In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10623

JAMES RASHAD CLAY,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:23-cv-02971-SEG

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: May 1, 2024

For the Court: DAVID J. SMITH, Clerk of Court

ISSUED AS MANDATE: May 31, 2024

[DO NOT PUBLISH]

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Non-Argument Calendar

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Before JORDAN, ROSENBAUM, and LUCK, Circuit Judges.

PER CURIAM:

This appeal is DISMISSED, *sua sponte*, for lack of jurisdiction. James Clay, a state prisoner proceeding *pro se*, appeals from the magistrate judge's final report and recommendation ("R&R") that his habeas petition be denied. We lack jurisdiction to review the R&R because it has not been rendered final by the district court. *See* 28 U.S.C. § 1291; *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1066-67 (11th Cir. 1982); *Perez-Priego v. Alachua Cnty. Clerk of Ct.*, 148 F.3d 1272, 1273 (11th Cir. 1998).

No petition for rehearing may be filed unless it complies with the timing and other requirements of 11th Cir. R. 40-3 and all other applicable rules.

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

JAMES RASHAD CLAY, GDC No. 1001326571, Petitioner, v. ROY ODUM, Warden, Respondent.	: : : : : : : :	PRISONER CIVIL RIGHTS 28 U.S.C. § 2254 CIVIL ACTION NO. 1:23-CV-2971-SEG-JCF

ORDER AND FINAL REPORT AND RECOMMENDATION

Petitioner James Rashad Clay, a state prisoner currently confined at Ware State Prison in Waycross, Georgia, has filed a *pro se* 28 U.S.C. § 2254 habeas corpus petition challenging his 2014 Gwinnett County convictions and sentences for malice murder, aggravated assault, and possession of a firearm during the commission of a crime. (Doc. 1 at 1.) The matter is before the Court on the petition and the state's answer-response. For the reasons stated below, **IT IS RECOMMENDED** that the § 2254 petition be **DENIED** and that **no certificate of appealability issue.**

I. PROCEDURAL HISTORY

On September 5, 2012, a Gwinnett County grandy jury indicted Petitioner for malice murder ("Count 1"), felony murder ("Count 2"), two counts of aggravated

assault ("Counts 3 and 4"), and possession of a firearm during the commission of a crime ("Count 5"), related to the July 5, 2012, shooting death of Rashonda Patterson and shooting of Joseph Emener. See Clay v. State, 847 S.E.2d 530, 532 n.1 (Ga. 2020). Petitioner proceeded to a jury trial. See id. The Supreme Court of Georgia summarized the evidence adduced at trial as follows:

> ... Clay had been a resident at the Suburban Lodge, an extended-stay motel located in Gwinnett County. However, prior to the day of the crimes, Clay was banned from the premises. Despite this, Raymond Robertson, a resident at the motel, saw Clay on the property the day before the crimes. Then, on July 5, 2012, Clay entered the motel and rode the elevator to the third floor with Ronald Collins, another resident at the motel who had known Clay for years. During their elevator ride, Clay took out a 9-millimeter pistol and cocked it. Collins asked "who you got that for," to which Clay responded, "it ain't for you." The men exited the elevator together and walked in opposite directions; when Collins reached his room, he called the front desk to inform them that Clay was on the property.
>
> Meanwhile, Patterson was in her motel room with her daughter Miyah, her mother Denise, and her fiancé Emener. The group was getting ready to watch a movie when they heard a knock on the door. Both Emener and Patterson approached the door. Patterson looked through the peephole and asked the person standing on the other side of the door to identify himself. Just then, two shots were fired through the closed door. One bullet struck Patterson in the head, killing her immediately, and the second bullet struck Emener in his leg.
>
> Law enforcement officers arrived at the scene and found Patterson unresponsive. Officers located two bullet holes in the door, two cartridge casings outside the door, and one bullet inside the room.

> During Patterson's autopsy, the medical examiner retrieved a single bullet from Patterson's head and noted the presence of wood splintering around her face; the medical examiner concluded that Patterson died as a result of the gunshot.
>
> Witnesses provided a description of Clay to officers, and, after a short canvass of the vicinity, Clay was found at a nearby apartment complex. He was carrying a 9-millimeter pistol that the State's firearm examiner later matched to the shell casings and bullets collected from the scene and from Patterson's autopsy.
>
> Clay testified at trial and denied being at the motel on the date of the murder and denied committing the shooting. However, he admitted holding a grudge against Emener's identical twin brother based upon allegations that Emener's brother had abused Clay's mother.

Id. at 533-34. The jury convicted Petitioner of all counts. Id. at 532 n.1. The trial court sentenced Petitioner to life imprisonment without parole to be followed by a consecutive 25 years' imprisonment. Id. The felony murder charge in Count 2 and aggravated assault charge in Count 3 were either vacated by operation of law or merged into other counts for sentencing purposes. Id.

Following motion-for-new-trial proceedings, Petitioner appealed, and ultimately represented himself *pro se* on appeal. Id. The Supreme Court of Georgia affirmed Petitioner's convictions and sentences. Id. at 536.

Petitioner filed a *pro se* state petition for a writ of habeas corpus. (Doc. 7-1.) Following an evidentiary hearing, the state habeas court entered a final order denying

relief. (Doc. 7-2.) Petitioner sought a certificate of probable cause ("CPC") to appeal the denial of state habeas relief, but the Supreme Court of Georgia denied his application and dismissed his motion for reconsideration as untimely. (Docs. 7-3, 7-4, 7-6.) The instant § 2254 petition followed.

II. 28 U.S.C. § 2254 PETITION

Under 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus on behalf of a person being held in custody pursuant to the judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." Butts v. GDCP Warden, 850 F.3d 1201, 1212 (11th Cir. 2017) (quotation marks omitted). This is "a substantially higher threshold" than a determination that the state court's

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

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

In his petition, attached pages, and supporting brief, Petitioner enumerates the following grounds for relief:[1]

1. (a) Petitioner is actually innocent of the offenses of conviction; and

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[1] Petitioner's grounds have been restated for the sake of clarity.

(b) the prosecution concealed exculpatory gunshot residue evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963);

2. (a) the state's lay witnesses Ronald Collins and Raymond Robertson gave perjured testimony; and

   (b) trial counsel was ineffective for failing to impeach Collins and Robertson with their prior inconsistent statements;

3. trial counsel operated under a conflict of interest and rendered ineffective assistance by communicating privileged information to the prosecution;

4.[2] the trial judge exhibited judicial bias against Petitioner by:

   (a) presiding over his trial without the requisite procedural order; and

   (b) delaying his direct appeal by failing to hear his motion for new trial until more than four years after it was filed; and

   (c) making "unwarranted misbehaving gestures" and laughing at him during his motion-for-new-trial hearing; and

   (d) failing to act as "13th juror" and set aside the jury verdict; and

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[2] On the § 2254 petition form, Petitioner enumerates as Ground 4 a claim that law enforcement officers tampered with the alleged murder weapon which was subsequently admitted as evidence at trial. (See doc. 1 at 10.) However, in his attached pages and supporting brief, Petitioner names as Ground 4 the judicial bias claims listed here and labels his evidence tampering claim as Ground "5" or "5(a)." (Compare doc. 1 at 10, with doc. 1 at 17, 21.) To avoid further confusion, this R&R will refer to Petitioner's judicial bias claims as subclaims of "Ground 4," and his evidentiary challenges as subclaims of "Ground 5."

Georgia Supreme Court Chief Justice Harold Melton exhibited judicial bias against Petitioner on direct appeal by:

(e) deciding his direct appeal as a single-judge order;

5. the trial court erred in admitting into evidence at trial:

(a) the alleged murder weapon where the lead detective testified to tampering with it before it was placed into evidence; and

(b) Petitioner's videotaped interrogation where he did not confess to the actual crime and where law enforcement officers repeatedly offered "hope of benefit;" and

(c) Petitioner's custodial statements which were made incident to an unlawful arrest; and

(d) state firearms examiner Dennis Miller's conclusions that the projectiles used in the crime were fired from the gun found in Petitioner's possession;

6. Petitioner's in-court identifications by Ronald Collins and Raymond Robertson were tainted by impermissibly suggestive pre-trial identification procedures;

7. Petitioner's indictment was fatally defective and void;

8. the racial composition of the jury pool and petit jury violated Batson v. Kentucky, 476 U.S. 79 (1986), and one of the jurors was not a resident of Gwinnett County;

9. the prosecutor engaged in misconduct by:

(a) soliciting privileged information from defense counsel; and

(b) "inflaming ... the jury's passions";

10. two certified court reporters knowingly falsified the transcripts of Petitioner's probable cause hearing, bond revocation hearing, and trial by "rewording and omitting crucial testimony" to frustrate his attempts to obtain appellate and postconviction relief.

(Doc. 1 at 5, 7-8, 10, 16-25.)

A. Ground 1(a)

In Ground 1(a), Petitioner asserts that he is actually innocent of all counts of conviction. (Doc. 1 at 5, 16, 18; doc. 1-2 at 3). Petitioner points to the lack of any DNA evidence, fingerprint evidence, and/or gunshot residue evidence linking him to the crime. (Doc. 1 at 5, 18.) Petitioner alternatively describes this claim as one that the evidence was insufficient to support his convictions. (Doc. 1 at 16, 18.)

The state responds that federal law does not permit a freestanding actual innocence claim and that, in any event, Petitioner has not made a credible showing of actual innocence. (Doc. 6-1 at 4-6.) To the extent that Petitioner challenges the sufficiency of the evidence, the state argues that the state court's resolution of this claim on direct appeal was reasonable and is entitled to deference. (Id. at 7, 9-11.)

The Supreme Court has stated that "actual innocence, if proved, serves as a gateway through which a [§ 2254] petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations." McQuiggen v.

Perkins, 569 U.S. 383, 386 (2013). However, the Supreme Court has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." Id. at 384. The Eleventh Circuit repeatedly has refused to consider freestanding claims of actual innocence presented in habeas corpus petitions. See, e.g., Brownlee v. Haley, 306 F.3d 1043, 1065 (11th Cir. 2002) ("[C]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.") (quotation omitted); Mize v. Hall, 532 F.3d 1184, 1195 (11th Cir. 2008); Jordan v. Sec'y Dep't of Corr., 485 F.3d 1351, 1356 (11th Cir. 2007) (refusing to consider a claim of actual innocence in a non-capital case because "our precedent forbids granting habeas relief based upon a claim of actual innocence, anyway, at least in non-capital cases").

Consequently, to the extent that Petitioner attempts to assert a freestanding actual innocence claim, any such claim is non-cognizable in a § 2254 petition and is foreclosed by Circuit precedent. See Brownlee, 306 F.3d at 1065; Mize, 532 F.3d at 1195; Jordan, 485 F.3d at 1356. Moreover, to the extent that Petitioner seeks to avail himself of the actual innocence "gateway" with respect to his procedurally defaulted claims, see Parts B, C, G, H, and I, *infra*, Petitioner has not made the "extraordinarily

high" showing required to prove actual innocence. See Schlup v. Delo, 513 U.S. 298, 324, 327 (1995) (explaining that, to state a credible claim of actual innocence, a petitioner must present new reliable evidence that was not presented at trial showing that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."). Here, the evidence relied upon by Petitioner is not "new," including the results of gunshot residue testing which the Supreme Court of Georgia found on direct appeal had not been suppressed. See Clay, 847 S.E.2d at 533 n.2. Additionally, a lack of DNA, fingerprints, and/or gunshot residue does not in any way scientifically exonerate Petitioner, particularly in light of the witness testimony placing Petitioner at the scene with a weapon, the ballistic matching evidence, and Petitioner's statements during his videotaped interview. See Schlup, 513 U.S. at 324, 327 (stating that evidence supporting a credible actual innocence claim will normally consist of "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."). Petitioner has not proven a credible actual innocence "gateway" claim.

To the extent that Petitioner's Ground 1(a) challenges the sufficiency of the evidence, the Due Process Clause of the Fourteenth Amendment protects an accused person against conviction except on proof beyond a reasonable doubt of every

material element of the offense. In re Winship, 397 U.S. 358, 364 (1970). However, federal habeas review of the constitutional sufficiency of evidence in a state criminal prosecution is limited. Martin v. Alabama, 730 F.2d 721, 724 (11th Cir. 1984). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). "Jackson leaves [the trier of fact] broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that [the trier of fact] draw reasonable inferences from basic facts to ultimate facts." Coleman v. Johnson, 566 U.S. 650, 655 (2012) (quotation marks omitted). Thus, "the only question under Jackson is whether [the trier of fact's] finding was so insupportable as to fall below the threshold of bare rationality." Id. at 656. Accordingly, a sufficiency claim in a § 2254 petition is subject to "two layers of judicial deference." Id. at 651. First, a court may set aside a jury verdict "only if no rational trier of fact could have agreed with the jury," and, second, a state court decision may be overturned only if it was "objectively unreasonable." Id.

Here, the state appellate court's determination that sufficient evidence supported Petitioner's convictions was reasonable and is entitled to deference. As

noted above, witness testimony placed Petitioner at the scene of the offenses and ballistic matching evidence linked the gun found in Petitioner's possession to bullets collected from the scene and Patterson's autopsy. Moreover, Petitioner testified in his own defense at trial, and the jury was permitted to disbelieve his testimony and consider his statements as substantive evidence of his guilt. See United States v. Brown, 53 F.3d 312, 314-15 (11th Cir. 1995). ("At least where some corroborative evidence of guilt exists for the charged offense ... and the defendant takes the stand in his own defense, the defendant's testimony, denying guilt, may establish, by itself, elements of the offense.") As a result, Petitioner has not shown that the jury's finding "was so insupportable as to fall below the threshold of bare rationality," particularly under the doubly deferential standard that applies to a sufficiency challenge in a § 2254 petition. See Coleman, 566 U.S. at 651, 656. Petitioner is not entitled to relief on Ground 1(a).

B. Grounds 1(b), 4(a), 7, 8, 9(a)

In Ground 1(b), Petitioner argues that the state violated Brady by suppressing a report showing that Petitioner tested negative for gunshot residue. (Doc. 1 at 5, 18.) In Ground 4(a), Petitioner alleges that the trial judge, Judge Kathryn Schrader, illegally presided over his case after the retirement of Judge Dawson Jackson without

a requisite "procedural order," in violation of Uniform Superior Court Rule 3.1. (Id. at 17, 20.) In Ground 7, Petitioner asserts that his indictment was fatally defective in that it was not returned in open court and contained substantive and "non-amendable" defects including that it charged multiple offenses without adequately specifying the time, place, manner, and intent of each offense, that it charged multiple offenses arising from the same course of conduct, and that Petitioner was innocent under the facts charged. (Id. at 17, 22-23.) In Ground 8, Petitioner alleges that the racial composition of the jury pool and petit jury violated Batson, and that one juror did not reside in Gwinnett County. (Id. at 17, 23-24.) In Ground 9(a), Petitioner states that the prosecutor committed misconduct by soliciting privileged information from defense counsel in a pre-trial letter. (Id. at 18, 24.)

The state responds that these grounds are procedurally defaulted based on the state appellate court's finding that Petitioner failed to preserve them for appellate review. (Doc. 6-1 at 12.) Alternatively, the state argues that Grounds 4(a) and 7 do not allege the deprivation a federal constitutional right and fail to state a claim for federal habeas relief. (Id. at 12-13.)

"Federal courts may not review a claim procedurally defaulted under state law if the last state court to review the claim states clearly and expressly that its judgment

rests on a procedural bar, and the bar presents an independent and adequate state ground for denying relief." Hill v. Jones, 81 F.3d 1015, 1022 (11th Cir. 1996). Here, Petitioner presented these grounds on direct appeal and the Supreme Court of Georgia found that they were procedurally defaulted because Petitioner failed to preserve them for appellate review. See Clay, 847 S.E.2d at 533; see also Harris v. State, 818 S.E.2d 530, 534 (Ga. 2018) (explaining that claims not raised and ruled upon in the lower court are not preserved for appellate review); Higuera–Hernandez v. State, 714 S.E.2d 236, 238 (Ga. 2011) ("Standard practice in Georgia ... allows parties to raise on appeal only the same objections that were properly preserved below.") (citation omitted). This state procedural rule is "independent and adequate," and, thus, Grounds 1(b), 4(a), 7, 8, and 9(a) are procedurally defaulted. See generally Henderson v. Campbell, 353 F.3d 880, 891 (11th Cir. 2003).

While procedural default may generally be excused if the petitioner establishes cause and prejudice, see Bailey v. Nagle, 172 F.3d 1299, 1306 (11th Cir. 1999), when "[a] state court finds insufficient evidence to establish cause and prejudice to overcome a procedural bar, [a federal habeas court] must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption with clear and convincing evidence." Greene v. Upton, 644 F.3d 1145, 1154 (11th Cir. 2011)

(quotation marks omitted). Petitioner has not rebutted the state appellate court's implicit cause and prejudice determinations with clear and convincing evidence. Grounds 1(b), 4(a), 7, 8, and 9(a) are due to be denied.

C. Ground 2(a)

In Ground 2(a), Petitioner alleges that the state's lay witnesses Ronald Collins and Raymond Robertson gave perjured trial testimony when they testified inconsistently with their prior statements to police. (Doc. 1 at 7.) Specifically, Petitioner alleges that: (a) Collins's trial testimony that he heard two gunshots a short time after exiting the elevator with Petitioner was inconsistent with his July 20, 2012, preliminary hearing testimony that he did not hear any gunshots; and (b) Robertson's trial testimony that he heard more than two gunshots on the day of the incident and that he had seen Petitioner on the property two or three days prior to the incident was inconsistent with his prior statements to police that he had seen Petitioner on the property an hour before the incident. (Id. at 19.) Petitioner asserts that these discrepancies amount to perjury and require vacatur of his convictions under O.C.G.A. § 17-1-4. (Id.) Petitioner also emphasizes that neither Collins nor Robertson actually witnessed the crime. (Id. at 7.)

The state responds that Petitioner failed to preserve a federal law claim with respect to Ground 2(b) because he raised the issue as a violation of a state statute on direct appeal, made only passing references to the United States Constitution and United States Supreme Court cases, and the state appellate court treated the claim as a state law issue. (Doc. 6-1 at 14-15.) Alternatively, the state argues that no due process violation occurred, and that the state appellate court's denial of this claim is entitled to deference. (Id. at 15-16.)

Federal habeas relief is not available for "errors of state law." Estelle v. McGuire, 502 U.S. 62, 67 (1991); see also Cabberiza v. Moore, 217 F.3d 1329, 1333 (11th Cir. 2000) (stating that the writ of habeas corpus was not enacted to enforce state-created rights). Further, in order to exhaust a federal constitutional claim, a petitioner "must make the state court aware that the claims asserted present federal constitutional issues." Snowden v. Singletary, 135 F.3d 732, 735 (11th Cir. 1998). "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." Zeigler v. Crosby, 345 F.3d 1300, 1307 (11th Cir. 2003) (quotation omitted). Rather, the petitioner must have articulated the constitutional theory serving as the basis for relief in state court, with reference to specific federal sources of law. Gray v. Netherland,

518 U.S. 152, 162-63 (1996). Critically, a petitioner may not circumvent this limitation on federal habeas review by "couching" state law issues "in terms of equal protection and due process." Branan v. Booth, 861 F.2d 1507, 1508 (11th Cir. 1988) (quotation omitted).

Here, Petitioner's claim in Ground 2(a) is fundamentally one that Collins and Robertson committed perjury as defined in O.C.G.A. § 16-10-70(a), and that his conviction should be vacated under O.C.G.A. § 17-1-4 as a result. (See doc. 1 at 19.) Petitioner's string citation to the U.S. Constitution and federal case law, without any further elaboration, does no more than "couch" his state law arguments in terms of due process. (See id. a t 16, 19.) Because Petitioner's claim is grounded in issues of state law, it is not cognizable on federal habeas review. Branan, 861 F.2d at 1508. Further, Petitioner presented the analogous claim to the state appellate court in identical terms seeking relief under O.C.G.A. § 17-1-4 with only passing reference to federal sources of law. (Compare doc. 7-11 at 201, 203-04, with doc. 1 at 16, 19.) Thus, any federal constitutional claim is unexhausted and procedurally defaulted. See Snowden, 135 F.3d at 735; Bailey, 172 F.3d at 1302-03.

In any event, Petitioner has not shown a due process violation. As noted by the state appellate court, Petitioner has not shown that Collins or Robertson ever were

convicted of perjury or that their testimony was "the purest fabrication." See Clay, 847 S.E.2d at 534. Rather, Petitioner's arguments go to the weight and credibility of the witnesses' testimonies, and, ultimately, the sufficiency of the evidence used to convict him. A federal habeas court must defer to the jury's judgment as to the weight and credibility of the evidence unless it is incredible as a matter of law. Wilcox v. Ford, 813 F.2d 1140, 1145-46 (11th Cir. 1987) (noting that testimony is incredible as a matter of law only where it is "so inherently incredible, so contrary to the teachings of human experience, so completely at odds with ordinary common sense, that no reasonable person would believe it beyond a reasonable doubt"). Nothing in Collins's or Robertson's testimony involved events that the witnesses physically could not possibly have observed or events that could not have occurred under the laws of nature, and, thus, their testimonies were not incredible as a matter of law and the jury's credibility determinations cannot be revisited on federal habeas review. See id.; United States v. Feliciano, 761 F.3d 1202, 1206 (11th Cir. 2014). Petitioner's Ground 2(a) is due to be denied.

D. Ground 2(b)

In Ground 2(b), Petitioner alleges that his trial counsel rendered ineffective assistance by failing to impeach the state's lay witnesses Ronald Collins and Raymond Robertson with their prior inconsistent statements. (Doc. 1 at 19.)

The state responds that the state appellate court's rejection of this claim on direct appeal was reasonable and is entitled to deference. (Doc. 6-1 at 16.)

The Sixth Amendment right to counsel includes the right to the effective assistance of competent counsel. McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970). To make a successful claim of ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. See Strickland, 466 U.S. at 687-88. Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

"The standards created by Strickland and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." Harrington v. Richter, 562

U.S. 86, 105 (2011). The Supreme Court has emphasized that the Strickland standard is a general one with a substantial "range of reasonable applications" and that federal habeas courts "must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d)." See id. "Thus, under § 2254(d), "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id.

Here, the state appellate court correctly applied Strickland to Petitioner's claim of ineffective assistance of trial counsel, and its denial of this claim was not contrary to clearly established federal law. As the state appellate court noted, Petitioner's contention that trial counsel failed to impeach Collins and Robertson with their prior inconsistent statements is plainly contradicted by the record. See Clay, 847 S.E.2d at 534 n.6. Counsel did, in fact, cross-examine Collins and Robertson about their prior statements to law enforcement, including the specific inconsistencies in Robertson's statements highlighted by Petitioner. (See doc. 7-10 at 98-101, 156, 159-62.) On this record, Petitioner has not shown that counsel performed deficiently for failing to do something that counsel did, in fact, do, or that he was prejudiced by counsel's performance. Ground 2(b) is due to be denied.

E. Ground 3

In Ground 3, Petitioner alleges that his trial counsel operated under a conflict of interest and rendered ineffective assistance by communicating with the prosecutor about something that happened during an attorney visit with Petitioner at the jail. (Doc. 1 at 8, 17, 19-20.) Petitioner points to an October 16, 2013, letter from the prosecution asking counsel to "please take a moment and enter something describing your meeting with your client at the jail that you told me about" as evidence that defense counsel disclosed privileged information to the prosecution. (Doc. 1-4 at 4.)

The state responds that the state appellate court's denial of this claim was reasonable and is entitled to deference. (Doc. 6-1 at 17-18.)

Here, the state appellate court's rejection of this claim was reasonable and is entitled to deference. The state appellate court noted that the October 16, 2013, letter (which concerned a court-ordered competency evaluation) was not in the record, and that Petitioner had not presented any evidence that trial counsel actually disclosed any privileged information. Clay, 847 S.E.2d at 533 n.4. These state court fact-findings are entitled to deference, and Petitioner has not rebutted them with clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

Indeed, Petitioner still has not identified what, if any, privileged information counsel divulged to the prosecution, or shown how he was specifically prejudiced thereby. (See generally doc. 1 at 8, 17, 19-20; doc. 1-4.) Instead, Petitioner provides only speculation that his trial counsel may have disclosed the contents of privileged communications to the prosecution based on the October 16, 2013, letter. Speculation is insufficient to satisfy a habeas corpus petitioner's burden of proving his entitlement to relief. See Aldrich v. Wainright, 777 F.2d 630, 636 (11th Cir. 1985); see also Blankenship v. Hall, 542 F.3d 1253, 1270 (11th Cir. 2008) ("It is the petitioner's burden to establish his right to habeas relief and he must prove all facts necessary to show a constitutional violation."). Ground 3 does not warrant relief.

F. Ground 4(b)

In Ground 4(b), Petitioner alleges that the trial judge exhibited judicial bias against him by unnecessarily delaying his direct appeal. (Doc. 1 at 20.) Specifically, Petitioner argues that he filed his motion for new trial on June 6, 2014, but that the trial court did not conduct a hearing on the motion until more than four years later on November 13, 2018. (Id.) Petitioner contends that the four-year delay violated his due process rights. (Id.)

The state responds that the state appellate court's rejection of this claim on direct appeal is entitled to deference. (Doc. 6-1 at 22.)

When a state provides a right to appeal, the appeal must meet the requirements of due process and equal protection. Douglas v. California, 372 U.S. 353, 356-57 (1963). An excessive delay in the provision of a direct appeal can amount to a denial of due process. See Rheuark v. Shaw, 628 F.2d 297, 302 (5th Cir. 1980) (finding that delay of nearly two years from notice of appeal to the date when his statement of facts was finally prepared exceeded the limits of due process). However, not every delay in the appeal of a criminal case, even an inordinate one, violates due process. Rheuark, 628 F.2d at 303. To prove a due process violation a petitioner must, among other factors, establish prejudice resulting from the delay. See Barker v. Wingo, 407 U.S. at 514, 530-32.

Here, the state appellate court correctly applied the Barker four-factor test and found that Petitioner had "failed to argue, let alone show, that a reasonable probability exists that he would have prevailed on appeal but for the post-conviction delay." Clay, 847 S.E.2d at 536. Petitioner's presentation in his § 2254 petition does nothing to alter that conclusion. Petitioner's convictions were affirmed on appeal, and Petitioner does not allege that the four-year delay impaired his direct appeal in

any way. Accordingly, Petitioner has not shown the requisite prejudice to establish a due process violation, and the state appellate court's denial of this claim was not contrary to clearly established federal law. Ground 4(b) is due to be denied.

G. Grounds 4(c) & 9(b)

In Ground 4(c), Petitioner alleges that the trial judge exhibited bias against him by making "unwarranted gestures" including "laughter" during his motion for new trial hearing. (Doc. 1 at 20.) In Ground 9(b), Petitioner alleges that the prosecutor engaged in misconduct by "inflaming ... the jury's passions." (Id. at 18.)

The state responds that these grounds are newly raised for the first time in the § 2254 petition and are unexhausted and procedurally defaulted under Georgia's successive petition rule. (Doc. 6-1 at 23-25; doc. 8-1 at 1-4.)

Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. 28 U.S.C. § 2254(b)(1). A federal claim is procedurally defaulted where the petitioner failed to properly exhaust the claim in state court, and it is obvious that the unexhausted claim would now be barred under state procedural rules. Bailey, 172 F.3d at 1302.

Here, Petitioner raises Grounds 4(c) and 9(b) for the first time in his § 2254 petition and did not present them to the state courts. As a result, these claims are

unexhausted and procedurally defaulted because they would now be barred by state procedural rules restricting successive petitions. See id. at 1302-03; O.C.G.A. § 9-14-51 (providing that a petitioner generally waives any grounds not raised in his first habeas corpus petition); Chambers v. Thompson, 150 F.3d 1324, 1327 (11th Cir. 1998) (holding that Georgia's successive petition statute "can and should be enforced in federal habeas proceedings" against unexhausted claims). Petitioner has not alleged cause and prejudice to overcome the default. Accordingly, Grounds 4(c) and 9(b) are procedurally defaulted and provide no basis for relief.

H. Grounds 4(d), 4(e), 5(a), 5(b), & 5(d)

In Ground 4(d), Petitioner alleges that the trial judge wrongfully failed to exercise her statutory discretion as "13th juror" and set aside the jury verdict, in violation of O.C.G.A. §§ 5-5-20 and 5-5-21. (Doc. 1 at 20.) In Ground 4(e), Petitioner alleges that Georgia Supreme Court Chief Justice Harold Melton decided his direct appeal as a single-judge order, in violation of Article VI of the Georgia Constitution and O.C.G.A. § 15-6-6. (Id.) In Ground 5(a), Petitioner alleges that the trial court erred in admitting into evidence a gun which Detective Christian Robertson testified to tampering with on the day of the incident by removing bullets from the magazine and replacing them with rounds from his duty magazine, in violation of

O.C.G.A. § 16-10-94. (Id. at 10, 17, 20.) In Ground 5(b), Petitioner alleges that the trial court erred in admitting into evidence Petitioner's videotaped interrogation where law enforcement repeatedly offered "hope of benefit," in violation of O.C.G.A. § 24-8-824. (Id. at 20.) In Ground 5(d), Petitioner alleges that a new trial was required under O.C.G.A. § 5-5-22 because the ballistic matching evidence was illegally admitted where GBI firearms specialist Dennis Miller subsequently testified that that hollow point bullets are difficult to ballistically match. (Id. at 21.)

The state responds that Petitioner's Grounds 4(d), 4(e), 5(a), 5(b), and 5(d) fail to state federal constitutional claims but allege only errors of state law, and that Petitioner's passing references to federal law were insufficient to exhaust them as federal law claims in state court. (Doc. 6-1 at 20, 26-28.)

The Court agrees that Petitioner's Grounds 4(d), 4(e), 5(a), 5(b), and 5(d) are grounded in non-cognizable issues of state law. See Estelle, 502 U.S. at 67; Branan, 861 F.2d at 1508. Indeed, Petitioner's Grounds 4(d), 5(b), and 5(d) are presented in the § 2254 petition solely by reference to state law, and do not state federal constitutional claims. (See doc. 1 at 20-21.) Grounds 4(e) and 5(a) make only passing references to the United States Constitution in string citations, without further elaboration, and merely "couch" the underlying state law issues in terms of

due process. (See doc. 1 at 17, 20-21); Branan, 861 F.2d at 1508. Further, because Petitioner presented the analogous claims in materially identical terms in state court, any federal components of Grounds 4(e) and 5(a) are unexhausted and procedurally defaulted. (Compare doc. 7-11 at 201, 204, and doc. 7-2 at 4, with doc. 1 at 17, 20-21); see also Snowden, 135 F.3d at 735; Bailey, 172 F.3d at 1302-03.

In any event, even assuming *arguendo* that Petitioner presented and exhausted federal claims in Grounds 4(e) and 5(a), these grounds are without merit. As noted by the state habeas court, Petitioner's contention that his direct appeal was decided as a single-judge order is belied by the record. (See doc. 7-11 at 4.) Petitioner appears to confuse Justice Melton's authorship of the opinion to mean that only Justice Melton participated in the decision. In fact, the opinion states that "[a]ll the Justices concur," indicating a unanimous decision by the full court. See Clay, 847 S.E.2d at 536. Petitioner has not rebutted the state habeas court's fact finding with clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). Nor has Petitioner identified any authority recognizing a federal right to have a state direct appeal decided by a panel of judges.

As to Ground 5(a), it is generally not within the province of a federal habeas corpus court to reexamine state court rulings on evidentiary issues. See 28 U.S.C.

§ 2254(a) (federal court may issue writ of habeas corpus only if petitioner is held in violation of federal law); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). Evidentiary rulings in state court are based on state—rather than federal—law, and this Court reviews state court evidentiary rulings in a habeas corpus proceeding to determine only "whether the error, if any, was of such magnitude as to deny petitioner his right to a fair trial." Futch v. Dugger, 874 F.2d 1483, 1487 (11th Cir. 1989) (quoting Osborne v. Wainwright, 720 F.2d 1237, 1238 (11th Cir. 1983)). In order for an erroneous evidentiary ruling to establish a right to habeas corpus relief, the evidence in question must constitute a "'crucial, critical, highly significant factor' in [Petitioner's] conviction." Williams v. Kemp, 846 F.2d 1276, 1281 (11th Cir. 1988) (quoting Jameson v. Wainwright, 719 F.2d 1125, 1126-27 (11th Cir. 1983)); see also Marshall v. Lonberger, 459 U.S. 422, 438, n.6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"); Dickson v. Wainwright, 683 F.2d 348, 350 (11th Cir. 1982) ("An evidentiary error does not justify habeas relief unless the violation results in a denial of fundamental fairness.").

Petitioner's Ground 5(a) concerns Detective Christian Robertson's testimony that, after Petitioner was apprehended shortly after the shooting and a 9mm pistol was recovered from his possession, Detective Robertson placed unfired rounds from his duty magazine into the magazine of Petitioner's pistol to determine the maximum capacity of the magazine. (See doc. 7-10 at 210-12.) By so doing, Detective Robertson determined that Petitioner's magazine contained two rounds fewer than its maximum capacity. (Id. at 212.) Detective Robertson then removed his duty ammunition from Petitioner's magazine. (Id. at 213.) Petitioner argues that these actions constituted evidence tampering under state law and that the trial court should have excluded the pistol from evidence as a result. (Doc. 1 at 10, 17, 20.)

The state appellate court rejected Petitioner's contention that Detective Robertson's actions amounted to evidence tampering under O.C.G.A. § 16-10-94, noting that there was no authority supporting Petitioner's position. See Clay, 847 S.E.2d at 535. This Court must defer to the state court's interpretation of state law. See, e.g., Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam) ("We have repeatedly held that a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus."). As a result, there was no evidentiary error, let alone one of constitutional dimension. Nor does research reveal any federal authority finding

a due process violation from similar facts. As a result, the state court's denial of this claim was not contrary to any clearly established Supreme Court precedent.

Petitioner's Grounds 4(d), 4(e), 5(a), 5(b), and 5(d) do not warrant relief.

I. Ground 5(c)

In Ground 5(c), Petitioner alleges that his videotaped interrogation should have been excluded because it was obtained incident to an unlawful arrest. (Doc. 1 at 21.)

The state responds that this ground is procedurally defaulted because the state appellate court deemed it abandoned on direct appeal. (Doc. 6-1 at 21.)

Petitioner presented a claim analogous to Ground 5(c) on direct appeal, and the state appellate court deemed it abandoned because Petitioner "offer[ed] no argument or evidence as to why his arrest was illegal." Clay, 847 S.E.2d at 535 n.9. This determination serves as an independent and adequate state procedural bar to federal review. See Ga. Supreme Ct. R. 22; Felix v. State, 523 S.E.2d 1, 5 n.6 (Ga. 1999) ("[I]f the assertion that a particular trial court ruling was error is not supported by argument or citation of authority, it is deemed abandoned[.]"). Petitioner has not alleged cause and prejudice to overcome the default or presented clear and convincing evidence to rebut the state appellate court's implicit cause-and-prejudice

determination. See Bailey, 172 F.3d at 1302-03; 28 U.S.C. § 2254(e)(1). Accordingly, Ground 5(c) is procedurally defaulted and provides no basis for relief.

J. Ground 6

In Ground 6, Petitioner alleges that the state's lay witnesses Ronald Collins and Raymond Robertson testified to pre-trial identifications of Petitioner using impermissibly suggestive procedures, thereby tainting their subsequent in-court identifications.[3] (Id. at 17, 22.) Specifically, Petitioner argues that Collins testified that he saw Petitioner transported to the crime scene handcuffed in a police patrol car before making an identification, and Robertson testified that he picked Petitioner out of a photo lineup after having seen his arrest on the news. (Id. at 22.)

The state responds that the state appellate court's rejection of this claim was reasonable and is entitled to deference. (Doc. 6-1 at 28-31.)

A pre-trial identification and subsequent in-court identification may amount to a due process violation if the pre-trial procedure was unnecessarily suggestive and

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[3] Petitioner also alleges in Ground 2 that Collins and Robertson testified to the use of impermissibly suggestive pre-trial identification procedures. (Doc. 1 at 7.) This enumeration is duplicative of Ground 6 and all issues regarding Petitioner's identification by Collins and Robertson are addressed here.

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

Here, the state appellate court applied the correct multifactor totality-of-the-circumstances test and reasonably denied this claim. See Clay, 847 S.E.2d at 535-36. The state court emphasized Collins's testimony that he had known Petitioner "since he was 16 years old" and that he had been a friend of Petitioner's mother and "like a father figure" to Petitioner at one point. (See doc. 7-10 at 96.) As a result, the state court found that Collins's in-court identification of Petitioner stemmed from an independent origin and was not conducive to irreparable mistaken identification. See Clay, 847 S.E.2d at 536. This determination was not contrary to clearly

established federal law, particularly considering the facts that Collins and Petitioner rode in an elevator together, spoke to each other, and that Collins had personally known Petitioner for a long time. See Stovall, 388 U.S. at 302; Brathwaite, 432 U.S. at 114; Biggers, 409 U.S. at 199-200.

With respect to Robertson's identification, the state appellate court noted that Petitioner was not alleging that there was something impermissibly suggestive about the photo lineup procedure, but that Robertson's identification lacked credibility after he had seen Petitioner's name and arrest on the news. See Clay, 847 S.E.2d at 847. The state court noted that it was the province of the jury to determine the weight and credibility of evidence of Robertson's pre-trial identification. Id.

This Court agrees that Petitioner is actually challenging the credibility of Robertson's photo lineup identification, not the photo lineup procedure. (See doc. 1 at 22.) As discussed in Parts A and C, *supra*, sufficient evidence supported Petitioner's convictions, and he cannot revisit questions of witness credibility on federal habeas review. See Wilcox, 813 F.2d at 1145-46; Feliciano, 761 F.3d at 1206. The state appellate court's denial of this claim was not contrary to clearly established federal law. Petitioner's Ground 6 is due to be denied.

K. Ground 10

In Ground 10, Petitioner alleges that two certified court reporters intentionally falsified the transcripts of his of his preliminary hearing, bond revocation hearing, and trial by "rewording and omitting crucial testimony" to deprive Petitioner of "substantial argument[s]" for appellate and postconviction relief. (Doc. 1 at 18, 24.)

The state responds that the state appellate court's denial of this claim on direct appeal was reasonable and is entitled to deference. (Doc. 6-1 at 31-32.)

Petitioner presented this claim on direct appeal and the state appellate court rejected it, noting that Petitioner "present[ed] no evidence to support this assertion." Clay, 847 S.E.2d at 536. Petitioner has not rebutted the state court's fact-finding with clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

While Petitioner attaches some newspaper clippings alleging general corruption in Gwinnett County, he offers no evidence, other than his own unsupported assertions, that transcripts of his state criminal proceedings were altered in any way. (See doc. 1-9 at 40-42.) Further, Petitioner does not specify what testimony was purportedly reworded or omitted, or of what "substantial argument[s]" he was deprived. A petitioner is not entitled to federal habeas relief "when his claims

are merely conclusory allegations unsupported by specifics." Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991). Ground 10 is without merit.

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

III. CERTIFICATE OF APPEALABILITY

Under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, a petitioner cannot appeal the final order in a habeas corpus proceeding "unless a circuit justice or a circuit or district judge issues a certificate of appealability ["COA"] under 28 U.S.C. § 2253(c)." Because reasonable jurists would not debate the resolution of the issues presented, **IT IS FURTHER RECOMMENDED** that a COA be **DENIED**. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). If the District Judge adopts this recommendation and denies a certificate of appealability, Petitioner is advised that he "may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." 28 U.S.C. foll. § 2254, Rule 11(a).

IV. CONCLUSION

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

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

SO RECOMMENDED, this 2nd day of February, 2024.

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

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