5). He amended his petition nine times. (Docs. 15-1, 15-2, 16-1, 15-3, 15-4, 15-5, 16-2, 15-6, 15-7). The case was transferred to the Superior Court of Baldwin County, and at the hearing, Petitioner went forward on his seventh, eighth, and ninth amended petitions. (Docs. 16-2; 15-6; 15-7; 16-4, p. 4-7). The amended petitions raised 25 claims. The seventh amended petition (Doc. 16-2) raised the following 20 claims: (1) the illegal search and seizure of Petitioner's laptop computer, including having an incomplete hearing on his motion to suppress; (2) the illegal photographic lineup and in court identification; (3) ineffective assistance of appellate counsel for failing to raise all the issues Petitioner wanted at the motion for new trial; (4) improperly admitted similar transaction evidence; (5) inaccurate jury instructions given regarding similar transaction evidence; (6) prevention of a full cross examination of Detective Reuttiger; (7) trial court's denial of motion for verdict of acquittal; (8) insufficiency of jury instructions regarding mistake of fact; (9) failure by the trial court to impose a split-sentence as required by law; (10) subornation of perjury by the prosecution; (11) prosecutorial misconduct related to *Brady*[1] and *Giglio*[2] violations; (12) expressing opinions during trial; (13) failure of the trial court to conduct hearing to determine obscenity; (14) jury instructions regarding corroboration improperly shifted the burden to the Petitioner at trial; (15) improper admission of hearsay evidence for purposes of impeachment; (16) insufficiency of jury instructions to define

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).
[2] *Giglio v. U.S*, 405 U.S. 150 (1972).

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"substantial act" for purposes of attempt; (17) delay in post-conviction proceedings; (18) failure of jury instructions to address asportation element of the count for enticing a child for indecent purposes; (19) improperly giving jury instructions for lesser included offenses; and (20) sufficiency of the evidence to sustain the verdict.

The eighth amended petition (Doc. 15-6) raised four additional claims: (21) the trial court improperly nolle prossed two counts of the indictment, which the Petitioner asserted voided the indictment; (22) the altered indictment necessarily voided Petitioner's conviction and sentence; (23) improper ex-parte communication between the State and the trial court about dismissing counts and providing a redacted indictment to the jury; and (24) ineffective assistance of counsel by Petitioner's first appellate counsel for failing to re-file the motion in arrest of judgment that Petitioner prepared *pro se*. Petitioner's ninth amended petition (Doc. 15-7) raised one final claim: (25) ineffective assistance of counsel because Mr. Gurd failed to challenge the indictment when he was still Petitioner's pre-trial counsel and that Mr. Gurd presented a distraction to the jury as Petitioner's standby counsel at trial.

After a hearing on Petitioner's amended claims, the habeas court denied Petitioner's state habeas petition. (Docs. 16-3; 16-4, p. 1-26). The Georgia Supreme Court then denied Petitioner's application for a certificate of probable cause on February 15, 2021. (Docs. 15-9, 15-10). Petitioner filed this timely petition for habeas corpus relief under § 2254 raising seven grounds. (Docs. 1, 9). Respondent filed an answer and response, along with numerous exhibits in support thereof, on April 11, 2022. (Docs. 12, 15, 16).

CLAIMS RAISED

Petitioner raises seven grounds for relief through his original and supplemental petitions.

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(Docs. 1, 9). These grounds cover issues originating with the trial court and through his appeal. Respondent is not specifically disputing exhaustion of Petitioner's claims. (Doc. 12, p. 6). The grounds, as Petitioner asserted them, are as follows:

(1) Insufficient evidence to sustain the verdict in that the prosecution did not prove essential elements of the four counts for which the jury found him guilty, (Doc. 1, p. 5);

(2) Ineffective assistance of pre-trial and standby counsel because standby counsel failed to advocate for the defense or provide any adversarial test for the prosecution, (Doc. 1, p. 7);

(3) Ineffective assistance of first appellate counsel for his failure to re-file Petitioner's *pro se* motion in arrest of judgment and failure to respond to Petitioner's letters, (Doc. 1, p. 8);

(4) Ineffective assistance of second appellate counsel due to conflicts of interest, (Doc. 1, p. 10);

(5) Unconstitutional and exorbitant post-conviction delays which led to a miscarriage of justice, (Doc. 1-7, p. 1);

(6) Prosecutorial conduct evidence by subordination of perjury, issues with similar transaction evidence, and *Brady/Giglio* violations, and interference into Petitioner's right to testify, (Docs. 1-7, p. 1; 9, p. 1-2); and

(7) Illegal search and seizure of laptop computer and evidence subsequently being used based upon lack of *Miranda*[3] warnings, request for counsel not being honored, invalid consent to search, and not receiving a full and fair hearing at the trial court, (Doc. 1-7, p. 2).

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

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STANDARDS OF REVIEW

Deference to State Court Rulings

The Anti-terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, governs a district court's jurisdiction over federal habeas corpus petitions brought by state prisoners. 28 U.S.C. § 2254(d). When a state court has previously denied relief, a federal court may grant relief under Section 2254(d) only where "the state-court decision was either (1) *contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States, or (2) *involved in an unreasonable application of* . . . clearly established Federal law as determined by the Supreme Court of the United States." *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000) (quotation marks omitted) (emphasis in original). A state court decision is "contrary to" clearly established federal law if either "(1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case." *Putnam v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001). Furthermore, "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

Ineffective Assistance of Counsel

Regarding claims of ineffective assistance of counsel, the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 669 (1984), requires a showing that (1) "counsel's performance

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was deficient," and that (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To satisfy the first prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. This means that "the Court must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). To satisfy the second prejudice prong, Petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "Claims of ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under *Strickland*." *Philmore v. McNeil*, 575 F.3d 1251, 1264 (11th Cir. 2009).

"When federal courts review a claim of ineffective assistance of counsel previously entertained by state courts, AEDPA review is doubly deferential," as "federal courts are to afford both the state court and the defense attorney the benefit of the doubt." *Woods v. Etherton*, 136 S.Ct. 1149, 1151 (2016) (internal quotations omitted). In these situations, a federal habeas petitioner "must also show that in rejecting his ineffective assistance of counsel claim, the state court 'applied *Strickland* to the facts of his case in an objectively unreasonable manner.'" *Rutherford v. Crosby*, 385 F.3d 1300, 1309 (11th Cir. 2004) (citation omitted).

Procedural Default

Federal courts cannot consider claims brought by a state prisoner if "the applicant failed to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). Such claims are either unexhausted or procedurally defaulted. *See, e.g., Mancill v. Hall*, 545 F.3d 935, 939-40 (11th Cir. 2008). Unexhausted claims should generally be dismissed without prejudice to allow a

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petitioner to exhaust. *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010). However, if the unexhausted state remedy is no longer available to a petitioner, it can be deemed procedurally defaulted and the federal court can dismiss the claim with prejudice. *Mancill*, 545 F.3d at 939.

A claim is procedurally defaulted under O.C.G.A. § 9-14-148(d), which requires issues to be "raised and litigated at the first available opportunity." *Davis v. Turpin*, 273 Ga. 244, 245 (2000). Grounds may also be procedurally defaulted under OCGA § 9-14-51 ("Waiver of ground not raised, exception"), which provides:

> All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

"A federal court may still address the merits of a procedurally defaulted claim if the petitioner can show cause for the default and actual prejudice resulting from the alleged constitutional violation." *Ward*, 592 F.3d at 1157. To show cause, the petitioner must demonstrate 'some objective factor external to the defense' that impeded his effort to raise the claim properly in state court." *Ward*, 592 F.3d at 1157 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). "To establish 'prejudice,' a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different." *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003) (citations omitted).

Judgment, No Attorney, Ineffective Assistance of Counsel

ANALYSIS

Petitioner previously raised portions of all his grounds in either his direct appeal or his state

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habeas petition, although Petitioner now slightly varies his arguments in his current petition. None of the grounds as asserted by Petitioner afford any basis for federal habeas relief.

1. Grounds Raised and Decided on Direct Appeal

On appeal, Petitioner argued that the evidence was insufficient to support his conviction because the State failed to prove venue for the crimes involving M.L and failed to prove that B.B. was under 16 years old at the time of the events underlying the indictment. (Doc. 15-13, p. 9). Petitioner raised a general sufficiency of the evidence claim in his state habeas petition. (Doc. 16-2, p. 8). In ground one, Petitioner again argues that evidence at trial was insufficient to sustain his convictions. (Doc. 1, p. 5). The Georgia Court of Appeals found that the State carried its burden of proof and that the evidence was sufficient to sustain Plaintiff's convictions. (Doc. 15-13, p. 9-11). Petitioner now suggests that the evidence was insufficient regarding other elements than those addressed on direct appeal. (Doc. 1, p. 5).

The Georgia Court of Appeals decision shows a thorough consideration of the entire record and indicates that it viewed the evidence in the light most favorable to the jury's verdict as directed in *Jackson v. Virginia*, 443 U.S. 307 (1979). Plaintiff has not demonstrated that the Georgia Court of Appeals mispresented any of the underlying facts and evidence from his trial or that the appellate court applied *Jackson* in an objectively unreasonable manner. Therefore, the appellate court's finding that the evidence was sufficient to sustain Plaintiff's convictions is entitled to deference. Look up → *See Eckman v. Williams*, 151 F. App'x 746 (11th Cir., 2005) (rejecting argument that the deference standard did not apply to sufficiency of the evidence claims); s*ee also Metrish v. Lancaster*, 569 U.S. 351, 357 (2012) (quoting *Harrington v. Richter*, 562 U.S. 86, 103). → good, important

Petitioner also raised on appeal the trial court's denial of his motion to suppress regarding

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evidence found on the laptop computer seized from his hotel room. (Doc. 15-13, p. 12-14). Petitioner makes this same argument in ground seven citing several failures in the search and how the trial court considered the motion, including that he was not given a full and fair hearing. (Doc. 1-7, p. 2). Even if the appellate findings were not owed any deference, the allegations of any illegal search and seizure would not be reviewable in these proceedings. *Stone v. Powell*, 428 U.S. 465 (1976). Under *Stone*, a federal court may not grant habeas relief stemming from an illegal search and seizure where a petitioner had a full and fair opportunity to litigation his claim in state court. While Petitioner attempts to pierce through *Stone* in ground seven, the record belies any argument that he was not provided a full and fair hearing.

The Georgia Court of Appeals considered Petitioner's argument that State's evidence about the search and Petitioner's consent for the hotel room search were tainted before rejecting this claim. (Doc. 15-13, p. 12-14). The trial transcript reflects that a hearing was held, and the trial court made specific findings that the search "was not done under duress or coercion" before considering Petitioner's other specific objections to use of the laptop evidence. (Doc. 16-6, p. 6-34). The appellate decision cited and considered evidence produced at the motion hearing, which afforded Petitioner "meaningful appellate review." (Docs. 15-13, p. 12-14); *see also Sheffield v. Sec., Dept. of Corr.*, 2016 WL 9461762, *2 (11th Cir. 2016) (analyzing the meaning of "full and fair opportunity" under *Stone*). Petitioner had a full and fair opportunity to litigate any claim that his hotel room was illegally searched and that his laptop was illegally seized. Therefore, the illegal search and seizure cited in ground seven is barred from habeas review. *Sheffield,* 2016 WL 9461762, *2 (citing *Stone*, 428 U.S. at 494).

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2. Grounds Raised and Decided in Petitioner's State Habeas Petition

Petitioner raised the remainder of his federal habeas action claims in his state habeas corpus petition, although he varies his supporting arguments in some of the grounds. Three of the grounds, grounds two, three, and four, involved alleged ineffective assistance of counsel against the three attorneys involved in Petitioner's case. Ground six raises issues of alleged prosecutorial misconduct, some of which Petitioner previously argued under the banner of ineffective assistance of counsel. And finally in ground five, Petitioner argues that the delay of his post-conviction proceedings led to a miscarriage of justice. None of these grounds support granting federal habeas relief.

a. Ineffective Assistance of Pre-Trial/Standby Counsel

While Petitioner represented himself at trial, he was first represented by appointed counsel, Robert Gurd, early in the case and as standby counsel at trial. In ground two, Petitioner argues that Mr. Gurd failed to provide actual and constructive assistance because he did not function "as an advocate for the defense or provide any adversarial test for the prosecution." (Doc. 1, p. 7; 1-10, p. 11-15). Plaintiff raised ineffective assistance of counsel as to Mr. Gurd in his state habeas petition but focused on the failure to file a demurrer to the indictment or motion to sever and on the trial court's handling of Mr. Gurd's presence in front of the jury. (Doc. 15-7).

The state habeas court found that any claim about the ineffectiveness of Mr. Gurd was procedurally defaulted because it was not raised post-trial or in Plaintiff's direct appeal. (Doc. 16-3, p. 19-21). Finding that this claim was defaulted, the state habeas court then examined whether Petitioner could show cause for failing to raise an ineffective assistance of counsel claim or that he had been actually prejudiced by the failure to raise it. (*Id*, p. 20). The state habeas court

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considered if Petitioner could show actual prejudice through the *Strickland* standard or that that any errors at trial "worked to his actual and substantial disadvantage [thus] infecting his entire trial with [constitutional error]" under *U.S. v. Frady*, 456 U.S.152 (1982). (*Id.*) The state habeas court found that Petitioner had produced no evidence of actual prejudice and could not show any cause to overcome the procedural default bar. (Doc. 16-3, p. 19-21, 30-31).[4] Petitioner has not shown that the state court unreasonably applied established federal law in its decision, and therefore, its decision warrants deference. This ground does not support federal habeas relief.

b. Ineffective Assistance of First Appellate Counsel

In ground three, Petitioner argues that William Peterson, the first attorney appointed to represent Petitioner post-trial, was ineffective for not re-filing a motion in arrest of judgment and for failing to respond to his letters. (Doc. 1, p. 8). Petitioner raised ineffective assistance of Mr. Peterson in his state habeas petition, but again slightly varies some of the supporting arguments.

In support of his claim against Mr. Peterson in his state habeas petition, Petitioner cited the same issue he now raises. *Compare* (Doc. 15-6, p. 2-3) *and* (Doc. 1, p. 8). However, at the hearing on his state habeas petition, Petitioner clarified that he was claiming ineffective assistance of counsel against Mr. Peterson only for not refiling a motion in arrest of judgment that Petitioner prepared when he was still acting *pro se*. (Doc. 16-4, p. 15-16). Petitioner testified that the motion in arrest of judgment challenged the dismissal of the two counts of the indictment and that indictment being presented to the jury without the case going back before a grand jury. (*Id.*) Citing a Georgia appellate case, the state habeas court considered the indictment and found that it "was properly drawn, and there was no error in the trial court redacting the indictment to remove the

[4] This is the standard used by the state habeas court throughout its order to determine if Plaintiff could overcome the procedural default relating to most of his claims.

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[counts]" before sending it back with the jury during deliberations. (Doc. 16-3, p. 15). Finding there was no error with the indictment or removal of the two counts, the court held that Petitioner had not shown that Mr. Peterson was ineffective under either prong of *Strickland*. (*Id.*, p. 15-16). In the present federal action, Petitioner has not shown that the state habeas court's decision unreasonably applied established federal law.

At the hearing on his state habeas petition, Petitioner admitted letters that he alleged he sent to Mr. Peterson, but he made no argument to show how Mr. Peterson was ineffective for failing to respond to them. (Doc. 16-13, p. 15-19). To the extent Petitioner seeks to revive his abandoned argument that Mr. Peterson was ineffective for not responding Petitioner's letters, that effort would be futile because neither the Georgia Court of Appeals nor the state habeas court had the opportunity to consider it. Therefore, the claim would be either unexhausted or procedurally defaulted. In effect this claim is procedurally defaulted because Petitioner raised, but appears to have abandoned, this ground at the state habeas court. Under O.C.G.A. § 9-14-51 he would not be allowed to raise this claim again in a successive habeas petition. "The Georgia statute restricting state habeas review of claims not presented in earlier state habeas petitions can and should be enforced in federal habeas proceedings against claims never presented in state court, unless there is some indication that a state court judge would find the claims in question 'could not reasonably have been raised in the original or amended [state habeas] petition.'" *Chambers v. Thompson*, 150 F.3d 1324, 1327 (11th Cir. 1998) (quoting O.C.G.A. § 9-14-51) (alteration in original), *see also, Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998) (citations omitted) ("[W]hen it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, [the district court] can forego the needless 'judicial ping-pong' and just treat

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those claims now barred by state law as no basis for federal habeas relief."). Therefore, ground 3 is without merit. procedurally barred?

c. Ineffective Assistance of Second Appellate Counsel

In ground four, he alleges that his second appellate attorney, Jeffrey Grube, was ineffective due to conflicts of interest and the attorney's purported loyalty to the trial court. (Docs. 1, p. 10; 1-10, 18-19). Petitioner raised a claim of ineffective assistance of counsel against Mr. Grube in his state habeas petition, but that challenge was based upon different grounds. *Compare* (Doc. 16-2, p. 2) *and* (Doc. 1, p. 10). Petitioner cannot reassert this claim by now alleging a different error because, as explained above, the claim would be procedurally defaulted under O.C.G.A § 9-14-51.

The state habeas court found that Petitioner failed to support his ineffective assistance of counsel claim against Mr. Grube on the grounds as alleged in his state habeas petition. (Doc. 16-3, p. 5-10). To the extent the state habeas court and courts below have considered the underlying substance of Petitioner's ineffective assistance of counsel claim against Mr. Grube and how Mr. Grube's actions affected Petitioner's post-conviction proceedings, those decisions are entitled to deference. Petitioner has not made any argument to overcome that deference, and he cannot show the state court unreasonably applied established federal law when decided the merits of the underlying substantive claim. Ground four is without merit.

U.S. Supreme Court decisions over U.S. Appellate Court or State court decisions. pet 2254(d)

d. Claims of Prosecutorial Misconduct

In ground 6, Petitioner challenges several actions by the State at trial which he argues amount to prosecutorial misconduct during the trial. (Docs. 1-7, p. 1; 9, p. 2). Respondent asserts that nearly all the allegations in ground 6 are either new or procedurally defaulted and that any

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remainder claims were implicitly rejected by the state habeas court. (Doc. 12-1, p. 20-27). However, Petitioner, at least in part, raised all portions of Ground 6 in his state habeas petition and hearing via alternatively labeled claims, which allowed the state habeas court to consider the substance of most of Petitioner's arguments.

Petitioner asserts that the State suborned perjury at trial through several witnesses, only two of which he referenced in his state habeas petition, Corporal Elvins and Detective Reuttiger. (Doc. 1-10; 9; 16-2, p. 4). The current petition focuses on Cpl. Elvins's testimony about presenting the photo lineup to B.B and the timing of the arrest warrant. (Doc. 9). Petitioner appears to reassert his challenge to the photographic lineup by alleging prosecutorial misconduct because both the Georgia Court of Appeals and state habeas court found no merit to the photo lineup challenge. (Doc. 15-13, p. 11-12 ; 16-3, p. 4-5). The state habeas court also considered issues relating to the photographic lineup in terms of ineffective assistance of counsel but found that the argument was without merit because appellate counsel did raise this issue on appeal. (Doc. 16-3, p. 5-9).

Petitioner's current challenge to Detective Ruettiger's testimony surrounds his testimony about Petitioner's consent to the search of his hotel room. (Doc. 1-10, p. 29). Petitioner challenged Det. Ruettiger's testimony in state habeas petition. (Gr. 10). The state habeas court found that the claim regarding Det. Ruettiger's testimony was defaulted (Doc. 16-3, p. 24), and as explained above, Plaintiff has not shown that the search of his hotel room may be reviewed in a federal habeas action. After finding that this claim was defaulted, the state habeas court then examined whether Petitioner could show cause for failing to raise this claim earlier. (*Id.*) The court found that Petitioner produced no evidence showing the challenged testimony was knowingly false, and therefore could not overcome the procedural default bar. (*Id.*) The remaining claims regarding the

Raising issue in final of direct appeal is stipulated as a requirement for fed habeas consideration →

SDPS Direct limit — why be encouraged to present all issues up front if only to be rejected on technicalities.

Interrogation room video inconsistent testimony

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testimony of M.L. and Michael Gilfoyle are new and are procedurally barred.

Petitioner's prosecutorial misconduct claims related to *Brady* and *Giglio* violations were alleged in his state habeas petition as a stand-alone challenge in ground 11 and as a basis for ineffective assistance of appellate counsel in ground three. (Doc. 16-2). Petitioner did not explain his *Giglio* challenge in his state habeas petition, and the state habeas court did not reference *Giglio* in its order. However, it now appears that the challenge focuses on issues stemming from withholding documentary evidence underlying his state habeas petition *Brady* claim. (Doc. 1-10, p. 27-28). When considering the ineffective assistance claims, the state habeas court found that there was no prosecutorial misconduct for failing to provide documents, such as a police report leading to the arrest of M.L. (Doc. 16-3, p. 14). Although the state habeas court ultimately found that state habeas ground 11 was procedurally defaulted because it was not presented at his motion for new trial or on direct appeal, it also concluded that there was no *Brady* violation and that Petitioner therefore could not show the prejudice needed to overcome the procedural bar. (Doc. 16-3, p. 20, 24-25). The same was true for Petitioner's challenge to the admissibility of similar transaction evidence, which he now raises as a claim of "prosecutorial misconduct." (Doc. 16-3, p. 21-22).

Must be raised at Enumeration of Argument

Petitioner also alleges that the State interfered with his right to testify at trial because he feared being impeached by hearsay statements made to the FBI. (Doc. 9, p. 4-6). Petitioner challenged the admissibility of the impeachment evidence in his state habeas petition. (Doc. 16-2; 16-3, p. 27). The state habeas court found that any challenge to this evidence was procedurally defaulted and that there was no error in the trial court's ruling to allow this evidence to be used. (Doc. 16-3, p. 16, 18, 27). Because he was not prejudiced, Petitioner could not show cause for

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failing to raise this error earlier. (*Id.* at p. 27).

In his brief, Petitioner also challenges the prosecution's statements during closing arguments and the trial court's decision that his convictions did not merge. (Doc. 1-10, p. 31-32, 33-34). These are issues that the state courts considered. Petitioner raised the question of merger on appeal and the appellate court found no error. (Doc. 15-13, p. 15-18). The state habeas court considered the challenge to the State's closing argument in terms of Petitioner's ineffective assistance of appellate counsel claim, and likewise, found no merit. (Doc. 16-3, p. 11-12).

In the portions of Ground 6 that the state appellate and habeas courts have considered, Petitioner has not shown that the courts unreasonably applied established federal law in their decisions, and therefore, those decisions warrant deference. The remaining portions of Ground 6 alleging prosecutorial misconduct are either altered or new arguments. Petitioner cannot reassert these new arguments now because those claims would be procedurally defaulted under O.C.G.A § 9-14-51. Ground 6 does not support any federal habeas relief.

e. Delay of Post-Conviction Proceedings

In ground 5, Petitioner asserts that the delay between his trial and post-conviction proceedings led to a miscarriage of justice. He also raised this ground in his state habeas petition. The state habeas court found that because Petition failed to raise this claim this earlier, it was procedurally defaulted. However, the court also found that the post-trial delay did not provide grounds for habeas relief under O.C.G.A. § 9-14-42(a) because the delay was not an error in the proceedings leading to Petitioner's conviction. (Doc. 16-3, p. 16, 28). As Respondent correctly notes, the Eleventh Circuit has recognized that issues unrelated to the cause of a petitioner's detention are not cognizable in habeas actions and that there is no right to a speedy direct appeal

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or other post-conviction proceedings. (Doc. 12-1, p. 20) *citing Quince v. Crosby*, 360 F.3d 1259, 1261 (11th Cir. 2004) and *Owens v. McLaughlin*, 733 F.3d 320, 329 (11th Cir. 2013). Petitioner has not shown that the state court unreasonably applied established federal law in its decision, and therefore, that decision warrants deference. Ground 5 presents no basis for federal habeas relief.

DCGA 17-2-2

CONCLUSION

For the reasons stated herein, it is **RECOMMENDED** that Petitioner's Section 2254 petition be **DENIED**. Furthermore, pursuant to the requirements of Rule 11 of the Rules Governing Section 2254 Cases, it does not appear that Petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, it is **RECOMMENDED** that the Court deny a certificate of appealability in its final order.

OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, **WITHIN FOURTEEN (14) DAYS** after being served with a copy thereof. Any objection is limited in length to **TWENTY (20) PAGES.** *See* M.D. Ga. L.R. 7.4. The District Judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions

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if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, this 3rd day of May, 2023.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

DONALD GENE BARNES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**CIVIL ACTION NO. 5:22-cv-43 (MTT)**
	)	
ANNETTIA TOBY, Warden,	)	
	)	
Respondent.	)	

ORDER

United States Magistrate Judge Charles H. Weigle recommends denying Petitioner Donald Gene Barnes's 28 U.S.C. § 2254 habeas petition, and because Barnes has not "made a substantial showing of the denial of a constitutional right," the Magistrate Judge also recommends denying a certificate of appealability. Doc. 20 at 18. Barnes objected to the Recommendation "in its entirety," so pursuant to 28 U.S.C. § 636(b)(1), the Court reviews the Recommendation de novo. Doc. 21. After review, the Court accepts the findings, conclusions, and recommendations of the Magistrate Judge. The Recommendation (Doc. 20) is **ADOPTED** and made the Order of the Court. Accordingly, Barnes's habeas petition (Docs. 1; 9) is **DENIED**. As recommended by the Magistrate Judge, a certificate of appealability is **DENIED**.

SO ORDERED, this 31st day of May, 2023.

S/ Marc T. Treadwell
MARC T. TREADWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

DONALD GENE BARNES, *

Petitioner, *

v. Case No. 5:22-cv-43- MTT *

ANNETTIA TOBY, Warden, *

Respondent. *

JUDGMENT

Pursuant to this Court's Order dated May 31, 2023, having accepted the recommendation of the United States Magistrate Judge, in its entirety, JUDGMENT is hereby entered dismissing this action.

This 31st day of May, 2023.

David W. Bunt, Clerk

s/ Shabana Tariq, Deputy Clerk

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Appendix C

1. June 6, 2024 pg. 57 - 58

11TH Circuit Court of Appeals
Rehearing Denial Decision

USCA 11 Case: 23-12070

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-12070

DONALD GENE BARNES,

Petitioner-Appellant,

versus

COFFEE CF WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 5:22-cv-00043-MTT-CHW

Before BRASHER and ABUDU, Circuit Judges.

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BY THE COURT:

Donald Barnes has filed a motion to file a reconsideration motion out of time, and a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2. He challenges this Court's order dated February 5, 2024, denying his motion for a certificate of appealability to appeal the district court's denial of his 28 U.S.C. § 2254 petition. Upon review, Barnes's motion to file out of time is GRANTED, but his motion for reconsideration is DENIED because he has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions.

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1. July 17, 2020 pg. 60 - 91

Superior Court of Baldwin County
State Habeas Corpus
Final Order Decision

Case No. 2016 CV 47878

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

DONALD BARNES, GDC# 1129864, Petitioner, vs. WARDEN, Baldwin State Prison, Respondent.	* * * * * * * * * *	CIVIL ACTION NO. 2016-CV-47878 HABEAS CORPUS

FINAL ORDER

Petitioner, Donald Barnes, filed this petition for a writ of habeas corpus, challenging his 2003 Houston County jury trial convictions for aggravated child molestation, distributing obscene materials, criminal attempt to commit child molestation, and enticing a child for indecent purposes, affirmed on appeal in 2012. Based upon the record as established at the December 11, 2019 hearing[1], this Court makes the following findings of fact and conclusions of law and DENIES relief.

I. PROCEDURAL HISTORY

Petitioner was indicted by a Houston County grand jury on September 3, 2002, for aggravated child molestation (count 1), sexual exploitation of a child (count 2), distributing obscene materials (count 3), electronically

[1] Citations to the December 11, 2019, evidentiary hearing transcript will be referred to as "HT," followed by the page number(s).

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furnishing obscene material to minors (count 4), criminal attempt to commit aggravated child molestation (count 5), and enticing a child for indecent purposes (count 6). (HT. 48-51).

At a jury trial held February 10-13, 2003, at which Petitioner represented himself, Petitioner was found guilty of all charges put before the jury. (HT. 83; 47)[2]. Petitioner was sentenced to thirty years for aggravated child molestation (count 1), twelve months concurrent for distribution of obscene material (count 3), fifteen years consecutive for criminal attempt to commit aggravated child molestation (count 5), and thirty years concurrent for enticing a child for indecent purposes (count 6). (HT. 39-42).

Petitioner appealed his convictions through counsel, Jeffrey Grube, alleging that:

1) the trial court erred in denying Petitioner's written motion to suppress the identification;

2) the trial court erred in denying Petitioner's motion to suppress based upon the illegal search and seizure of Petitioner's motel room at the Wingate Hotel;

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[2] Count 2 was dismissed prior to trial, and count 4 was dismissed after the close of evidence. (HT. 39; 76; 514).

3) the trial court erred in denying Petitioner's motion for new trial, based on the claim that Petitioner's due process rights were violated as a result of his inability to meaningfully participate in his defense;

4) the evidence was insufficient to support the jury verdicts;

5) the trial court erred in approving an illegal sentence on the charge of enticing a child for indecent purposes; and

6) the trial court erred in failing to merge criminal attempt to commit aggravated child molestation and enticing a child for indecent purposes.

(HT. 657-711).

The Georgia Court of Appeals found that there was no reversible error and affirmed Petitioner's convictions on January 11, 2012, in *Barnes v. State*, No. A11A2123 (Ga. App. Jan. 11, 2012) (unpublished). (HT. 728-42). The Court did agree that the sentence imposed for enticing a child for indecent purposes was higher than that allowed by law, vacated that sentence, and remanded for re-sentencing on that charge. *Id.* at 728, 742.

Petitioner filed this habeas corpus petition in Chattooga County on June 15, 2012, challenging his Houston County convictions and raising four grounds for relief. Petitioner subsequently amended his petition nine times. The case was transferred to this Court, where it came for an evidentiary hearing on December 11, 2019. At the hearing, Petitioner affirmed that he

was proceeding only on the seventh, eighth, and ninth amendments. (HT. 3-4). Therefore, the grounds in these three amendments are the remaining grounds before this Court for review, and the Court will address similar claims together. All other grounds are deemed withdrawn and/or abandoned.

II. THE GROUNDS FOR RELIEF

A. GROUNDS 1, 2, 7, 20
(Addressed on Appeal)

In ground 1 of the seventh amendment, Petitioner alleges an illegal search and seizure of his laptop computer in violation of his fourth, fifth, and fourteenth amendment rights.

In ground 2 of the seventh amendment, Petitioner alleges an illegal photographic line-up and subsequent in-court identification in violation of his sixth and fourteenth amendment rights.

In ground 7 of the seventh amendment, Petitioner alleges that the trial court improperly denied his motion for a directed verdict.

In ground 20 of the seventh amendment, Petitioner alleges that the evidence was insufficient to sustain the verdict.

Findings of Fact and Conclusions of Law

These are the same claims that Petitioner raised in enumerations of error one, two, and four on direct appeal. (HT. 672-97). The Court of Appeals

decided them adversely to Petitioner, finding that the evidence was sufficient, there was nothing improper or suggestive in the identification procedure, and the laptop was seized pursuant to a valid consent search. *See Barnes*, No. A11A2123. (HT. 729-38). That Court's rulings are binding on this Court. *Gaither v. Gibby*, 267 Ga. 96, 475 S.E.2d 603 (1996); *Gunter v. Hickman*, 256 Ga. 315, 348 S.E.2d 644 (1986). Accordingly, grounds 1, 2, 7, and 20 provide no basis for relief.

B. GROUNDS 3, 24
(Ineffective Assistance of Appellate Counsel)

In ground 3 of the seventh amendment, Petitioner alleges that he received ineffective assistance of appellate counsel. At the evidentiary hearing, Petitioner clarified that was a contending appellate counsel was ineffective for failing to raise issues the Petitioner presented to him in a letter dated February 7, 2011. (HT. 4-5). Thus, Petitioner alleges in ground 3 that appellate counsel was ineffective for failing to claim:

I) there was an illegal search and seizure of Petitioner's laptop;

II) the photographic lineup and in-court identification were illegal;

III) the trial court abused its discretion in: not allowing the jury to carry copies of the jury instructions with them and in the charge on child molestation as a lesser included offense; and

IV) prosecutorial misconduct when the State made an improper reference in closing arguments relating to statements made by the defense in a conversation at bar, exposed one witness to certain evidence prior to trial, and failed to turn over *Brady* evidence regarding a police report of an arrest of a state witness.

(HT. 30-38).

In ground 24 of the eighth amendment, Petitioner alleges that he received ineffective assistance of counsel when his first appellate counsel failed to re-submit Petitioner's *pro se* motion in arrest of judgment.

Findings of Facts and Conclusions of Law

Strickland v. Washington, 466 U.S. 684, 687 (1984), sets forth a two-pronged test, both of which must be proven by the petitioner in order to prevail on a claim of ineffective assistance.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreasonable.

Strickland, 466 U.S. at 687.

As to the first prong, this Court's scrutiny of an attorney's performance must be "highly deferential." *Strickland*, 466 U.S. at 689.

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id.

Counsel is "strongly presumed" to have rendered effective assistance and made "all significant decisions in the exercise of reasonable professional judgment." *Id.* A petitioner has the burden of proof to overcome the "strong presumption" that counsel's conduct falls within the range of reasonable professional conduct and affirmatively show that the purported deficiencies in counsel's performance were indicative of ineffectiveness and not examples of a conscious, deliberate trial strategy. *Morgan v. State*, 275 Ga. 222, 227, 564 S.E.2d 192 (2002).

An appointed appellate attorney has no constitutional duty to raise every non-frivolous issue requested by a client. *Jones v. Barnes*, 463 U.S. 745 (1983). A petitioner can still raise a *Strickland* claim based on an appellate attorney's failure to raise a particular claim "but it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). The "controlling principle" is whether appellate counsel's decision was a reasonable, tactical decision that any competent attorney in

the same situation would have made. *Shorter v. Waters*, 275 Ga. 581, 585, 571 S.E.2d 373 (2002).

As to *Strickland*'s prejudice prong:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. Where the claim is that appellate counsel was ineffective for not raising a particular issue on appeal, a petitioner must show there is a reasonable probability that the outcome of his appeal would have been different had the issue been raised. *Nelson v. Hall*, 275 Ga. 792, 573 S.E.2d 42 (2002). In addition, where a petitioner alleges that appellate counsel failed to raise a "structural error" on direct appeal, a petitioner no longer has the benefit of "presumed prejudice" but must show there is reasonable probability that the alleged error "would have been reversible error without the benefit of presumed prejudice." *Griffin v. Terry*, 291 Ga. 326, 328-29, 729 S.E.2d 334 (2012).

Petitioner has failed to meet his burden under *Strickland* to establish that counsel's performance was deficient for failing to raise the claims now asserted on appeal.

First, Petitioner claims that appellate counsel was ineffective for failing to claim that there was an illegal search and seizure of Petitioner's laptop,

and that the photographic lineup and in-court identification were illegal. (HT. 31-34). However, appellate counsel did raise these issues in direct appeal, and they were decided adversely by the Court of Appeals. (HT. 692-97; 729-38). As such, Petitioner has not demonstrated that appellate counsel's performance was deficient and that he was prejudiced as a result.

Next, Petitioner claims that appellate counsel was ineffective for failing to claim that the trial court abused its discretion: in not allowing the jury to carry copies of the jury instructions with them, and in charging on child molestation as a lesser included offense without charging that the jury must first consider the indicted charge. (HT. 35-36). However, as to the first issue, "there is no requirement under Georgia law, either statutory or otherwise, that the jury be given a written copy of the court's instructions for use in deliberations." *Franklin v. State*, 298 Ga. 636, 642, 784 S.E.2d 359 (2016); *See Pruitt v. State*, 270 Ga. 745, 514 S.E.2d 639 (1999) (no error in declining to send written instructions out with jury).

As to the second issue, contrary to Petitioner's claim, the record demonstrates the trial court did not charge the jury on child molestation as a lesser included offense. Petitioner was indicted in count six for enticing a child for indecent purposes. (HT. 50). Specifically, the indictment charged that Petitioner "did solicit, entice or take B.B., a child under sixteen (16) years of age, to any place whatsoever, for the purpose of child molestation..."

Id. As such, when the trial court charged the jury on enticing, the court gave the following charge:

> Enticing a child for indecent purposes is defined as follows: A person commits the offense of enticing a child for indecent purposes when that person solicits, entices or takes any child under the age of sixteen years to any place for the purposes of child molestation or indecent acts.
>
> A person commits child molestation when that person does any immoral or indecent act to or in the presence of or with any child under the age of sixteen years with the intent to arouse or satisfy the sexual desires of either the child or the person.

(HT. 544-45). The trial court merely provided the entire charge necessary for the jury's determination of enticing a child for indecent purposes as indicted in count six and did not charge the jury on child molestation as a lesser included offense. Thus, there was no error in the court's failure to tell the jury that they must first consider the indicted charge before considering the lesser included offense.

As there was no error by the trial court, Petitioner has not shown that appellate counsel's performance was deficient when he did not raise these alleged errors on appeal. Failure to raise a meritless claim cannot be evidence of ~~effective~~ ineffective assistance. *Hayes v. State*, 262 Ga. 881, 884-85, 426 S.E.2d 886 (1993). For the same reason, Petitioner has also failed to show a reasonable probability that the outcome of his appeal would have been different because counsel did raise the issues.

Petitioner also claims that appellate counsel was ineffective for failing to raise on appeal that the State committed prosecutorial misconduct by: making an improper reference in closing arguments relating to statements made by the defense in a conversation at bar; exposing one witness to certain evidence prior to trial; and, failing to turn over *Brady* evidence regarding a police report of an arrest of a state witness. (HT. 37-38).

As to the first issue, the State argued during closing arguments:

> In the beginning of this case, Mr. Barnes told you that law enforcement here in Houston County must not have anything better to do than to prosecute him. That's the one thing in this whole entire case that I will say we can agree upon.
>
> Law enforcement here in Houston County has absolutely nothing better to do than to prosecute people like Mr. Donald Barnes. Absolutely nothing better to do than to protect the innocence of our children.

(HT. 524). Petitioner alleges that this argument constituted a comment on statements Petitioner made to the prosecution privately during an argument at bar. (HT. 37). However, this argument was actually a reference to comments that Petitioner made during his opening statements, where Petitioner stated, "I believe this is a type of prosecution here that is what I'll call selective. They just want to get me. They don't have anything else better to do." (HT. 171). Comments on the defense case is a proper avenue for closing argument. *See Cochran v. State*, 305 Ga. 827, 834, 828 S.E.2d 338

(2019) (it is permissible for the State to comment on the defense's theory of the case during closing arguments).

As to the next issue, Petitioner alleges that it was error for the State to expose witness Michael Leo to State's evidence prior to trial for the purpose of reviving the witness's memory of events without presence or knowledge of the trial court or defense. (HT. 37). He points to the following portion of his re-cross-examination of Michael Leo at trial:

> Petitioner: Did you see those pictures come off of that computer?
>
> Witness: No. But it's the same --
>
> Petitioner: Did the prosecutor open up the computer; start it up show you the picture; and, then print them out on a computer for you while you were sitting there?
>
> Witness: No. No. You're right.
>
> Petitioner: Okay. That CD that she just showed you, did she show you any images off of that CD?
>
> Witness: Yes, sir. The same thing that's on the tape. That's what I'm trying to say.
>
> **Petitioner: They showed you that CD?**
>
> **Witness: Uh-huh.**
>
> **Petitioner: When did they do that? This morning?**
>
> **Witness: No. It was two days ago, something like that.**
>
> **Petitioner: I'm sorry?**
>
> **Witness: It was about two days ago, something like that.**

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Petitioner: About two days ago?

Witness: Like Tuesday or something.

...

Petitioner: Did they start the computer up in front of you; show you any images off of that computer right there?

Witness: No, they didn't start the computer up. They started what was in the computer which is on the CD.

...

Petitioner: What they showed you was actually on that CD?

Witness: Right.

Petitioner: Okay. And they told you that those images on that CD came from that computer. Correct?

Witness: Right. But –

Petitioner: Okay.

Witness: -- I mean there's no doubt in my mind. If you were showing it to somebody else, they couldn't prove it come off the computer, but you've got to think. You and me were there. I'm the one that taped it. I know it's me. I know it's you. I know it's true.

(HT. 464-66) (contested portion in bold).

The testimony clearly demonstrates that the State showed the images at issue to their witness prior to trial so that the witness could identify the CD for the purposes of authentication of the images contained on it. *See* O.C.G.A. § 24-9-901(b)(1) (allowing identification by a witness that a matter

is what it is claimed to be). Nothing in this interaction with their own witness is improper. Further, as Petitioner explored the fact that the witness saw the images prior to trial on cross-examination, the jury was given ample opportunity to evaluate the witness's testimony about the images, rendering any error in the State's showing the images to the witness ahead of trial harmless.

Petitioner lastly claims that the State committed prosecutorial misconduct by failing to supply beneficial evidence to Petitioner in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (HT. 37). Specifically, Petitioner claims that State should have turned over a police report detailing the arrest of Michael Leo in Munster, Indiana. (HT. 38). Petitioner alleges that this information would have demonstrated the State's knowledge of Michael Leo's character and should have been given to the defense for the purposes of impeachment. *Id.* However, the record of the trial demonstrates that Petitioner had knowledge of the arrest in Munster, Indiana at trial. (HT. 340). "*Brady* is concerned only with cases in which the government possesses information which the defendant does not. ... [T]here is no *Brady* violation if the defendant...the essential facts permitting him to take advantage of the information in question." *Cain v. State*, 306 Ga. 434, 439-40, 831 S.E.2d 788 (2019).

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As there was no prosecutorial misconduct on these issues, Petitioner has not shown that appellate counsel was ineffective for failing to raise these alleged errors on appeal. Failure to raise a meritless claim cannot be evidence of ~~effective~~ ineffective assistance. *Hayes v. State*, 262 Ga. 881, 884-85, 426 S.E.2d 886 (1993). For the same reason, Petitioner has also failed to show a reasonable probability that the outcome of his appeal would have been different had appellate counsel chosen to raise these claims.

Finally, Petitioner claims that his first appellate counsel was ineffective for failing to re-submit Petitioner's *pro se* motion in arrest of judgment. Petitioner clarified that this motion sought to attack the fact that two charges in the indictment were dismissed without resubmitting the indictment to the grand jury. (HT. 14). However, the indictment was properly drawn, and there was no error in the trial court redacting the indictment to remove the two grounds dismissed before/during trial. (HT. 48-51). *See Collins v. State*, 266 Ga. App. 871, 872-73 fn. 1-2, 601 S.E.2d 111 (2004) (noting that a court may proceed on a redacted indictment after certain counts were dismissed, as it is only error when allegations contained within counts are amended without resubmission to the grand jury). As such, Petitioner has failed to show either that first appellate counsel was ineffective for failing to pursue the motion in arrest of judgment and a

reasonable probability that the outcome would have been different but for his counsel's decision.

In sum, Petitioner has not shown either that appellate counsel was deficient and a reasonable probability that the outcome of his appeal would have been different but for counsel's decisions. These grounds provide no basis for relief.

C. GROUNDS 4-6, 8-19, 21-23, 25
(Defaulted Grounds)

In ground 4 of the seventh amendment, Petitioner alleges a violation of his sixth and fourteenth amendment rights when similar transaction evidence was improperly admitted without a Rule 31.3(b) hearing.

In ground 5 of the seventh amendment, Petitioner alleges his sixth and fourteenth amendment rights were violated when the trial court gave an inaccurate jury instruction on the similar transaction evidence that did not include the scienter definition.

In ground 6 of the seventh amendment, Petitioner alleges that his sixth and fourteenth amendment rights were violated when the trial court limited Petitioner's cross-examination of State witness Ruettiger.

In ground 8 of the seventh amendment, Petitioner alleges that his sixth and fourteenth amendment rights were violated when the trial court gave an insufficient jury instruction on mistake of fact.

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In ground 9 of the seventh amendment, Petitioner alleges that his sixth and fourteenth amendment rights were violated when his sentence was not split was required by O.C.G.A. § 17-10-6.1.

In ground 10 of the seventh amendment, Petitioner alleges that his sixth and fourteenth amendment rights were violated when the State suborned perjury by allowing Corporal Elvin to lie about contact with one of the victims and allowing Detective Reuttiger to lie regarding Petitioner's giving consent to search his hotel room.

In ground 11 of the seventh amendment, Petitioner alleges prosecutorial misconduct when the State violated *Brady v. Maryland* by failing to give Petitioner ample opportunity to review the discovery documents and did not make known beneficial material of the same.

In ground 12 of the seventh amendment, Petitioner alleges that his sixth and fourteenth amendment rights were violated when the trial court expressed an opinion in violation of O.C.G.A. § 17-8-57.

In ground 13 of the seventh amendment, Petitioner alleges that his 1ST, sixth and fourteenth amendment rights were violated when there was no hearing to determine obscenity.

In ground 14 of the seventh amendment, Petitioner alleges that his sixth and fourteenth amendment rights were violated when the jury instruction on corroboration was burden-shifting towards the Petitioner.

In ground 15 of the seventh amendment, Petitioner alleges that his sixth and fourteenth amendment rights were violated when hearsay evidence was admitted for impeachment purposes.

In ground 16 of the seventh amendment, Petitioner alleges that his sixth and fourteenth amendment rights were violated when the jury instruction on attempt did not give a definition of the substantial act element.

In ground 17 of the seventh amendment, Petitioner alleges that his sixth and fourteenth amendment rights were violated when there was a fifteen-year delay in obtaining post-conviction relief.

In ground 18 of the seventh amendment, Petitioner alleges that his sixth and fourteenth amendment rights were violated when the jury instruction on enticing was not tailored to include the facts of asportation.

In ground 19 of the seventh amendment, Petitioner alleges that his sixth and fourteenth amendment rights were violated when the trial court gave a jury charge on a lesser included offense where there was no evidence to support such an instruction.

In ground 21 of the eighth amendment, Petitioner alleges that his indictment was rendered void when the trial court dismissed two of the material charges, specifically sexual exploitation of children and electronically furnishing obscene materials to a minor.

In ground 22 of the eighth amendment, Petitioner alleges that his conviction and sentence were instantly void on attainment once the amended indictment was interposed into trial.

In ground 23 of the eighth amendment, Petitioner alleges that his sixth and fourteenth amendment rights were violated when the trial court and State held ex-parte communications.

In ground 25 of the ninth amendment, Petitioner alleges that he received ineffective assistance of counsel when his pre-trial counsel failed to challenge the indictment by way of a special demurrer.

Findings of Fact and Conclusions of Law

These claims were not raised at trial and on direct appeal, so they are procedurally defaulted under O.C.G.A. 9-14-48(d), and Petitioner has failed to show cause and prejudice to overcome the default.

Pursuant to O.C.G.A. § 9-14-48(d):

> The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted.

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Because Petitioner did not raise these claims at trial and on direct appeal, they are procedurally defaulted. *Todd v. Turpin*, 268 Ga. 820, 493 S.E.2d 900 (1997); *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985).

"Cause" to overcome a default may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of *Strickland v. Washington*. *Turpin v. Todd*, 268 Ga. 820, 826, 493 S.E.2d 900 (1997). "Actual prejudice" may be shown through satisfying the prejudice prong of *Strickland* or satisfying the actual prejudice test of *United States v. Frady*, 456 U.S. 152, 170 (1982), which requires "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Turpin* at 828-29. "[A] habeas petitioner who meets both prongs of the *Strickland* test has established the necessary cause and prejudice to overcome the procedural bar of OCGA § 9-14-48(d)." *Battles v. Chapman*, 269 Ga. 702, 506 S.E.2d 838 (1998).

Petitioner has not shown cause to overcome the default of this claim. *Todd v. Turpin*, 268 Ga. at 820. Petitioner did not present any testimony about appellate counsel's decisions as to why counsel did not raise these claims on appeal. In the absence of evidence to the contrary, "counsel's decisions are presumed to be strategic and thus insufficient to support an ineffective assistance of counsel claim." *Washington v. State*, 285 Ga. 541,

543, 678 S.E.2d 900 (2009). As such, Petitioner has not shown that appellate counsel's decisions constituted "cause" to overcome the default of these claims. *Todd*, 268 Ga. at 829; *Strickland*, 466 U.S. 689.

Petitioner has similarly failed to show prejudice, as shown below.

As to ground 4, Petitioner alleges his rights were violated when similar transaction evidence was improperly admitted without a Rule 31.3(b) hearing[3]. Prior to trial, there was discussion about the photos and videos depicting sex acts and drug use between Petitioner and victim Michael Leo. (HT. 137-39). The State pointed out that the third image depicting criminal acts actually occurred between Petitioner and Michael Leo in Illinois.[4] Because such acts did not occur in Houston County, the State instead sought to introduce such acts as similar transaction evidence. (HT. 139). The trial court ruled that the videos depicting criminal acts between Petitioner and Michael Leo that were produced outside of Houston County could be admitted as similar transactions. (HT. 141). As the discussion and ruling occurred prior to admission of such evidence, it functioned as a similar transaction hearing. *See Williams v. State*, 290 Ga. 805, 807, 725 S.E.2d 290 (2012) ("The judge shall hold a hearing at such time as may be appropriate, and may receive evidence on any issue of fact necessary to determine the request, out

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[3] This Rule has been deleted in light of O.C.G.A. § 24-4-404(b).
[4] It was this venue information that led the State to dismiss two counts of the indictment. (HT. 141).

of the presence of the jury."). Further, given that the similar transaction evidence was comprised of sex acts conducted between Petitioner and one of the victims in the case, there is adequate evidence that the similar transaction had the same scienter component, despite Petitioner's claim to the contrary. Thus, Petitioner has not shown prejudice to excuse his failure to overcome the default.

As to ground 5, Petitioner alleges his rights were violated when the trial court gave an inaccurate jury instruction on the similar transaction evidence that did not include the scienter definition. However, the trial court's similar transaction instruction was a proper statement of the law, which included that the transactions were to be considered for "the limited purpose of showing, if it does, the scheme, motive, bent of mind or course of conduct in the crimes now charged..." (HT. 540); *See former* O.C.G.A. 24-2-2. Petitioner has not established cause to overcome the default of this claim.

As to ground 6, Petitioner alleges that his rights were violated when the trial court limited Petitioner's cross-examination of State witness Detective Ruettiger. Specifically, Petitioner claims that he was improperly prevented from questioning the detective about his knowledge about a prior arrest of Michael Leo. (HT. 121-22; 321; 338). However, the trial court properly limited any questioning that would bring in irrelevant character evidence of the victim and questioning that would require the witness to

speculate. (HT. 338); *Butler v. State*, 254 Ga. 637, 640, 332 S.E.2d 654 (1985) (The general rule in Georgia is that the character of the victim is irrelevant and inadmissible); *Dempsey v. State*, 279 Ga. 546, 547, 615 S.E.2d 522 (2005) (the trial court did not abuse its discretion it limiting cross-examination which called for speculation). No prejudice has been shown to overcome the default of this claim.

As to ground 8, Petitioner claims that his rights were violated when the trial court gave an insufficient jury charge on mistake of fact as applied to Petitioner's claim that he thought Michael Leo was older than fifteen. (HT. 392-93; 433; 441). However, the trial court properly gave a full and accurate instruction on mistake of fact. (HT. 542). *See* O.C.G.A. § 16-3-5. No prejudice has been shown to overcome the default of this claim.

As to ground 9, Petitioner alleges that his rights were violated when his sentence was not split was required by O.C.G.A. § 17-10-6.1. (HT. 39-46; 569). However, "a crime is to be construed and punished according to the provisions of the law existing at the time of its commission." *Fleming v. State*, 271 Ga. 587, 590, 523 S.E.2d 315 (1999). Because Petitioner committed the crimes for which he was sentenced, and indeed was actually sentenced prior to the 2006 amendment, which provided for split sentences, there was no error in the trial court's sentence. (HT. 48-51). *See Bryson v. State*, 350 Ga. App. 206, 207, 828 S.E.2d 450 (2019) (acknowledging that the

pre-2006 versions of the applicable statutes did not contain split sentence requirements). No prejudice has been shown to overcome the default of this claim.

As to ground 10, Petitioner alleges that his rights were violated when the State suborned perjury by allowing Corporal Elvin to lie about contact with one of the victims and allowing Detective Reuttiger to lie regarding Petitioner's giving consent to search his hotel room. (HT. 100-13; 118-20; 131-39; 173-216; 305; 319). However, Petitioner presented no evidence that the testimony at issue constituted knowing and willful false statements material to the issue or point in question in violation of O.C.G.A. § 16-10-70 or that the State knowing presented such false testimony. No prejudice has been shown to overcome the default of this claim.

As to ground 11, Petitioner alleges prosecutorial misconduct when the State committed a *Brady* violation by failing to give Petitioner ample opportunity to review the discovery documents and did not make known beneficial material of the same. (HT. 148). However, "*Brady* is concerned only with cases in which the government possesses information which the defendant does not. ... [T]here is no *Brady* violation if the defendant knows...the essential facts permitting him to take advantage of the information in question." *Cain,* 306 Ga. As the record demonstrates that Petitioner was given the opportunity to view the State's file and videos prior

to trial, along with the opportunity to retain copies of anything in the file, he has not shown that the State violated any obligation under *Brady*. (HT. 148). No prejudice has been shown to overcome the default of this claim.

As to ground 12, Petitioner alleges that his rights were violated when the trial court expressed an opinion in violation of O.C.G.A. § 17-8-57. (HT. 199; 321; 329; 339-40; 510; 513; 520-21; 540). However, the comments to which Petitioner takes issue were proper comments made during rulings and nothing in any of the comments indicated an opinion on the evidence, witness credibility, or Petitioner's guilt.[5] *Johnson v. State*, 246 Ga. 126, 128, 269 S.E.2d 18 (1980) ("[O.C.G.A. § 17-8-57] is not violated by the remarks of the trial court when giving reasons for a ruling."); *Hargett v. State*, 285 Ga. 82, 88, 674 S.E.2d 261 (2009) (O.C.G.A. § 17-8-57 "is only violated when the court's charge assumes certain things as facts and intimates to the jury what the judge believes the evidence to be."). No prejudice has been shown to overcome the default of this claim.

As to ground 13, Petitioner alleges that his rights were violated when there was no hearing to determine obscenity. However, there is no requirement that a separate hearing be conducted to determine obscenity prior to trial for the purposes of O.C.G.A. § 16-12-80. Indeed, whether the

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[5] Further, it appears that several of the comments occurred outside the presence of the jury. (HT. 324-40; 510; 513).

materials were obscene was for the jury to determine after the presentation of evidence, and the trial court properly charged the jury on that. (HT. 544). No prejudice has been shown to overcome the default of this claim.

As to ground 14, Petitioner alleges that his rights were violated when the jury instruction on corroboration was burden-shifting towards the Petitioner. However, the charge to which Petitioner takes issue is simply the instruction that Petitioner cannot be *convicted* on his own statements alone and that the State has the burden to produce evidence to corroborate his statement.[6] *See former* O.C.G.A. § 24-3-53 (now O.C.G.A. § 24-8-823). Such instruction is a proper statement of the law, is not burden-shifting, and indeed works to the benefit of a defendant. *See Walsh v. State*, 269 Ga. 427, 429, 499 S.E.2d 332 (1998) ("The State cannot rely solely on Walsh's statement to prove its case. If Walsh's statement is an admission, the State must present additional direct or circumstantial evidence of his guilt of felony murder. [] If the statement is a confession, the State must introduce

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[6] "A statement uncorroborated by any other evidence is not sufficient to justify a conviction. Proof beyond a reasonable doubt that a crime has been committed may, but does not necessarily constitute corroboration of a defendant's statement, if any. The law does not fix the amount of corroboration necessary. You, as jurors, are judges of whether or not other evidence sufficiently corroborates a defendant's statement so as to justify a conviction. If you find that there was a statement made by the defendant and corroborated by other evidence, the degree of proof necessary to convict is that you be satisfied of the guilt of the accused beyond any reasonable doubt." (HT. 541-42).

additional evidence which corroborates it."). No prejudice has been shown to overcome the default of this claim.

As to ground 15, Petitioner alleges that his rights were violated when hearsay evidence was admitted for impeachment purposes. Petitioner specifically takes issue with the fact that the State informed the trial court that they would seek to admit a prior out-of-court statement that Petitioner made to the FBI for impeachment purposes in the event that Petitioner chose to testify. (HT. 140-41). However, the law at the time of Petitioner's trial was clear that, if Petitioner had testified, the State could impeach him with a prior inconsistent statement, even if such statement constituted hearsay. *See Welch v. State*, 298 Ga. 320, 781 S.E.2d 768 (2016) (Even if a witness's out-of-court statement to a detective was hearsay under O.C.G.A. § 24-3-1(a), it was admissible as a prior inconsistent statement under O.C.G.A. § 24-9-83).[7] No prejudice has been shown to overcome the default of this claim.

As to ground 16, Petitioner alleges that his rights were violated when the jury instruction on attempt did not give a definition of the substantial act element. However, the jury charge at issue was the full pattern jury charge, and it, along with the indictment, which charged that Petitioner intentionally

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[7] Under the new Code such statement is defined as non-hearsay: "An out-of-court statement shall not be hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior inconsistent statement..." O.C.G.A. § 24-8-801(d)(1)(A).

attempted to commit the act of aggravated child molestation by "asking B.B. if he could suck said child's cock, said statement was committed for the purpose of sodomy...," provided the jury with on the law of attempt as charged. (HT. 50; 542-43); 2 Ga. Jury Inst. Crim. § 2.01.10; *See Wittschen v. State*, 189 Ga. App. 828, 377 S.E.2d 681 (1988) (finding that the defendant committed a substantial act for the purpose of attempted child molestation by approached the victims and offering money for the performance of a lewd act). No prejudice has been shown to overcome the default of this claim.

As to ground 17, Petitioner alleges that his rights were violated when there was a fifteen-year delay in obtaining post-conviction relief. This claim does not even state a claim under O.C.G.A. § 9-14-42(a), as it does not allege violations of state or federal constitutional rights *in the proceedings giving rise to the conviction. Parker v. Abernathy*, 253 Ga. 673, 324 S.E.2d 191 (1985). No prejudice has been shown to overcome the default of this claim.

As to ground 18, Petitioner alleges that his rights were violated when the jury instruction on enticing was not tailored to include the facts of asportation. (HT. 544). However, the pattern charge given was a full and accurate statement of the law on enticing. 2 Ga. Jury Inst. Crim. § 2.34.40; O.C.G.A. § 16-6-5(a). This charge properly included the asportation requirement by charging that a person commits the offense of enticing when "that person solicits, entices, or takes any child under the age of sixteen years

The use of convict case decisions known by not considering the year defendant was convicted.

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to any place" for the purpose of child molestation. (HT. 544); *See Kelley v. State*, 301 Ga. App. 43, 686 S.E.2d 810 (2009) (acknowledging that the asportation element was satisfied when the victim was enticed or persuaded and did not require a physical taking). No prejudice has been shown to overcome the default of this claim.

As to ground 19, Petitioner alleges that his rights were violated when the trial court gave a jury charge on a lesser included offense where there was no evidence to support such an instruction. However, as discussed above in Section B, the instruction on child molestation was not an instruction on a lesser included offense. Instead it was part of the entire charge necessary for the jury's determination of enticing a child for indecent purposes as indicted in count six. (HT. 544-45). No prejudice has been shown to overcome the default of this claim.

As to grounds 21 and 22, Petitioner alleges that his indictment was rendered void and that his convictions and sentences were subsequently void when the trial court dismissed two of the material charges and allowed a redacted indictment to be presented to the jury. However, as discussed above, Petitioner's indictment was properly drawn, and there was no error in the trial court redacting the indictment to remove the two grounds dismissed before/during trial. (HT. 48-51); *Collins*, 266 Ga. App. at 872-73 fn. 1-2 (noting that a court may proceed on an indictment after certain counts were

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dismissed, as it is only error when allegations contained within counts are amended without resubmission to the grand jury). No prejudice has been shown to overcome the default of these claims.

As to ground 23, Petitioner alleges that his rights were violated when the trial court and State held ex-parte communications. Petitioner specified that the State and the trial court "conspired to deprive Petitioner of his rights to a fair trial and due process by implementing a scheme to conform the indictment to suit the evidence instead of simply sustaining the grant of a verdict of acquittal." However, this alleged conspiracy merely consists of the State's dismissal of count two prior to trial and the dismissal of count four after the close of evidence. (HT. 151-52; 513-14). As above, this was properly done. Further, as Petitioner was present during discussion of the dismissal of count two and was informed of the discussion regarding dismissal of count four, this did not constitute improper ex parte communication. *Id.* No prejudice has been shown to overcome the default of this claim.

Finally, as to ground 25, Petitioner alleges that he received ineffective assistance of counsel when his pre-trial counsel failed to challenge the indictment by way of a special demurrer. However, as the indictment contained all the elements of the offenses charged, sufficiently apprised Petitioner of what he must be prepared to meet, and protected him from double jeopardy, it would not have been subject to a special demurrer. (HT.

48-51); *State v. Wyatt*, 295 Ga. 257, 260, 759 S.E.2d 500 (2014). No prejudice has been shown to overcome the default of this claim.

CONCLUSION

Wherefore, the habeas corpus petition is denied.

If Petitioner desires to appeal this order, he must file an application for a certificate of probable cause to appeal with the Clerk of the Georgia Supreme Court within thirty (30) days of the date this order is filed. Petitioner must also file a notice of appeal with the Clerk of the Baldwin County Superior Court within the same thirty (30) day period.

The Clerk of the Superior Court is hereby directed to provide a copy of this order to Petitioner, Respondent, and the Attorney General's Office.

SO ORDERED, this 17th day of July, 2020.

ALISON T. BURLESON, Judge
Ocmulgee Judicial Circuit

Prepared by:

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CERTIFICATE OF SERVICE

This is to certify that I have this day served all parties with the attached Final Order by hand-delivery, electronic transmission, facsimile and/or by depositing same in the United States Mail, with sufficient postage affixed thereto as follows:

Donald Barnes
GDC ID# 1129864
Hancock State Prison
P.O. Box 339
Sparta, GA 31087

Meghan Hill
Attorney General's Office
40 Capital Square, SW
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Warden
Baldwin State Prison
P.O. Box 218
Hardwick, GA 31034

Original Filed with Clerk's Office

This 29th day of July, 2020

Clerk of Superior Court Baldwin County
Ocmulgee Judicial Circuit

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Appendix E

SUPREME COURT OF GEORGIA
Case No. S21H0148

February 15, 2021

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

DONALD BARNES v. WARDEN, BALDWIN STATE PRISON.

Upon consideration of the application for certificate of probable cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied.

All the Justices concur, except Ellington, J., disqualified.

Trial Court Case No. 16CV47878

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Thiina A Bamua, Clerk

Appendix E

SUPREME COURT OF GEORGIA
Case No. S21H0148

March 26, 2021

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

DONALD BARNES v. WARDEN, BALDWIN STATE PRISON.

Upon consideration of the Motion to Stay Remittitur filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Ellington, J., disqualified.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Trina A Barnes, Clerk

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Appendix F

1. January 11, 2012 pg. 96 - 110

Georgia Court of Appeals
Appellate Denial Decisions.

Case # A11A2123

THIRD DIVISION
DOYLE, P. J.,
MILLER and ELLINGTON, JJ.

January 11, 2012

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A11A2123. BARNES v. THE STATE. JE-081C

ELLINGTON, Judge.

A Houston County jury found Donald Barnes guilty of crimes involving two children, the aggravated child molestation of M. L., OCGA § 16-6-4 (c); distributing obscene materials to M. L., OCGA § 16-12-80 (a); criminal attempt to commit aggravated child molestation against B. B., OCGA §§ 16-4-1; 16-6-4 (c); and enticing a child, B. B., for indecent purposes, OCGA § 16-6-5 (a). Barnes appeals from the order denying his motion for new trial, challenging the sufficiency of the evidence, the trial court's rulings on suppression motions, the propriety of his sentences, and the fairness of the proceedings. Finding no reversible error, we affirm the judgment of conviction; however, we vacate Barnes' sentence for enticing a child for indecent purposes and remand the case for re-sentencing on that conviction.

Viewed in the light most favorable to the jury's verdict,[1] the record shows the following. During the late morning of February 27, 2002, 13-year-old B. B. walked into his yard with his dog to see why two white trucks were parked on his parent's Houston County property. B. B. was at home because he was being home-schooled at the time. The men, a white man with a Russian accent and a black man with "blondish-white hair," who was later identified as Barnes, informed B. B. that they worked for AT&T and that they were looking for buried cable. While his co-worker began scanning for cable, Barnes continued chatting with B. B., asking him about school and whether B. B. knew where to find "some bud," meaning marijuana. B. B. said "no" and walked away, and Barnes rejoined his co-worker.

The next day, Barnes returned alone and struck up another conversation with B. B. He had no work to do in B. B.'s yard that day, but was on a break. Barnes offered B. B. a Mountain Dew and a cigarette, and then told B. B. that he lived "to smoke bud and suck cock." He asked if he could perform oral sex on B. B. When the surprised child did not respond, Barnes began bargaining with B. B., offering up to

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[1] *Jackson v. Virginia*, 443 U. S. 307, 319 (III) (B) (99 SC 2781, 61 LE2d 560) (1979).

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$150 if B. B. would allow him to "give him a blow job." B. B. refused, and later that day, he told his father what had transpired.

B. B. gave an investigator with the Houston County Sheriff's Office a detailed description of the men who came to his house. B. B. said the man who had propositioned him was staying at the Holiday Inn in Perry, that he would soon be returning to Chicago, and that his last name started with a "B."

Based on this information, the investigator contacted AT&T and obtained the names and photographs of about a dozen employees who were working in the area on the days in question, and determined that the two men who went to Barnes' home were Mark Ostromogilsky and the defendant, David Barnes. AT&T records showed that Barnes had stayed at the Holiday Inn in Perry, Houston County, from January 31 through March 1, 2002, and that he had purchased gasoline on February 28 at a gas station just three miles from B. B.'s home. During the initial phase of the investigation, Barnes called the investigator and said that he wanted to "clear his name." When the investigator asked Barnes to come in to the office, Barnes said he could not because he was in Wisconsin.

Using the AT&T photographs of Barnes and the other two black male employees, the investigator put together a photographic array. Although Barnes' hair

was dark in his employee photograph, B. B. selected his picture, commenting that the man had changed his hair color. Based on B. B.'s statement, the identification, and the information provided by AT&T, the investigator obtained a warrant for Barnes' arrest. With help from AT&T's security office, the investigator learned that Barnes was staying at the Wingate Hotel in Illinois.

When the deputies with the Will County Sheriff's Office in Illinois went to the Wingate Hotel to execute the arrest warrant, they entered the room and saw a male juvenile lying on Barnes' hotel bed, naked. The juvenile, M. L., was identified as a run-away from Jacksonville, Florida. Both Barnes and M. L. were taken into custody. Shortly thereafter, pursuant to Barnes' verbal and written consent, the deputies searched Barnes' room and recovered a computer, cell phones, drugs, pornography, and sex toys. Barnes was allowed to accompany the deputies during the search so that he could gather his clothes and personal belongings and "so [that] he could withdraw [his] consent at any time." While Barnes was being transported back to the jail, he told the deputies: "I never f_ _ _ed that kid; I just sucked his dick."

Both B. B. and M. L. testified at trial and positively identified Barnes. M. L. testified that he was a 15-year-old runaway when he met Barnes in Jacksonville. M. L. testified that he and Barnes traveled together and that they stayed in a hotel in

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Georgia for about a month. During that period, Barnes performed oral sex on him about ten times. M. L. testified that Barnes seduced him into sexual activity by offering him $150. M. L. testified that he frequently had to hide for fear that Barnes' AT&T co-workers would notice that he was staying in the hotel room, which was not allowed. Barnes and M. L. smoked marijuana, drank alcoholic beverages, and used cocaine together. Barnes showed M. L. pornography on his computer. Barnes took nude photographs and videos of M. L. M. L. also testified that, during this period, Barnes dyed his hair blonde. At trial, M. L. identified Barnes' hand-held video camera and his computer, which was covered with an assortment of decals and stickers with lewd sayings like "suck on this." The computer contained many sexually explicit images of young males, including M. L. Investigators also found a sexually explicit video-recording of M. L., the digital file of which was stored on Barnes' computer on March 4, 2002, just a few days after Barnes checked out of the Houston County hotel.

The State also presented the testimony of Mark Ostromogilsky, the AT&T employee who accompanied Barnes to B. B.'s home on February 27. Ostromogilsky, who is from Ukraine, testified that he and Barnes worked together on the same job, and that he and Barnes, as well as all the other AT&T contract technicians in his group, stayed at the same Holiday Inn in Perry, Houston County. He recalled Barnes

having a conversation with B. B., and he specifically remembered the boy being in the yard with his dog and hearing Barnes use the words "home schooled" and "marijuana."

1. Barnes contends the State's evidence was insufficient to support the jury's verdict in two respects. First, he contends that, as to the convictions for aggravated child molestation and distributing obscene materials, crimes against M. L., the State failed to prove venue beyond a reasonable doubt. Second, he argues that, as to the convictions for criminal attempt to commit aggravated child molestation and enticing a child for indecent purposes, crimes against B. B., the State failed to prove that B. B, was under the age of 16 at the time of the crimes.

(a) The trial transcript shows that the State carried its burden of proving the venue of the crimes involving M. L. beyond a reasonable doubt.

> Our Georgia Constitution requires that venue in all criminal cases must be laid in the county in which the crime was allegedly committed. Venue is a jurisdictional fact, and is an essential element in proving that one is guilty of the crime charged. Like every other material allegation in the indictment, venue must be proved by the prosecution beyond a reasonable doubt.

(Punctuation and footnote omitted.) *King v. State*, 271 Ga. App. 384, 385 (1) (609 SE2d 725) (2005). Although the State must prove venue beyond a reasonable doubt, it may do so "by whatever means of proof are available to it," including "both direct and circumstantial evidence." (Punctuation and footnote omitted.) Id. "Whether the evidence as to venue satisfied the reasonable-doubt standard is a question for the jury, and its decision will not be set aside if there is any evidence to support it." (Punctuation and footnote omitted.) *Barkley v. State*, 302 Ga. App. 437, 438 (691 SE2d 306) (2010).

The evidence shows that Barnes stayed at the Holiday Inn in Perry, Houston County, during the entire month of February 2002. M. L. testified that he stayed with Barnes for a month in a hotel in Georgia, and that, during that time Barnes dyed his hair blonde. B. B., whom Barnes encountered toward the end of this period, testified that Barnes had "blondish white" hair. M. L. testified that, during the month-long period that he and Barnes were in Georgia, Barnes committed the acts for which he was tried. Thus, the evidence was sufficient to connect the location of the relevant criminal acts to the county in which they occurred beyond a reasonable doubt. See *Thompson v. State*, 277 Ga. 102, 104 (3) (586 SE2d 231) (2003).

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(b) Barnes contends that his convictions for attempted aggravated child molestation and enticing a child for indecent purposes must be reversed because the State failed to prove that B. B. was under the age of 16 on February 28, 2002.[2] B. B. testified at trial on February 10, 2003, that he was 14 years old. The offense occurred a year prior to trial, when B .B. was 13 years old. Therefore, the jury was authorized to infer that B. B. was a child under the age of sixteen years when Barnes committed the crimes charged.

2. Barnes contends the trial court erred in denying his motion to suppress B. B.'s identification of him from the photographic array because the array "only consisted of three black males." Without any further explanation or argument, Barnes contends that the photographs were "as overtly suggestive as any photographs could be." The photographs, however, are remarkably similar head-shots of black men with similar skin tones, hair styles, and facial features. Their clothing is not visible, the backgrounds are all white, and the photographs are the same size. There is no evidence that the investigator presented the pictures in such a way that he suggested a particular

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[2] Pursuant to OCGA § 16-6-4 (a), which defines the crime of child molestation, the victim must be a "child under the age of 16 years[.]" Pursuant to OCGA § 16-6-5 (a), which defines the crime of enticing a child, the victim must be "a child under the age of 16 years[.]"

photograph to B. B. The trial court found nothing improper or suggestive with the array or the identification procedure, and the record supports that finding. Because the identification procedure was not unduly suggestive, we need not consider whether there was a substantial likelihood that B. B. irreparably misidentified Barnes. See *Taylor v. State*, 302 Ga. App. 54, 55-56 (2) (690 SE2d 641) (2010).

3. Barnes contends that the trial court erred in denying his motion to suppress evidence taken from his hotel room in Illinois. Barnes contends that the consent he gave to search his hotel room was tainted because it was obtained after he invoked his right to counsel and because the police threatened to send him to jail dressed only in shorts unless he signed a form consenting to the search. When a defendant moves to suppress evidence seized in a consent search,

> the burden is on the State to demonstrate that the consent was voluntarily given, and not the result of duress or coercion, express or implied. Whether an individual's consent is, in fact, voluntary, is to be determined from the totality of all the circumstances under which consent was given. As a general rule, voluntariness is an issue of fact for the trial court.

(Punctuation and footnotes omitted.) *State v. Baker*, 261 Ga. App. 258, 260 (582 SE2d 133) (2003).

According to Barnes, about ten minutes after his arrest, the deputies told him that if he did not consent to the search, they would seek a warrant[3] and send him to jail dressed as he was. Therefore, Barnes testified that he "opted to sign" the consent to search. The deputies testified that they did not threaten Barnes or deny him access to clothing. They testified that, shortly after Barnes was taken into custody on the Georgia arrest warrant and read his *Miranda*[4] rights, he gave verbal and written consent to search his hotel room. Although the deputies did not remember how Barnes was clothed when they arrested him, they remembered that he was, in fact, clothed. Even Barnes concedes he was wearing shorts, a shirt, shoes, and a leather jacket. The deputies allowed Barnes to accompany them to the hotel after he gave his consent to search so that he could gather his belongings, including some warmer clothes, and so that he could withdraw his consent at any time.

Although Barnes declined to give a statement and asked for and was given an opportunity to speak with counsel, the record does not indicate that any custodial

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[3] It is not improper, coercive, or deceitful merely to announce an intent to seek a search warrant if consent to search is not given. See *Palmer v. State*, 257 Ga. App. 650, 653 (2) (572 SE2d 27) (2002). There is no evidence that the deputies told Barnes they had a warrant, that one was forthcoming, or that they otherwise misrepresented to him that they had the authority to search his room.

[4] *Miranda v. Arizona*, 384 U. S. 436 (86 SC 1602, 16 LE2d 694) (1966).

interrogation occurred. In fact, it appears from the record that the deputies asked both for consent to search and for a statement in the same brief conversation. The record also shows that Barnes had some college education and understood the legal process. Given this evidence, the trial court did not err in concluding that the State had met its burden of proving that Barnes' consent to search the hotel room was voluntary. See *Handy v. State*, 298 Ga. App. 633, 636 (680 SE2d 646) (2009); *Pollard v. State*, 265 Ga. App. 749, 751 (2) (595 SE2d 574) (2004). Therefore, we find no error in the court's order denying Barnes' motion to suppress evidence seized from his hotel room.

4. Barnes contends the trial court violated his due process rights when it denied his request for hearing assistance during trial, contending that an auditory disability hindered him from properly representing himself at trial. There is no evidence in the record, however, that such a request was made, nor does Barnes support this claim of error with citation to the alleged request. Barnes did not indicate at his pretrial motions hearing that such a request was pending. And, during the motion for new trial hearing, the trial judge stated that he did not recall such a motion being made, nor was he made aware of Barnes having a hearing problem during the course of the trial. Because Barnes' claim of error is not supported by the record, he has failed to carry his burden

of showing error on appeal. "The burden is on the party alleging error to show it affirmatively by the record. . . . [W]hen the burden is not met, the judgment complained of is assumed to be correct and must be affirmed." (Citations and punctuation omitted.) *Taylor v. State*, 197 Ga. App. 678, 680 (2) (399 SE2d 213) (1990).

5. Barnes contends that his convictions for criminal attempt to commit aggravated child molestation and for enticing a child for indecent purposes should have been merged by the trial court; therefore, he argues, the trial court erred in imposing separate sentences. We disagree.

"The doctrine of merger precludes the imposition of multiple punishments when the same conduct establishes the commission of more than one crime." *McKenzie v. State*, 302 Ga. App. 538, 539 (1) (a) (691 SE2d 352) (2010). See also OCGA § 16-1-7 (a). Whether offenses merge is a legal question, which we review de novo. *Jones v. State*, 285 Ga. App. 114, 115 (645 SE2d 602) (2007). In considering a merger question, the critical issue is "whether, looking at the evidence required to prove each crime, one of the crimes was established by proof of the same or less than all the facts required to establish the commission of the other crime charged." (Citation and punctuation omitted.) *Middlebrooks v. State*, 289 Ga. App. 91, 93 (1) (656 SE2d 224)

(2008). "But, the rule prohibiting multiple convictions does not apply unless the same conduct of the accused establishes the commission of multiple crimes." (Punctuation omitted.) *Chalifoux v. State*, 302 Ga. App. 119, 119 (690 SE2d 262) (2010); see also *Collins v. State*, 277 Ga. App. 381, 382 (626 SE2d 513) (2006) ("The key question in determining whether a merger has occurred is whether the different offenses are proven with the same facts."). "Thus, if the underlying facts show that one crime was completed prior to the second crime, there is no merger." (Citation and punctuation omitted.) *McKenzie v. State*, 302 Ga. App. at 539 (1) (a).

In this case, the evidence shows that the crime of attempted child molestation was complete before the crime of enticing a child for indecent purposes began.

"A person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of the crime." OCGA § 16-4-1. Criminal attempt liability is created where the perpetrator intends to commit the crime, and then takes a "substantial step" toward committing the crime. *Adams v. State*, 178 Ga. App. 261, 263 (2) (b) (342 SE2d 747) (1986). The indictment alleged that Barnes intended to commit the crime of aggravated child molestation, and that the substantial step he took toward completing that crime was the act of asking B. B. if he "could suck said child's cock[.]"

"A person commits the offense of enticing a child for indecent purposes when he or she solicits, entices, or takes any child under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts." OCGA § 16-6-5 (a). The indictment in this case described the act of solicitation or enticement as offering B. B. "$150.00 if [B.B.] would allow [Barnes] to suck his cock."

The evidence in this case shows at least two distinct requests wherein Barnes offered to perform oral sex on B. B. The first request was not accompanied by an offer of money. When B. B. showed no interest in Barnes' offer, Barnes thereafter began offering the child money, enticing B. B. with increasingly larger amounts until he reached the price of $150. Thus, the criminal attempt to commit aggravated child molestation was complete when Barnes first asked B. B. if he could perform oral sex on him, thereby taking a substantial step toward committing aggravated child molestation (and also revealing his specific criminal intent). The last request, which was accompanied by a large monetary enticement, constitutes a different event, a separate act, an act which supports the crime of enticing a child for indecent purposes. Because the underlying facts of this case show that one crime was completed prior to the second crime, there is no merger. See id. See also *Brown v. State*, 275 Ga. App. 99, 106 (5) (619 SE2d 789) (2005) (convictions for aggravated assault, kidnapping

with bodily injury, and aggravated battery did not merge because each offense was supported by separate facts even though the victim's injuries occurred during the course of a single but prolonged struggle).

6. Barnes contends that his written sentence for the offense of enticing a child for indecent purposes contains a typographical error in that it imposes a higher sentence than is allowed by law, a sentence that the court did not intend to impose. The State concedes that the written sentence contains a typographical error. Therefore, Barnes' sentence for enticing a child for indecent purposes is hereby vacated and the case is remanded to the trial court for re-sentencing on that count.

Judgment affirmed; sentence vacated in part, and case remanded for re-sentencing. Doyle, P. J., and Miller, J., concur.

Appendix F

Appendix G

1. February 9, 2022 pg. 112 - 115

Orders of the Magistrate Judge

Motion for Discovery Denied
Motion for Appointment of Counsel Denied
Motion for In Forma Pauperis Granted
30 days to amend petition
60 days Respondent Answer

Case # 5:22-cv-43-MTT-CHW

2. April 12, 2022 pg. 116

Order of the Magistrate Judge

Motion to Seal Documents Granted for Respondent

Case # 5:22-cv-43-MTT-CHW

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

DONALD GENE BARNES,	:	
	:	
Petitioner,	:	
VS.	:	**NO. 5:22-CV-00043-MTT-CHW**
	:	
Warden ANNETTIA TOBY,	:	
	:	
Respondent.[1]	:	
	:	

ORDER

Presently pending before the Court is the habeas corpus petition of *pro se* Petitioner Donald Gene Barnes, an inmate currently incarcerated in the Hancock State Prison in Sparta, Georgia, seeking relief pursuant to 28 U.S.C. § 2254 (ECF No. 1). Petitioner is challenging his 2003 convictions in the Superior Court of Houston County, Georgia for aggravated child molestation, distributing obscene materials, criminal attempt to commit aggravated child molestation, and enticing a child for indecent purposes. Pet. 1, ECF No. 1. Petitioner has also submitted a motion for leave to proceed *in forma pauperis* (ECF No. 2) and a motion seeking discovery (ECF No. 3).

[1]Rule 2 of the Rules Governing Section 2254 cases in the United States District Courts provides that "if the petitioner is currently in custody under a state court judgment, the petition must name as respondent the state officer who has custody." Petitioner is presently housed at the Hancock State Prison, and the warden of that facility is Annettia Toby. www.dcor.state.ga.us/sites/default/files/Facilities%20Directory.pdf (last accessed Feb. 1, 2022). Therefore, the Court has corrected the style of this case to show Annettia Toby as the Respondent in this action, and the Clerk is **DIRECTED** to correct the Docket accordingly.

Petitioner's submissions demonstrate that he is presently unable to pay the $5.00 filing fee for this action. His motion to proceed *in forma pauperis* (ECF No. 2) is therefore **GRANTED.** In addition, it is now **ORDERED** that, within thirty (30) days of the date of this Order, Petitioner amend his petition to include every unalleged possible constitutional error or deprivation entitling him to federal habeas corpus relief, failing which Petitioner will be presumed to have deliberately waived his right to complain of any constitutional errors or deprivations other than those set forth in his initial habeas petition. If amended, Petitioner will be presumed to have deliberately waived his right to complain of any constitutional errors or deprivations other than those set forth in his initial and amended habeas petitions.

It is further **ORDERED** that Respondent file an answer to the allegations of the petition and any amendments within sixty (60) days after service of this Order and in compliance with Rule 5 of the Rules Governing Section 2254 Cases. Either with the filing of the answer or within fifteen (15) days after the answer is filed, Respondent shall move for the petition to be dismissed or shall explain in writing why the petition cannot be adjudicated by a motion to dismiss. Any and all exhibits and portions of the record that Respondent relies upon must be filed contemporaneously with Respondent's answer or dispositive motion.

No discovery shall be commenced by either party without the express permission of the Court. Unless and until Petitioner demonstrates to this Court that the state habeas Court's fact-finding procedure was not adequate to afford a full and fair evidentiary hearing or that the state habeas court did not afford the opportunity for a full, fair, and adequate hearing, this Court's consideration of this habeas petition will be limited to an examination

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of the evidence and other matters presented to the state trial, habeas, and appellate courts.

Petitioner has also filed a motion seeking discovery in this action—including various depositions, interrogatories, and documents—and requesting appointed counsel (ECF No. 3). Generally, there is no right to legal representation in a federal habeas corpus proceeding. *See, e.g., Wright v. West*, 505 U.S. 277, 293 (1992). The Rules governing habeas cases provide that appointment of counsel is proper if an evidentiary hearing is needed, if counsel is necessary for effective discovery, or "if the interest of justice so requires." *Jones v. Thompson*, No. CV410-039, 2010 WL 3909966, at *2 (S.D. Ga. Oct. 5, 2010) (citing Rules 6(a) & 8(c) of the Rules Governing § 2254 Cases). This Court is not yet able to determine whether counsel needs to be appointed in this case. However, if it becomes apparent at some point later in these proceedings that counsel should be appointed for Petitioner, the Court will entertain a renewed motion for counsel. Until then, Petitioner's request for counsel is also **DENIED.** Moreover, as just noted, discovery will not commence in this case at this time. Petitioner's motion seeking discovery (ECF No. 3) is therefore premature and **DENIED** as such.

Petitioner has also submitted a letter indicating that he has requested protective custody at Hancock State Prison but "that designation is being withheld from [him]." Letter 1, ECF No. 5. As a result, Petitioner states that he has "been recently assaulted" and his "current cellmate is threatening the same." *Id.* To the extent Petitioner believes his constitutional rights have been violated by prison officials' failure to place him in protective custody, he should file a separate action seeking relief pursuant to 42 U.S.C. § 1983. The Clerk is **DIRECTED** to mail Petitioner a blank copy of the forms Petitioner may use for

this purpose, if desired.

Pursuant to the memorandum of understanding with the Attorney General of the State of Georgia, a copy of the petition and a copy of this Order shall be automatically served on the Attorney General and Respondent electronically through CM/ECF. A copy of this Order shall be served by the Clerk by U.S. mail upon Petitioner. Petitioner is advised that his failure to keep the Clerk of the Court informed as to any change of address may result in the dismissal of this action.

SO ORDERED, this 9th day of February, 2022.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge

Appendix G

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