

APPENDIX A
Eleventh Circuit Court of Appeals' Order Denying Griffin a Certificate of
Appealability

Griffin v. Warden, et al

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11667-B

JEFFERY D. GRIFFIN,

Petitioner-Appellant,

versus

WARDEN,
MARTY ALLEN,

Respondents-Appellees.

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

ORDER:

Jeffrey Griffin seeks a certificate of appealability (“COA”) in order to appeal the district court’s denial of his amended petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Griffin is a Georgia prisoner serving a life sentence, and an additional consecutive sentence of five years’ imprisonment, after a jury convicted him of felony murder and possession of a firearm during the commission of a crime.

After the district court granted a motion for a stay and abeyance so that Griffin could exhaust state remedies, Griffin filed an amended § 2254 petition raising only one claim: the state court unreasonably applied federal law in admitting propensity evidence that was so prejudicial that it resulted in a fundamentally unfair trial. Griffin maintained that his instant conviction was based upon the factual finding that he handed a gun to his codefendant, who used it to shoot the

victim, and the jury heard evidence that Griffin previously provided a gun to another person who used it to shoot an unarmed man and his five-year-old child. The district court denied the petition, finding that the claim was not exhausted, and, even if it was, the claim failed on the merits.

Griffin did not raise a federal due process claim of error concerning this issue before the trial court or on direct appeal. He raised one issue on direct appeal, that the trial court erred in admitting evidence of the alleged similar transaction evidence, and cited only to Georgia law. In his state habeas petition, Griffin argued that “[t]he trial court erred by allowing similar transaction evidence to be presented,” and he maintained that the claim had been raised previously.¹ The state habeas court denied the claim on the basis of *res judicata*, noting that issues decided on direct appeal may not be re-litigated in habeas proceedings.

To merit a COA, a petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a district court denies a habeas petition on procedural grounds, the petitioner must demonstrate that reasonable jurists would find it debatable whether (1) the petition states a valid claim of the denial of a constitutional right, and (2) the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate the district court’s conclusion that Griffin’s claim of a Fourteenth Amendment due process violation was not exhausted in state court. The Supreme

¹ Griffin’s claim read as follows:

Judicial Error. The trial court erred by allowing similar transaction evidence to be presented. The trial court erred by allowing the state to present similar transaction evidence of an alleged crime that occurred four months prior to this crime. The trial court abused its discretion in allowing the evidence to be presented to the jury.

Court has held that, if a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court. *Duncan v. Henry*, 513 U.S. 364, 365 (1995). Griffin acknowledged that on direct appeal he argued that admitting the evidence was error only under Georgia law, and he indicated in his state habeas petition that he was raising the same claim previously presented to the Georgia Supreme Court.

Reasonable jurists would also not debate the district court's conclusion that the claim is procedurally defaulted, and that Griffin did not demonstrate cause to overcome the default. Because Griffin could have raised the claim on direct appeal, Georgia law barred it from being raised in a state habeas petition, absent a showing of cause and prejudice. *See Turpin v. Todd*, 268 Ga. 820, 824 (Ga. 1997). Although Griffin argues that Georgia's adoption of the Federal Rules of Evidence created a change in the law, the Fourteenth Amendment and due process rights existed at the time that Griffin filed his direct appeal and his initial state habeas petition. As such, Georgia law also precludes the claim from being raised in a successive petition. *See* O.C.G.A. § 9-14-51.

Finally, reasonable jurists would not debate the district court's conclusion, regardless of whether the claim was exhausted, it was without merit. The record demonstrates that the trial court balanced the probative value of the evidence against its possible prejudicial effect, instructed the jury on more than one occasion as to the limited purpose of the evidence, and constitutionally exercised its authority to admit the evidence. As such, Griffin's motion for a COA is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

APPENDIX B
District Court's Order on Report and Recommendation

Griffin v. Warden, et al

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

JEFFERY D. GRIFFIN,	*	
Petitioner,	*	
vs.	*	CASE NO. 4:14-CV-29-CDL
Warden GREGORY MCLAUGHLIN,	*	
Respondent,	*	

ORDER ON REPORT AND RECOMMENDATION

After a de novo review of the record in this case, the Report and Recommendation filed by the United States Magistrate Judge on March 3, 2017, is hereby approved, adopted, and made the Order of the Court.¹

The objections of the Petitioner to the Report and Recommendation have been considered and are found to be without merit.

SO ORDERED this March 30, 2017

s/ CLAY D. LAND

CLAY D. LAND, CHIEF
UNITED STATES DISTRICT JUDGE

¹ Certificate of Appealability is also denied as recommended on page 16 of the Report and Recommendation (ECF 54).

APPENDIX C
Magistrate Judge's Report and Recommendation

Griffin v. Warden, et al

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION**

JEFFERY D. GRIFFIN,	:	
	:	
Petitioner,	:	
	:	CIVIL NO. 4:14-CV-29-CDL-MSH
VS.	:	
	:	
Warden GREGORY MCLAUGHLIN,	:	
	:	
Respondent.	:	

REPORT AND RECOMMENDATION

Jeffery Griffin petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For reasons discussed below, it is recommended that relief be denied.

BACKGROUND

A. Facts

The Georgia Supreme Court summarized the facts of this case in Griffin’s direct appeal:

[Antonio] Gray believed Dontavious R. Bunkley had burglarized the home of Gray’s grandmother, and confronted him. Gray and Bunkley engaged in a physical altercation, which was stopped by bystanders. Griffin went to his car and retrieved a pistol, gave it to Bunkley, and said, “handle your business.” Gray began to run away, and Bunkley fatally shot him.

Griffin v. State, 288 Ga. 833, 833-34 (2011).

B. Procedural History

Griffin was charged with malice murder, felony murder, aggravated assault, and possession of firearm during the commission of a crime. *Id.* at 833 n.1. He was tried

with Bunkley and both were found not guilty of malice murder and guilty of the remaining charges. *Id.* Griffin was sentenced “to life in prison for felony murder and a consecutive term of five years in prison for possession of a firearm during the commission of a crime; the guilty verdict for the crime of aggravated assault merged with the crime of felony murder.” *Id.* (citations omitted).

Following the denial of his motion for new trial, the Georgia Supreme Court affirmed Griffin’s conviction and sentence on March 18, 2011. *Id.* at 835.

Griffin filed a pro se state habeas petition in the Superior Court of Telfair County, Georgia on July 22, 2011. Resp’t’s Ex. 1, ECF No. 7-1. An evidentiary hearing was held on February 27, 2012. Resp’t’s Ex. 4a at 1, ECF No. 7-4. In an order dated May 13, 2013, the state habeas court denied relief. Resp’t’s Ex. 2, ECF No. 7-2. In an order dated January 6, 2014, the Georgia Supreme Court dismissed Griffin’s application for a certificate of probable cause to appeal (“CPC application”) as untimely. Resp’t’s Ex. 3, ECF No. 7-3.

On January 27, 2014, Griffin filed his pro se federal habeas petition in this Court raising seven claims for relief (ECF No. 1). Respondent filed an answer and brief in support of his answer, alleging that all of Griffin’s claims were procedurally defaulted (ECF Nos. 6, 6-1). Specifically, Respondent argued that claims one through five and seven were procedurally defaulted because Griffin failed to file a timely CPC application in the Georgia Supreme Court. Resp’t’s Br. in Supp. 3-8, ECF No. 6-1. Respondent alleged claim six was not exhausted, could not be raised in future state proceedings, and was, therefore, procedurally defaulted. *Id.* at 8-9.

In response to Respondent's answer, Griffin alleged that he was prevented from filing a timely CPC application because the Telfair Superior Court Clerk failed to serve him with a copy of the state habeas court's final order (ECF No. 8). Griffin moved for appointment of counsel (ECF No. 10), and the Court granted his motion (ECF No. 18). Newly appointed counsel filed a motion to stay Griffin's federal habeas corpus proceedings so Griffin could return to state court and exhaust claims one through five and seven (ECF No. 25). The Court granted this motion (ECF No. 26).

Griffin returned to state court and pursued a motion to set aside judgment in the state habeas court under O.C.G.A. § 9-11-60(d)(2), alleging that he did not timely receive a copy of that court's May 13, 2013 final order denying relief. Pet'r's Status Update Attach. 1, ECF No. 29-1. On September 28, 2015, the state habeas court granted Griffin's motion to set aside judgment, vacated its January order, and entered an order denying his state habeas petition. Pet'r's Status Update Attach. 3, ECF No. 29-3. Griffin filed a timely CPC application and the Georgia Supreme Court summarily denied relief on April 5, 2016. Pet'r's Status Update Attach. 5, ECF No. 29-5 & Attach. 6, ECF No. 29-6.

On May 2, 2016, this Court lifted the stay and ordered Griffin to amend his petition. On November 1, 2016, Griffin, represented by appointed counsel, filed an amended habeas petition raising only one claim: "The Court Unreasonably Applied Federal Law in Admitting Propensity Evidence Which Was So Prejudicial That It Resulted in a Fundamentally Unfair Trial." Am. Pet. 4, ECF No. 38. Respondent filed an answer and brief in support of his answer, alleging that this claim was unexhausted,

and the Court should treat it as procedurally defaulted. Resp't's Suppl. Answer-Resp., ECF No. 41 & Br. in Supp., ECF No. 41-1.

The Court granted Griffin's request for an evidentiary hearing and held a hearing at which Griffin addressed the only claim he raised in his amended habeas petition (ECF No. 53).

DISCUSSION

I. Griffin's Claims

A. Admission of the similar transaction evidence was so prejudicial it rendered Griffin's trial fundamentally unfair.

Griffin argues that admission of the similar transaction evidence was so prejudicial it rendered his trial fundamentally unfair. For the reasons described below, it is recommended that this claim be denied.

i. Griffin's Fourteenth Amendment due process claim is unexhausted.

The State notified Griffin's trial counsel that it intended to introduce evidence of a similar transaction. Specifically, the State sought to present testimony that, in the same neighborhood, just four months before Griffin provided Bunkley with the gun that Bunkley used to shoot Gray, Griffin provided William Lockett with a gun that Lockett used to shoot at Nicholas Talton. Resp't's Ex. 4a at 84, ECF No. 7-4 & Ex. 4a at 148-54, ECF No. 7-5. Griffin was indicted for aggravated assault in relation to the Lockett/Talton incident. Resp't's Ex. 4a at 84, ECF No. 7-4 & Ex. 4a at 154, ECF No. 7-5. The State argued the purpose of introducing the evidence was to show Griffin's "intent, bent of mind, . . . course of conduct . . . [and] modus operandi." Resp't's Ex. 4a at 148, ECF No

7.5. Trial counsel objected, arguing that the State sought to use the previous incident to show Griffin's bad character. *Id.*

The trial court allowed the State to present the similar transaction testimony. Resp't's Ex. 4b at 62, ECF No. 7-7. The prosecutor told the jury that the similar transaction evidence was offered to show Griffin's "intent, course of conduct, and bent of mind." Resp't's Ex. 4b at 47, ECF No. 7-8 & Ex. 4c at 186, ECF No. 7-9. During the trial, the court instructed the jury:

Sometime evidence is admitted for a particular purpose. That evidence may be considered by you, the jury, for just a sole issue or for a sole purpose for which the evidence is introduced and not for any other purpose.

The law provides that evidence of other transactions or other offenses of this particular defendant in this case, Mr. Griffin, that are similar or connected to the offense for which the defendant is on trial, may be considered for the limited purpose of showing, if it does, if you feel like it does, course of conduct, bent of mind, or knowledge or intent of the defendant with respect to the acts allegedly committed by him or her.

Resp't's Ex. 4b at 46-47, ECF No. 7-8. The trial court later re-instructed the jury that it could consider the similar transaction testimony only "for a limited purpose to show course of conduct or a bent of mind or a knowledge or intent" Resp't's Ex. 4c at 9, ECF No. 7-10. Finally, when giving the charges, the trial court again instructed that evidence of similar transactions "may be considered for that limited purpose of showing course of conduct, bent of mind, knowledge or intent. . . ." Resp't's Ex. 4d at 22, ECF No. 7-12.

The time for Griffin to raise his Fourteenth Amendment due process argument regarding the similar transaction evidence was on direct appeal. "The burden is on the

petitioner to raise his federal claim in the state courts at a time when state procedural law permits its consideration on the merits” *Paschal v. Sec’y, Dep’t of Corr.*, No. 8:08-CV-1688-T-33TBM, 2009 U.S. Dist. LEXIS 108925, at *14-15 (M. D. Fla. Nov. 9, 2009). In Georgia, “[a] procedural bar to asserting a claim on habeas corpus arises if the defendant failed to timely object to any alleged error or deficiency at trial or on appeal.” *Turpin v. Todd*, 268 Ga. 820, 824 (1997) (citing O.C.G.A. § 9-14-48(d); *Black v. Hardin*, 255 Ga. 239, 240 (1985)). But, it is clear that Griffin did not raise a federal due process claim before the Georgia Supreme Court and Griffin does not argue otherwise. Pet’r’s Reply 4, 6, ECF No. 46.

Appellate counsel raised only one issue on direct appeal: “The trial court erred in admitting evidence of the alleged similar transaction evidence” Resp’t’s Ex. 4e at 74, ECF No. 7-17. He cited only Georgia law and argued “[t]he trial [c]ourt erred in admitting the similar transaction evidence” because it only showed Griffin “had a propensity to be around people who used firearms for criminal purposes. That is not indicative of motive, bend of mind, or modus operandi.” *Id.* at 78. Appellate counsel did not claim the trial court’s evidentiary ruling denied Griffin the due process of law guaranteed under the Fourteenth Amendment. In fact, he did not cite the United States Constitution or any federal case law.

The Georgia Supreme Court upheld the trial court’s evidentiary ruling:

A trial court’s decision to admit evidence of similar transactions will be upheld unless there has been an abuse of the trial court's discretion.

Similar transaction evidence must satisfy three elements to be admitted: (1) the evidence must be introduced for a

proper purpose; (2) the evidence must establish by a preponderance of the evidence that the defendant perpetrated the similar transaction; and (3) the two transactions must be sufficiently similar or connected so that the existence of the former transaction tends to prove the latter transaction.

When the evidence was admitted, the trial court instructed the jury that it could be used for the limited purpose of showing “course of conduct, bent of mind, or knowledge or intent of the defendant with respect to the acts allegedly committed by him ...,” and not for any other purpose. Such are proper purposes, and Griffin was identified in court as the one who gave Lockett the pistol in the prior incident. “When considering the admissibility of similar transaction evidence, the proper focus is on the similarities, not the differences, between the separate [transaction] and the crime in question.” In both instances, Griffin provided a pistol to one who was involved in an altercation, and that person used it to fire at another. And, the evidence was probative of the fact that Griffin intended the result that Bunkley shoot at the person who had offended him, as Lockett had done in the earlier instance. There was no abuse of discretion in admitting the challenged evidence

Griffin, 288 Ga. at 834-35 (citations and footnotes omitted).

Griffin acknowledges that he did not exhaust his Fourteenth Amendment due process claim on direct appeal. Pet’r’s Reply 4, 6. Instead, he argues that he exhausted this federal claim during his state habeas proceedings.

In his pro se state habeas petition Griffin raised seven claims, one of which was: “The trial court erred by allowing similar transaction evidence to be presented.” Resp’t’s Ex. 1 at 8, ECF No. 7-1. In response to a question on the habeas form, Griffin informed the state habeas court that his “similar transaction error claim” had been raised previously. *Id.* at 9. At the state habeas evidentiary hearing, the court told Griffin that “the issue of similar transaction[s] was raised on appeal and the appellate court decided against you. So that issue cannot be raised again in habeas.” Resp’t’s Ex. 4a at 8, ECF

No. 7-4. In his post-hearing brief, Griffin argued that the trial court should have excluded the similar transaction evidence because he had not been convicted of the similar transaction. Pet'r's Br. 19, ECF No. 1-1. Griffin asked the court to overrule as unconstitutional a Georgia case that held underlying similar transaction conduct is admissible even if it did not result in a conviction or criminal charge. *Id.* (citing *Harris v. State*, 222 Ga. App. 52 (1996)). Citing state law, Griffin argued the prejudicial impact of the similar transaction evidence outweighed its relevancy to the issues. *Id.* (citing *Rice v. State*, 217 Ga. App. 456 (1995)). He stated, "The Sixth Amendment to the Constitution of the United States provides the guarantee of a fair trial to a criminal defendant." *Id.* Griffin did not mention the Fourteenth Amendment or complain that his due process rights had been violated.

The state habeas court denied Griffin's similar transaction claim on the basis of res judicata. The court held that "[i]ssues decided on direct appeal may not be re-litigated in habeas corpus if there has been no change in the facts or the law." Resp't's Ex. 2 at 10, ECF No. 7-2.

Griffin argues that his mention of the words "fair," "fairness," and, "unfairness" exhausted his due process claim. "If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court. *Duncan v. Henry*, 513 U.S. 364, 366 (1995). "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." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (citations omitted). He

must also “have ‘fairly presented’ to the state courts the ‘substance of his federal habeas corpus claim.’” *Id.* (citations omitted).

Griffin acknowledges that on direct appeal he argued only that admitting the evidence was legal error under Georgia law. Pet’r’s Reply 46, ECF No. 46. In his state habeas petition, Griffin told the state habeas court that he was raising the same claim he previously presented to the Georgia Supreme Court. Resp’t’s Ex. 1 at 9, Doc. 7-1. Thus, it was reasonable for the state habeas court to assume that Griffin was raising the same claim he raised before the Georgia Supreme Court. His post-hearing brief would not have changed the court’s perception of the claim. Griffin did not argue that the admission of the evidence denied him the due process of law guaranteed by the Fourteenth Amendment and resulted in a fundamentally unfair trial. “The only cases [Griffin] cited in the discussion of the issue [were Georgia] . . . cases that make no mention of the United States Constitution and cite no federal cases.” *Ziegler v. Crosby*, 345 F.3d 1300, 1307 n.5 (11th Cir. 2003). Given this, the Court fails to see how Griffin apprised the state habeas court of his claim that he was denied the due process of law guaranteed by the Fourteenth Amendment.¹

¹ The Court notes that the final adjudication for claims raised during state habeas comes from the Georgia Supreme Court when it addresses a petitioner’s CPC application. *Wilson v. Warden*, 834 F.3d 1227, 1232-35 (11th Cir. 2016). In his CPC application, Griffin again argued that the similar transaction evidence should have been excluded because it “was of a charge, not a conviction, and its prejudicial impact far outweighed its relevance.” Pet’r’s Status Update Ex. 5 at 10, ECF No. 29-5. He did not cite the Fourteenth Amendment or allege that his due process rights had been violated. Thus, he did not apprise the Georgia Supreme Court of his Fourteenth Amendment due process claim. This Court presumes that the Georgia Supreme Court, like the state habeas court, read Griffin’s claim to be one of legal error for admitting the similar transaction evidence and denied relief on the basis of res judicata, just as the state habeas court had. See *Wilson*, 834 F.3d at 1235.

Also, had Griffin first raised a Fourteenth Amendment due process challenge in the state habeas court—as he now argues he did—the state habeas court would have found the claim procedurally barred. In Georgia, if a claim could have been raised on direct appeal, a state habeas petitioner is barred, absent a showing of cause and prejudice or fundamental miscarriage of justice, from raising the claim during his habeas proceedings. *Turpin*, 268 Ga. at 824.

ii. *The Court should treat the unexhausted due process claim as procedurally defaulted.*

In many instances, unexhausted claims can be found to be procedurally defaulted. “[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 those claims now barred by state law as no basis for federal habeas relief.” *Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998).

Griffin argues this rule does not apply in this case because a state court would not deem his federal due process claim successive in a second petition, “due to the intervening change in Georgia evidence law.” Pet’r’s Reply 9. This change in the law, according to Griffin, is Georgia’s adoption of the federal rules of evidence, effective January 1, 2013, which eliminated “bent of mind” and “course of conduct” as permissible exceptions to the bar on admitting similar transactions evidence. Am. Pet. 12; Pet’r’s Reply 9. Griffin acknowledges that the new evidentiary rule is not a substantive change in the law, and it would not be applied retroactively to his case. Am. Pet. 13; Pet’r’s Reply 10. He argues, instead, that the change in the law makes “his due process

argument more apparent and more viable in state courts.” Pet’r’s Reply 10-11.

Pursuant to O.C.G.A. § 9-14-51, any issue not raised in a first state habeas petition is waived unless the issue “could not have been raised in the original or amended petition.” O.C.G.A. § 9-14-51. While the change in the Georgia’s evidence law might arguably benefit or improve Griffin’s federal due process argument, he was not precluded from raising a due process argument prior to the adoption of the new law. Nothing prevented Griffin from raising a federal due process claim in his first state habeas petition, or in his direct appeal, which is where the claim should have been raised. Because Griffin would be barred from raising a federal due process claim in state court, this Court can treat the unexhausted claim as procedurally defaulted.

iii. There has been no waiver of the procedural default defense.

Griffin argues that “[t]he Respondent has waived procedural default as to the Georgia habeas court’s actual dismissal of Griffin’s due process claim.” Pet’r’s Reply 11. He states “[t]he state habeas court dismissed Griffin’s due process claim based on res judicata, but the Respondent does not argue that this dismissal resulted in a procedural default.” *Id.* at 12. Therefore, according to Griffin, the Respondent has waived a procedural default defense. “Because it did not assert in either of its responses that the state habeas court’s dismissal of Griffin’s exhausted due process claim bars federal consideration of the claim, Respondent has waived this arguable procedural default defense” *Id.* at 12-13.

This argument fails to two reasons. First, Griffin never raised a federal due process claim on direct appeal or during state habeas and, therefore, the state habeas court

did not find his federal due process claim was res judicata. On direct appeal, Griffin argued that admitting the similar transaction evidence was legal error under Georgia law. *Id.* at 6. Before the state habeas court, he again claimed a state law evidentiary violation and informed the court that his “similar transaction error claim” had been raised previously. Resp’t’s Ex. 1 at 9, Doc. 7-1. The state habeas court found this claim of legal error under Georgia law was barred by res judicata.

Second, had Griffin raised a due process claim before the Georgia Supreme Court, which he admits he did not do, and had the state habeas court later found the claim res judicata, there would be no “arguable procedural default defense” for Respondent to raise. Pet’r’s Reply 13. Controlling Supreme Court precedent holds that “[w]hen a state court declines to review the merits of a petitioner’s claim on the ground that it has done so already, it creates no bar to federal habeas review. *Cone v. Bell*, 556 U.S. 449, 466 (2009); *Wellons v. Hall*, 558 U.S. 220, 222 (2010). Had Griffin raised his due process claim before the Georgia Supreme Court, this Court would review the claim based on that court’s findings regardless of any subsequent res judicata determination. This, however, is not the situation in which Griffin finds himself because his due process claim was not raised on direct appeal.

iv. *Griffin cannot show cause and prejudice to overcome procedural default and, even assuming he could, his claim nonetheless fails.*

Griffin argues that he can demonstrate cause and prejudice to overcome the procedural default of his due process claim. He alleges that Georgia’s adoption of the federal rules of evidence was a “landmark change in Georgia’s collateral evidence rule”

and his lack of access to the law library impeded his ability to “develop[] a due process argument incorporating the change in Georgia evidence law.” Pet’r’s Reply 15; Hr’g Tr. 13-16, Feb. 21, 2017, ECF No. 53. While the change in Georgia’s evidence law was new, the due process fundamental fairness test was not. *Dowling v. United States*, 439 U.S. 342, 352-53 (1990). Nothing prevented Griffin from raising his Fourteenth Amendment due process argument on direct appeal—where he was represented by counsel. Nothing prevented him from raising his Fourteenth Amendment due process argument during his state habeas proceedings. He may not have been able to raise Georgia’s new evidence law as an argument in support of this claim, but he could have made the claim. Griffin has, therefore, failed to show cause to excuse his procedural default.

Respondent states that Griffin cannot show prejudice to overcome the default because his due process claim does not state a basis for federal habeas relief. Br. in Supp. of Resp’t’s Suppl. Answer-Resp. 11, ECF No. 41-1. Respondent argues that there is no clearly established federal law directly on point and/or Griffin’s claim is barred by *Teague v. Lane*, 489 U.S. 299 (1989). Br. in Supp. of Resp’t’s Suppl. Answer-Resp. 11. Griffin states that he is not advocating for the retroactive application of Georgia’s new evidentiary rule. Instead, he argues the clearly established federal law is the basic “fundamental fairness” rule from *Dowling*: Due process bars evidence so unfairly prejudicial that it results in a fundamentally unfair trial. 439 U.S. at 352-53.

Assuming Griffin is correct, his claim still fails. He has not shown a reasonable probability of a different outcome had his Fourteenth Amendment due process claim been

presented to the state courts. The Court finds that even if Griffin had exhausted his due process claim, the admission of the similar transaction evidence in his case did not render his trial fundamentally unfair.

Griffin acknowledges that the admission of similar transaction evidence was upheld in *Dowling*. Pet'r's Reply 16. He argues that, unlike the situation in *Dowling* where similar transaction evidence was relevant to establish the identity of the perpetrator, identity was not an issue in his case and the similar transaction evidence was relevant only "to show his propensity to use guns." *Id.* at 17. While identity was not an issue in Griffin's case, intent was an issue. Resp't's Ex. 4d at 136, ECF No. 7-11. (Griffin's trial counsel argued that the State had to prove Griffin "intended for Dontavious Bunkley to kill and murder Tony Gray" when Griffin gave Bunkley the gun.). Knowledge was also an issue. *Id.* (Griffin's trial counsel argued that the State had to prove that Griffin "knew [Bunkley] was going to kill [Gray]."). Even with the change in Georgia's evidence law, evidence of "other crimes, wrongs, or acts" is still admissible to prove intent and knowledge. O.C.G.A. § 24-4-404(b).

Because the similar transaction evidence helped establish both intent and knowledge, it, just as the similar transaction evidence in *Dowling*, "was at least circumstantially valuable in proving [Griffin's] guilt." *Dowling*, 493 U.S. at 353. Also, on at least three separate occasions, the trial court gave the jurors a limiting instruction regarding the similar transaction evidence. In light of this, the Court cannot find that the introduction of the similar transaction testimony "so infused the trial with unfairness as to deny due process of law." *Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284, 1295

(11th Cir. 2014) (quoting *Lisenba v. California*, 314 U.S. 219, 228 (1941)).

For the foregoing reasons, it is recommended that this claim be denied.

B. Remaining Claims

In his original federal habeas petition, Griffin raised six additional claims: (1) ineffective assistance of appellate counsel for failure to raise claims on direct appeal; (2) ineffective assistance of trial counsel for failing to file a motion to sever Griffin's trial from that of his co-defendant; (3) ineffective assistance of trial counsel for failing to object to a key State's witness being present in the courtroom prior to testify; (4) trial court error for allowing a State's key witness to be present in the courtroom prior to testifying; (5) ineffective assistance of trial counsel for failing to object to the prosecutor's remarks; and (6) prosecutorial misconduct. Pet. 3. The state habeas court denied relief for Griffin's claim of ineffective assistance of appellate counsel (number one shown above) on the merits, and found the remaining claims were procedurally defaulted because Griffin did not raise them on direct appeal and he failed to show cause and prejudice or a fundamental miscarriage of justice to overcome default. Pet'r's Status Update Ex. at 4-13, ECF No. 29-3. The Georgia Supreme Court summarily denied relief, finding Griffin's CPC application lacked "arguable merit." *Wilson*, 834 F.3d at 1233 (citations omitted).

In his amended petition, Griffin's counsel acknowledges these claims "are not cognizable in this petition, either because they were procedurally defaulted without cause, or because trial counsel's problematic performance was not so deficient as to be constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). During

the evidentiary hearing, counsel affirmed that he was raising only the Fourteenth Amendment due process claim surrounding the similar transaction evidence. Hr'g Tr. 3-4. Given this, it is recommended that all remaining claims be denied.

II. Certificate of Appealability

Rule 11(a) of Rules Governing Section 2254 Cases in the United States District Courts provides that “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” A certificate of appealability may issue only if the applicant makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a court denies a habeas petition on procedural grounds without reaching the merits of the petitioner’s application for habeas relief, this standard requires a petitioner to demonstrate that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Petitioner cannot meet this standard and, therefore, a certificate of appealability in this case should be denied.

CONCLUSION

For the reasons described above, it is recommended that Petitioner’s petition for writ of habeas corpus be denied. 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 hereof. 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 hereby 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 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 March, 2017.

/s/ Stephen Hyles

UNITED STATES MAGISTRATE JUDGE

APPENDIX D

Griffin's Brief on Direct Appeal to the Supreme Court of Georgia, Appeal No.
S10A1766

Griffin v. Warden, et al

IN THE SUPREME COURT FOR
THE STATE OF GEORGIA

JEFFERY JEROD GRIFFIN,
Appellant,

vs.

STATE OF GEORGIA,
Appellee.

*

*

* Appeal Case No.: S10A1766

*

* Date of Docketing: July 15, 2010

*

*

BRIEF OF APPELLANT

Prepared by:

William J. Mason
Attorney for Appellant
Georgia State Bar No.: 475690
18 Ninth Street, Suite 101
Post Office Box 1011
Columbus, Georgia 31902-1011
Phone: 706-323-6220
Facsimile: 706-323-8863

Jeffery Jerod Griffin
GDC# 1196338
Telfair State Prison
Post Office Box 549
Helena, Georgia 31037

1448

Blumberg No. 5194
RESPONDENT
EXHIBIT
3

IN THE SUPREME COURT FOR
THE STATE OF GEORGIA

JEFFERY JEROD GRIFFIN,
Appellant,

vs.

STATE OF GEORGIA,
Appellee.

*
*
* Appeal Case No.: S10A1766
*
* Date of Docketing: July 15, 2010
*
*

BRIEF OF APPELLANT

Jurisdiction

The Supreme Court has jurisdiction of this matter as it involves a conviction for murder.

Statement of Case

The appellant and a co-defendant were indicted in a four count indictment (R11) charging malice murder, felony murder, aggravated assault and possession of a firearm during the commission of a crime. On July 15, 2005 appellant was convicted of felony murder and possession of a firearm during the commission of a crime and sentenced to life

in the penitentiary. (R101) A motion for new trial was filed on July 19, 2005 (R106), amended on August 10, 2009 (R122) and denied on April 21, 2010. (R131) A notice of appeal (R1) was filed and this case was docketed on July 15, 2010 and is submitted for appeal by Brief.

Relevant facts are that the appellant and co-defendant Dontavious Bunkley were involved in an altercation with the victim, Antonio Gray on November 17, 2004. Multiple witnesses confirmed that Gray threw the first punch and struck co-defendant Bunkley. (T210/6) The appellant went to a car and got a pistol and gave it to Bunkley. (T254/14) Co-defendant Bunkley shot and killed Tony Gray. (T161/24)

The appellant was tried as a party to the crime and evidence of an alleged similar transaction was entered against him. The State filed a notice of their intent to present similar transaction and following a hearing and prior to the beginning of trial the Court ruled that they would be admissible during the trial of the case. (T95/21) It is the admission of this similar transaction against the appellant that forms the sole enumeration of error and will be addressed in the body of the Brief.

Enumeration of Errors

1. The trial court erred in admitting evidence of the alleged similar transaction evidence against the appellant.

Argument and Citation of Authority

1. The trial court erred in admitting evidence of the alleged similar transaction evidence against the appellant.

The standard of review is whether the Court abused its discretion in admitting the evidence of similar transaction. Error was preserved by objecting to the admission of the evidence during the motion hearing held on July 11, 2005. (Motions Transcript 45/2)

The State's motion seeks admission of the similar transaction for the purpose of showing the defendant's intent, bent of mind, modus operandi, and course of conduct. (R68) In its proffer to the Court at the motion hearing the State said that it would introduce evidence that defendant Griffin provided a pistol to William Lockett who then pointed the

firearm at others. (Motions Transcript 34/18) The State proffered that the incident occurred on July 9, 2004 less than a block from where the murder occurred on November 17, 2004. (Motions Transcript 35/16) Lockett pointed a shotgun at a crowd of people who ran. When the shotgun did not work Lockett supposedly obtained a pistol from Griffin and then pursued the object of his assault, one Nicholas Talton. (Motions Transcript 37/3) Multiple gunshots were fired but no one was injured. (Motions Transcript 37/18)

After the hearing the Court reserved ruling but eventually after jury selection ruled in open court that the similar transaction could be introduced during the murder trial. (T95/21) The Court did not state the reason for its ruling.

At trial the similar transaction evidence consisted of the testimony of witness Xavier Talton. On the July, 2004 day in question Lockett got into an argument with an individual named Nicholas Townsend and began waving a shotgun around. (T265/1) Lockett then tried to shoot Townsend but the gun jammed. (T265/10) Lockett met up with appellant Griffin and they exchanged guns. (T265/22) Talton does not know what kind of gun Griffin gave Lockett. (T266/19)

Witness Wylanda Harpe stated she heard Lockett ask Griffin to give him a gun but never did see a weapon. (T572/19)

Similar transaction witness Draper Woodard saw Griffin and Lockett together and Lockett had a shotgun. (T581/20) He heard Lockett tell Griffin to give him "the .45". (T583/3)

During the motion hearing prior to trial the Court indicated that the similar transaction evidence did not deal so much with motive as the fact that it was so close in time to the offense for which Mr. Griffin was on trial. (Motions Transcript 44/2)

During its closing argument to the jury the State argued that the similar transaction evidence showed Griffin's intent and bent of mind and course of conduct to provide "another firearm for a shooting down in the bottoms." (T901/18)

In Wade v. State, 295 Ga. App. 45 (2008), the Court of Appeals cited a concurring opinion from Justice Sears in Farley v. State, 265 Ga. 622 (1995) that "bent of mind is dangerously close to being his character, and a person's course of conduct could easily show nothing more than a mere propensity to act in a certain manner." Neither character

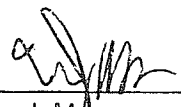
1473

nor propensity is a valid basis for admitting similar transaction evidence. The defendant was on trial for a charge of murder arising from his decision to provide a friend of his with a weapon to defend himself against an attack from an unarmed aggressor. Evidence that the defendant aligned himself with an individual in the past that aggressively pursued a violent course of conduct against someone is not probative of any issue of intent in the present case. While both instances involved the furnishing of a firearm the underlying facts were polar opposite. Identity was not an issue in this case. It cannot be said that there was sufficient similarity between the independent offense and the charged crime so the proof of the former tends to prove the latter, a requirement of Uniform Superior Court Rule 31.1(B). Morales v. State, 210 Ga. App. 414 (1993)

The similar transaction evidence only consisted of a showing that the defendant had a propensity to be around people who used firearms for criminal purposes. That is not indicative of motive, bent of mind or modus operandi. The trial Court erred in admitting the similar transaction evidence and the appellant should be afforded a new trial.

(Signature on following page.)

This 4 day of August, 2010.



William J. Mason
Attorney for Appellant
Georgia State Bar No.: 475690

18 Ninth Street, Suite 101
Post Office Box 1011
Columbus, Georgia 31902-1011
Phone: 706-323-6220
Facsimile: 706-323-8863

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing document upon the individual listed below by hand delivery or depositing a copy in the United States mail with proper postage affixed thereon and addressed as follows:

Ms. Jennifer Dunlap
District Attorney's Office
Post Office Box 1340
Columbus, Georgia 31902-1340

Mr. Thurbert E. Baker
Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334-1300

This 4 day of August, 2010.



William J. Mason
Attorney for Appellant

1475

IN THE SUPREME COURT FOR
THE STATE OF GEORGIA

JEFFERY JEROD GRIFFIN,
Appellant,

vs.

STATE OF GEORGIA,
Appellee.

*

*

* Appeal Case No.: S10A1766

*

* Date of Docketing: July 15, 2010

*

*

ENUMERATION OF ERRORS

1. The trial court erred in admitting evidence of the alleged similar transaction evidence against the appellant.

This 4 day of August, 2010.



William J. Mason
Attorney for Appellant
Georgia State Bar No.: 475690

18 Ninth Street, Suite 101
Post Office Box 1011
Columbus, Georgia 31902-1011
Phone: 706-323-6220
Facsimile: 706-323-8863

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Mr. Thurbert E. Baker
Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334-1300

This 4 day of August, 2010.



William J. Mason
Attorney for Appellant

STATE OF GEORGIA

COUNTY OF DODGE

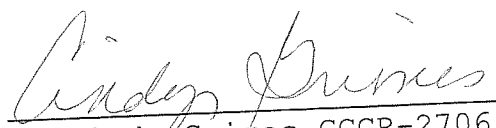
C E R T I F I C A T E

I, CINDY GRIMES, CERTIFIED COURT REPORTER, do hereby certify that the foregoing pages were taken down by me and reduced to typewritten page and constitute a true, accurate, and complete transcript of said proceeding.

This certification is expressly withdrawn and denied upon the disassembly or photocopying of the foregoing transcript, or any part thereof, including exhibits, unless said disassembly or photocopying is done by the undersigned court reporter and the original seal and signature is attached thereto.

I further certify that I am not of kin nor counsel to any of the parties in the case; am not in the regular employ of counsel for any of said parties; nor am I anyway interested in the result or outcome thereof.

WITNESS MY HAND AND OFFICIAL SEAL, this 7TH day of September, 2012.


Cindy Grimes GCCR-2706

(SEAL)

APPENDIX E

Opinion by the Supreme Court of Georgia in *Griffin v. State*, 288 Ga. 833 (March 18, 2011)

Griffin v. Warden, et al

In the Supreme Court of Georgia

Decided: March 18, 2011

S10A1766. GRIFFIN v. THE STATE.

HINES, Justice.

Jeffery Jerod Griffin appeals his convictions for felony murder and possession of a firearm during the commission of a crime, in connection with the death of Antonio Gray.¹

Construed to support the verdicts, the evidence showed that Gray believed Dontavious R. Bunkley had burglarized the home of Gray's grandmother, and confronted him. Gray and Bunkley engaged in a physical altercation, which was stopped by bystanders. Griffin went to his car and retrieved a pistol, gave it to Bunkley, and said, "handle your business." Gray

¹ The crimes occurred on November 17, 2004. On February 15, 2005, a Taylor County grand jury indicted Griffin and Dontavious R. Bunkley for malice murder, felony murder while in the commission of aggravated assault, aggravated assault, and possession of a firearm during the commission of a crime. The two men were tried together before a jury July 12-15, 2005, and both were found not guilty of malice murder, and guilty of all other charges in the indictment. On July 15, 2005, the trial court sentenced Griffin to life in prison for felony murder and a consecutive term of five years in prison for possession of a firearm during the commission of a crime; the guilty verdict for the crime of aggravated assault merged with the crime of felony murder. *Malcolm v. State*, 263 Ga. 369, 372-374 (4) (434 SE2d 479) (1993). On July 19, 2005, Griffin filed a motion for a new trial, which he amended on August 10, 2009; the motion was denied on April 21, 2010. Griffin filed a notice of appeal on April 23, 2010, his appeal was docketed in the September 2010 term of this Court, and submitted for decision on the briefs.

began to run away, and Bunkley fatally shot him.

1. The evidence was sufficient to enable a rational trier of fact to find Griffin guilty beyond a reasonable doubt of the crimes of which he was convicted. *Jackson v. Virginia*, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. The State was permitted to introduce evidence that, four months prior to Gray's death, at an outdoor gathering, William Lockett and a man named Nicholas argued. Lockett departed the gathering, and returned with Griffin; Lockett was carrying a shotgun, with which he attempted to shoot Nicholas. The shotgun did not fire, and Lockett told Draper Woodard that he would "get him too." Griffin produced a pistol and gave it to Lockett in exchange for the shotgun; carrying the pistol, Lockett ran after the other men and fired some shots. Griffin contends that this evidence was not introduced for a proper purpose, and was not sufficiently similar to the crimes of which he was charged.

A trial court's decision to admit evidence of similar transactions will be upheld unless there has been an abuse of the trial court's discretion. *Moore v. State*, 288 Ga. 187, 190 (3) (702 SE2d 176) (2010).

Similar transaction evidence must satisfy three elements to be admitted: (1) the evidence must be introduced for a proper purpose; (2) the evidence must establish by a preponderance of the evidence that the defendant perpetrated the similar transaction; and (3) the two transactions must be sufficiently similar or connected so that the existence of the former transaction tends to prove the latter transaction. [Cits.]

Bryant v. State, 282 Ga. 631, 634 (3) (651 SE2d 718) (2007).

When the evidence was admitted, the trial court instructed the jury that it could be used for the limited purpose of showing “course of conduct, bent of mind, or knowledge or intent of the defendant with respect to the acts allegedly committed by him . . . ,” and not for any other purpose.² Such are proper purposes, see *Barnes v. State*, 287 Ga. 423, 426 (3) (696 SE2d 629) (2010), and Griffin was identified in court as the one who gave Lockett the pistol in the prior incident. See *McKenzie v. State*, 274 Ga. 151 (3) (549 SE2d 337) (2001). “When considering the admissibility of similar transaction evidence, the proper focus is on the similarities, not the differences, between the separate [transaction] and the crime in question.” *Phillips v. State*, 287 Ga. 560, 564 (4) (697 SE2d 818) (2010) (Citation and punctuation omitted.). In both instances, Griffin, provided a pistol to one

² This instruction was repeated in the final jury charge.

who was involved in an altercation, and that person used it to fire at another.

And, the evidence was probative of the fact that Griffin intended the result that Bunkley shoot at the person who had offended him, as Lockett had done in the earlier instance. There was no abuse of discretion in admitting the challenged evidence.

Judgments affirmed. All the Justices concur.

APPENDIX F

Griffin's Application for Writ of Habeas Corpus filed in the Superior Court of Telfair
County, Georgia, Civil Action Case No.: 11-CV-264

Griffin v. Warden, et al

IN THE SUPERIOR COURT OF TELEAIR COUNTY
STATE OF GEORGIA

JEFFERY J GRIFFIN,
Petitioner
1196338,
Inmate Number

Civil Action No. 11-CV-264

DAVID FRAEZER,
Warden
Telfair State Prison,
Respondent
(Name of Institution where you are now located)

Habeas Corpus

FILED IN OFFICE
CLERK SUPERIOR COURT
TELEAIR COUNTY, GA

JUL 22 2011

Rene Johnson

APPLICATION FOR WRIT OF HABEAS CORPUS

PART I: BACKGROUND INFORMATION ON YOUR CONVICTION

1. Name, county, and court which entered the judgment of conviction under attack:

Superior Court of Taylor County, Case No: 05-CR-020

2. Date of conviction: July 15, 2005

(Please Note: O.G.C.A. § 9-14-42(c) mandates that applications for writ of habeas corpus must be filed within a certain time. Please see Instructions (7) for more information.)

3. Length of sentence(s): Life Plus 5 Years

4. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? ☒ Yes ☐ No

5. Name of offense(s). List all counts: Felony Murder, Aggravated Assault and Possession of A Firearm During The Commission of a crime.

6. What was your plea? Please check one:

- ☐ Guilty
☐ Guilty but mentally ill
☐ Nolo contendere
☒ Not guilty

If you entered a guilty plea to one count or indictment, and a not guilty or nolo contendere plea to another count or indictment, give details: N/A

7. Kind of trial. Please check one:

- ☒ Jury
☐ Judge only

8. Did you testify at the trial? ☐ Yes ☒ No

9. Did you appeal from the conviction? ☒ Yes ☐ No

10. If you did appeal, answer the following:

Name of appellate court to which you appealed: Georgia Supreme Court S10A1746

Result of appeal: Conviction Affirmed

Date of result: March 18, 2011

11. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this conviction in any state or federal court?

☒ Yes

☐ No

12. If you answer to 11 was "Yes," give the following information: (Note: If more than three petitions, please use a separate sheet of paper and use the same format to list them.)

A. Name of court and case number: Superior Court of Taylor County, 05-LR-020

What kind of case or action was this? Motion For New Trial

All grounds raised (attach extra sheet of paper if necessary): Similar Transaction error

Did a judge hear the case? ☒ Yes ☐ No Did witnesses testify? ☐ Yes ☒ No

Name of Judge: Bobby G. Peters

Result: Denied

Date of Result: March 23, 2010

B. As to any second petition, application or motion, give the same information.

Name of court and case number: N/A

What kind of case or action was this? N/A

All grounds raised (attach extra sheet of paper if necessary): N/A

Did a judge hear the case? ☐ Yes ☒ No Did witnesses testify? ☐ Yes ☒ No

Name of Judge: N/A

Result: N/A

Date of Result: N/A

C. As to any third petition, application or motion, give the same information.

Name of court and case number: N/A

What kind of case or action was this? N/A

All grounds raised (attach extra sheet of paper if necessary): N/A

Did a judge hear the case? ☐ Yes ☒ No Did witnesses testify? ☐ Yes ☒ No

Name of Judge: N/A

Result: N/A

Date of Result: N/A

D. Did you appeal to the Georgia Supreme Court or the Georgia Court of Appeals from the result taken on any petition, application, or motion listed above?

First petition, application or motion: ☒ Yes ☐ No

Second petition, application or motion: ☐ Yes ☐ No

Third petition, application or motion: ☐ Yes ☐ No

E. If you did not appeal from the denial of relief on any petition, application or motion, explain briefly why you did not: By the time I was notified of the Supreme Court's decision the time to file in the Eleventh Circuit had expired.

F. If you appealed to the highest state court having jurisdiction, did you file a petition for certiorari in the United States Supreme Court to review the denial of your petition by the Georgia Supreme Court or the Georgia Court of Appeals? ☐ Yes ☒ No

13. Do you have any petition or appeal now pending in any court, either state or federal, as to the conviction under attack? ☐ Yes ☒ No

14. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

At preliminary hearing: Mark A Casto, Attorney At Law, 18 9th Street, Columbus, Ga. 31901.

At arraignment and plea: Mark A Casto, Attorney At Law, 18 9th Street, Columbus, Ga. 31901.

At trial: Mark A Casto, Attorney At Law, 18 9th Street, Columbus, Ga. 31901.

At sentencing: Mark A Casto, Attorney At Law, 18 9th Street, Columbus, Ga. 31901.

On appeal: William J Mason, Attorney At Law, P.O. Box 2011 Columbus, Ga. 31902-1011.

In any post-conviction proceeding: William J. Mason, Attorney At Law, P.O. Box 2011 Columbus, Ga. 31902-1011.

On appeal from any adverse ruling in a post-conviction proceeding: William J Mason, Attorney At Law, P.O. Box 2011 Columbus, Ga. 31902-1011.

15. Do you have any other sentence, either state or federal, to serve after you complete the sentence imposed by the conviction under attack? ☐ Yes ☒ No

If so, give the name and location of the court(s) which impose any other sentence:

N/A

"

State the date and length of any other sentence to be served: N/A

"

Have you filed, or do you contemplate filing, any petition attacking the judgment(s) which imposed any other sentence? ☐ Yes ☒ No

PART II: STATEMENT OF YOUR CLAIMS

State concisely every ground on which you no claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. In necessary, you may attach pages stating additional grounds and facts supporting the same.

1.

GROUND ONE: Ineffective Assistance of Appellate Counsel - Appellate Counsel Failed In The Performance of His Duties.

SUPPORTING FACTS. (Tell your story briefly without citing cases or law): Appellate Counsel rendered ineffective assistance by failing to raise the meritorious claims herein listed on direct appeal.

2.

GROUND TWO: Ineffective Assistance of Counsel - Trial Counsel Failed In The Performance of His Duties.

SUPPORTING FACTS. (Tell your story briefly without citing cases or law): Trial Counsel rendered ineffective assistance by failing to file a motion for severance of Trial from the co-defendant, thus denying the petitioner a fair trial.

3.

GROUND THREE: Ineffective Assistance of Counsel - Trial Counsel Failed In The Performance of His Duties.

SUPPORTING FACTS. (Tell your story briefly without citing cases or law): Trial Counsel rendered ineffective assistance by failing to object to the Key State's witness being present in the Courtroom prior to testifying.

4.

GROUND FOUR: Judicial Error - The Trial Court Erred By Allowing

A State's Witness To Be Present In The Courtroom Prior To Testifying

SUPPORTING FACTS. (Tell your story briefly without citing cases or law): The Trial Court erred in allowing G.B.I Agent Brunner to be present in the Courtroom after the rule of sequestration had been invoked. This key witness was then able to bolster and color the testimony of another state's key witness.

See Attachment A For Additional Grounds

ATTACHMENT A

GROUND FIVE: Ineffective Assistance of Counsel- Trial Counsel Failed In The Performance of His Duties.

SUPPORTING FACTS: Trial Counsel failed to object to prejudicial remarks made by the Prosecutor, thus denying the Petitioner A fair trial.

GROUND SIX: Judicial Error- The Trial Court Erred By Allowing Similar Transaction Evidence To Be Presented.

SUPPORTING FACTS: The Trial Court erred by allowing the State to present similar transaction evidence of an alleged crime that occurred four months prior to this crime, The trial Court abused its discretion in allowing the evidence to be presented to the jury.

GROUND SEVEN: Prosecutorial Misconduct- The Prosecutor ASSASINATED The Petitioner's Character.

SUPPORTING FACTS: The Prosecutor called the Petitioner a "killer" in his closing argument and also said that even if the Petitioner did not know his co-defendant was going to shoot the gun its still felony murder on the petitioner behalf, thus denying the petitioner a fair trial.

PART III: OTHER CLAIMS NOT PRESENTED TO A COURT BEFORE THIS

If any of the grounds listed in PART II were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

All of the claims herein listed, except for the similar transaction
error claim, have not been previously raised due to the
ineffective assistance of appellate counsel.

The Petitioner Reserves The Right To Amend.

Wherefore, petitioner prays that the Court grant relief to which the petitioner may be entitled in this proceeding.

Jeffery Smith
Felton State Prison

7-22-11
Date

P.O. Box 549 Helen Ga. 31037
Signature and Address of Petitioner's
Attorney (if any attorney)

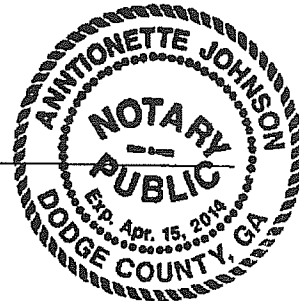
I declare (or certify, verify, or state) under penalty of perjury that the foregoing statements made in this Application for Writ of Habeas Corpus are true and correct.

Executed on 7-12-11
Date

Jeffery Smith
Signature of Petitioner

Sworn to and subscribed before me this
12 day of July, 20 11.

[Signature]
Notary Public or Other Person Authorized to Administer Oaths



Please note that under O.C.G.A. § 91-4-5 service of a petition on habeas corpus shall be made upon the person having custody of the petitioner. If you are being detained under the custody of the Georgia Department of Corrections, an additional copy of the petition must be served on the Attorney General of Georgia. If you are being detained under the custody of some authority other than the Georgia Department of Corrections, an additional copy of the petition must be served upon the district attorney of the county in which the petition is filed. Service upon the Attorney General or the district attorney may be had by mailing a copy of the petition and a proper certificate of service.

IN THE SUPERIOR COURT OF TELEAIR COUNTY
STATE OF GEORGIA

JEFFERY J GRIFFIN,
Petitioner
1196338,
Inmate Number

Civil Action No. 11-CV-264

DAVID FRAIZER,
Warden
Telfair State Prison,
Respondent
(Name of Institution where you are now located)

Habeas Corpus

FILED IN OFFICE
CLERK SUPERIOR COURT
TELEAIR COUNTY, GA

JUL 22 2011

Rene Johnson

REQUEST TO PROCEED IN FORMA PAUPERIS

I, Jeffery J Griffin, depose and say that I am the plaintiff in the above entitled case; that in support of my request to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below are true.

1. List any and all aliases by which you are known: CRACK

2. Are you presently employed? ☐ Yes ☒ No

If the answer is "Yes," state the amount of your salary or wages per month, and give the name and address of your employer: N/A

If the answer is "No," state the date of last employment and the amount of the salary and wages per month which you received: N/A

2. Have you received within the past twelve months any money from any of the following sources?

Business, profession, or form of self-employment? ☐ Yes ☒ No

Pensions, annuities, or life insurance payments? ☐ Yes ☒ No

Rent payments, interest or dividends? ☐ Yes ☒ No

Gifts or inheritances?

☐ Yes

☒ No

Any other sources?

☐ Yes

☒ No

If the answer to any of the above is "Yes," describe each source of money and state the amount received from each source during the past twelve months: N/A

//

//

3. Do you own any cash, or do you have money in a checking or savings account? (Include any funds in prison accounts): ☐ Yes ☒ No

If the answer is "Yes," state the total value of the items owned: N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? ☐ Yes ☐ No

If the answer is "Yes," describe the property and state its approximate value: N/A

//

//

5. List the persons who are dependant upon you for financial support, state your relationship to those persons, and indicate how you contribute toward their support: N/A

//

//

//

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury and that state law provides as follows:

- a. A person to whom a lawful oath or affirmation has been administered commits the offense of perjury when, in a judicial proceeding, he knowingly and willfully makes a false statement material to the issue on point in question
- b. A person convicted of the offense of perjury shall be punished by a fine of not more than \$1,000 or by imprisonment for not less than one nor more than ten years, or both. O.G.C.A. § 16-10-70.

Jeffery Smith
Signature of Petitioner

7-12-11
Date

VERIFICATION

I, Jeffery J Griffin, do swear and affirm under penalty of law that the statements contained in this affidavit are true. I further attest that this application for in forma pauperis status is not presented to harass or to cause unnecessary delay or needless increase in the costs of litigation.

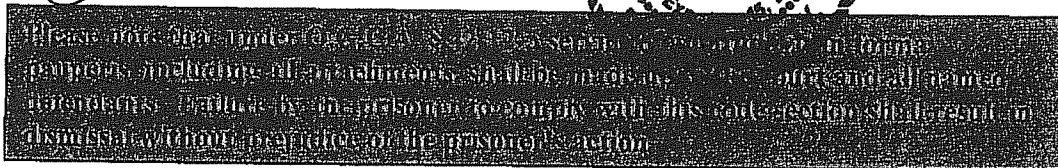
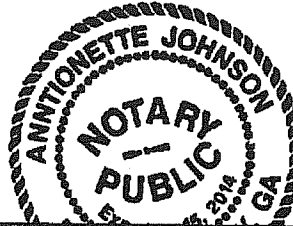
I am the plaintiff in this action and know the content of the above Request to Proceed in Forma Pauperis. I verify that the answers I have given are true of my own knowledge, except as to those matters that are stated in it on my information and belief, and as to those matters I believe them to be true. I have read the perjury statute set out above and am aware of the penalties for giving any false information on this form.

Jeffery Griffin
Signature of Affiant Petitioner

7-12-11
Date

Sworn to and subscribed before me this
12 day of July, 20 11.

[Signature]
Notary Public or Other Person Authorized to Administer Oaths



THIS FORM IS TO BE COMPLETED ONLY BY AN AUTHORIZED INDIVIDUAL AT THE INSTITUTION WHERE THE INMATE PLAINTIFF IS PRESENTLY INCARCERATED, OR HIS/HER DESIGNEE

CERTIFICATION

I hereby certify that the Plaintiff herein, Griffin Jeffery # 196338
has an average monthly balance for the last twelve (12) months of \$ 25.94 on account at
the Telfair State Prison 210 Longbridge Rd
Helena, S. 31037 institution where confined. (If not confined for a full
twelve (12) months, specify the number of months confined. Then compute the average monthly balance
on that number of months.)

I further certify that Plaintiff likewise has the following securities according to the records of said
institution: _____

A. Bedd
Authorized Officer of Institution

7/6/2011
Date

NOTE: Please attach a copy of the prisoner's inmate account of the last 12 months, or the period of incarceration (whichever is less).

APPENDIX G

Transcript of the February 27, 2012 Evidentiary Hearing filed in the Superior Court
of Telfair County, Georgia, Civil Action Case No.: 11-CV-264

Griffin v. Warden, et al

IN THE SUPERIOR COURT OF TELFAIR COUNTY, GEORGIA

JEFFERY J. GRIFFIN : 11-CV-264
1196338 :
PETITIONER : PETITION FOR WRIT OF
VS. : HABEAS CORPUS

DAVID FRAZIER, WARDEN :
TELFAR STATE PRISON :
RESPONDENT :

APPEARANCE OF COUNSEL:

FOR THE PETITIONER: PRO SE

FOR THE RESPONDENT: MATTHEW CROWDER, S.A.A.G.
1111 BELLEVUE AVENUE
DUBLIN, GEORGIA

EVIDENTIARY HEARING
(VOLUME 1 OF 5)
(PAGES 1-350)
FEBRUARY 27, 2012
JUDGE PHILLIP R. WEST, PRESIDING

Cindy Grimes
GCCR-2706
123 Rozar Goolsby Road
Eastman, Georgia 31023



I N D E X

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WILLIAM J. MASON

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P R O C E E D I N G

1
2 THE COURT: Have a seat, Mr. Griffin. You are
3 Jeffery Griffin; is that correct?

4 PETITIONER GRIFFIN: Yes, sir.

5 THE COURT: We are here today to have your
6 evidentiary hearing on your habeas petition. You will
7 be allowed to testify under oath if you choose to do
8 so. You will also be allowed to call any witnesses
9 that you might have. You will also be allowed to
10 present any relevant documentary evidence that you
11 might have at your disposal. Do you understand what
12 you can do today in terms of offering evidence?

13 PETITIONER GRIFFIN: No, Your Honor.

14 THE COURT: Did you hear what I just said?

15 PETITIONER GRIFFIN: Yeah, you said I could call
16 witnesses. That all I can do right there what you just
17 told me?

18 THE COURT: Right.

19 PETITIONER GRIFFIN: All right. I understand.

20 THE COURT: The only thing that you can't do, put
21 it another way, is to argue your case today or to
22 present legal authority. I'll give you time after this
23 petition--after the transcript of this hearing is
24 prepared you will receive a copy of all that's said and
25 done here today. And at that point you will have

1 thirty days to prepare and submit an argument in the
2 form of a brief to me on these issues that we cover
3 today. Do you understand that?

4 PETITIONER GRIFFIN: Yes, sir.

5 THE COURT: Okay. Do you have any witnesses you
6 want to call this morning?

7 PETITIONER GRIFFIN: Yeah, I would like to call
8 William J. Mason, my appellate attorney.

9 THE COURT: All right. Come up please and take the
10 witness stand.

11 (Witness takes the stand)

12 THE COURT: I'll ask the Respondent to swear the
13 witness.

14 MR. CROWDER: Please raise your right hand. Do you
15 solemnly swear or affirm the testimony you are about to
16 give in this matter will be the truth, the whole truth,
17 and nothing but the truth? So help you God.

18 MR. MASON: Yes, sir.

19 THE COURT: Before we start the questioning, I'd
20 like for you to give us a brief synopsis of your
21 education and experience.

22 MR. MASON: I'm Bill Mason. A 1984 graduate of
23 Mercer Law School. I've been in a solo private
24 practice since August 1984. Approximately fifty
25 percent of my practice is criminal trial work and

1 appellate work and fifty percent is civil and personal
2 injury.

3 THE COURT: All right. What is your business
4 address, Mr. Mason?

5 MR. MASON; 18 Ninth Street, Columbus, Georgia,
6 31901.

7 THE COURT: Okay. You may question the witness.

8 **DIRECT EXAMINATION OF WILLIAM MASON BY PETITIONER GRIFFIN:**

9 Q See, Mr. Mason, did you represent me on direct
10 appeal?

11 A Yes.

12 Q Were you appointed or retained?

13 A Appointed.

14 Q Did you investigate my case?

15 A I read your transcript and wrote you letters.

16 Q Did you read the transcript?

17 A Yes.

18 Q Have you stayed in current study of case cites?

19 A Yes.

20 Q In Georgia is the prosecution allowed to offer
21 evidence of similar transactions?

22 A Under some circumstances, yes.

23 Q What are those circumstances?

24 A When they are relevant as to motive and
25 circumstances and the probative value outweighs the

1 prejudicial effect.

2 Q Similar transactions have to result in a
3 conviction? Does it have to result in a conviction for them
4 to introduce similar transaction?

5 A No.

6 Q In light of this, why did you raise the single
7 weak issue of similar transaction?

8 A It's the only one I saw.

9 Q So why didn't you raise any other claims I have
10 listed in my habeas corpus?

11 A Because I didn't think they were meritorious.

12 Q Isn't it true that any claims not raised on direct
13 appeal are procedurally barred?

14 A Yes.

15 Q Isn't it true that the only way you can raise
16 these errors is through the claim of ineffective assistance
17 of appellate counsel?

18 A In a habeas, generally, that's correct.

19 Q Raising the claim of ineffective assistance of
20 appellate counsel, do both prongs of Strickland v Washington
21 have to be met?

22 MR. CROWDER: Your Honor, I think that's a legal
23 conclusion and this has nothing to do with his
24 representation at the appeal phase.

25 THE COURT: I would agree with that. I sustain

1 the objection, but I want to ask you to speak a little
2 slower. I'm trying to take notes of what you are
3 saying and I'm missing a few words here and there.

4 PETITIONER GRIFFIN: All right.

5 THE COURT: Okay, go forward.

6 Q When raising a claim of ineffective assistance of
7 appellate counsel, do both prongs of Strickland v Washington
8 have to be met?

9 MR. CROWDER: I still think that's an inappropriate
10 question.

11 THE COURT: I would agree it's inappropriate in
12 light of the fact that the issue of similar transaction
13 was raised on appeal and the appellate court decided
14 against you. So that issue cannot be raised again in
15 habeas. Those issues that were appealed.

16 PETITIONER GRIFFIN: I ain't understand you, Your
17 Honor. Say what now?

18 THE COURT: The issue of similar transactions was
19 presented, as I understand it, to the Court of Appeals,
20 I mean, the Supreme Court of Georgia.

21 PETITIONER GRIFFIN: Yes, sir.

22 THE COURT: And they decided that the similar
23 transaction evidence in this case was appropriate or
24 was not entered in error. Do you understand what I
25 said?

1 PETITIONER GRIFFIN: I understand what you said.

2 THE COURT: Therefore, that is an issue that
3 cannot be re-litigated in this habeas corpus hearing.
4 Move on with another question.

5 Q So in your qualified opinion, it would be easy to
6 raise all the claims on direct appeal to start with?

7 A No.

8 Q I can't hear you.

9 A No.

10 Q You said no? Why is that?

11 A Well, if they are not issues I don't raise them.

12 Q If they are not issues, you don't raise them. So
13 in transcript page 99 line 16 the Court say, I also ask the
14 Court permission to allow Special Agent Brunner to remain in
15 the courtroom. She is the GBI case agent. You didn't see
16 that error when you read the transcript? When the GBI lady
17 was allowed to stay in the courtroom while prior to
18 testifying after the other witnesses?

19 A Correct.

20 Q So you didn't see that?

21 A I saw it, but it's not error.

22 Q It's not an error?

23 A Correct.

24 Q For her to bolster another witness' testimony or
25 violating the rule of sequestration?

1 A Correct.

2 Q That's not an error? Sequestration rule is not an
3 error?

4 A Correct, for the fourth time.

5 Q So O.C.G.A. 24-9-61 says a witness is not allowed
6 to hear another witness' testimony.

7 THE COURT: What you are doing now is sort of in
8 the form of argument with a citation of legal
9 authority. That will be raised or presented in your
10 brief that you submit to me after this hearing.

11 PETITIONER GRIFFIN: Yes, Your Honor.

12 THE COURT: I don't think the question is
13 appropriate except in the form of a brief with your
14 legal authority that you are citing there. Okay?

15 PETITIONER GRIFFIN: I was just saying he said
16 it's not an error.

17 THE COURT: I heard what he said.

18 PETITIONER GRIFFIN: Yes, sir.

19 THE COURT: And I know that you contend it was an
20 error and I'll have to decide whether it was or not.
21 Put that in your brief. That will be your argument to
22 me as to why you are correct and he's wrong. All
23 right?

24 PETITIONER GRIFFIN: Yes, Your Honor.

25 THE COURT: Go ahead.

1 PETITIONER GRIFFIN: That's all the questions I
2 want to ask, Your Honor.

3 THE COURT: All right, Mr. Crowder, do you have any
4 questions of this witness?

5 **CROSS-EXAMINATION OF WILLIAM MASON BY MR. CROWDER:**

6 Q Mr. Mason, you just handled the appeal in this
7 case; is that correct? You had nothing to do with the
8 trial?

9 A Correct.

10 Q During your representation of Mr. Griffin, did you
11 communicate with him about the appeal?

12 A Yes.

13 Q Was that by phone, letters, in person?

14 A Letters.

15 Q You never met with him in person?

16 A No.

17 Q Did you have any discussions with him about the
18 trial and what he thought could have been done differently?

19 A Yes.

20 Q Did he offer any arguments he wanted to raise on
21 the appeal?

22 A Yes.

23 Q Did you raise any of those?

24 A Only the similar transaction.

25 Q Nothing else he identified you saw as viable?

1 A Correct.

2 Q You testified that you reviewed the transcript of
3 the trial in preparing the appeal?

4 A I read it.

5 Q Did you look at the clerk's file also?

6 A Yes.

7 Q Was there anything else that you reviewed in
8 preparing the appeal?

9 A I read a motion transcript and I talked to his
10 trial lawyer.

11 Q Did the trial attorney identify anything that he
12 thought could have been raised as error that he saw?

13 A The similar transaction.

14 MR. CROWDER: If I may approach the witness, Your
15 Honor.

16 THE COURT: Sure.

17 Q Marked as Respondent's 3, I'd like to ask if you
18 recognize that document?

19 A Yes.

20 Q Does that appear to be a true and correct copy of
21 the brief you filed in Mr. Griffin's appeal?

22 A Yes.

23 MR. CROWDER: Your Honor, based on Mr. Mason's
24 identification I'll go ahead and tender that as
25 Respondent's 3.

1 THE COURT: It is admitted.

2 Q Mr. Mason, how did you decide which grounds to
3 raise in the appeal?

4 A I read the transcript, I read the file, I talked
5 to the trial lawyer. I considered what Mr. Griffin had to
6 say and then I raised anything I thought was meritorious.

7 Q Were there any meritorious claims you could have
8 raised but chose not to?

9 A No.

10 Q Did you review the petition Mr. Griffin filed in
11 this habeas action?

12 A Yes.

13 Q I believe you've already testified you did not see
14 any viable argument relating to the GBI agent being allowed
15 to remain in violation of the rule of sequestration?

16 A It's a matter in the Court's discretion.

17 Q And you didn't see any evidence of abuse of
18 discretion in that case?

19 A No.

20 Q Did you see any possible argument that trial
21 counsel should have moved to sever the trial?

22 A No. It all happened at the same time at the same
23 place and the witnesses against each of them were the same
24 witnesses.

25 Q Did you see any evidence that the prosecutor made

1 improper remarks about Mr. Griffin during the trial?

2 A In the habeas Mr. Griffin said the prosecutor
3 called him a killer in his closing argument and I felt that
4 in the wide latitude given to counsel in closing that would
5 be a fair comment on what he believed the evidence was.

6 Q So you did not see that as a viable argument on
7 appeal?

8 A No.

9 Q Did you see an argument that trial counsel should
10 have objected to it?

11 A No.

12 MR. CROWDER: Nothing further, Your Honor.

13 THE COURT: Will you have any further questions of
14 Mr. Mason?

15 PETITIONER GRIFFIN: Yes, Your Honor.

16 **REDIRECT EXAMINATION OF WILLIAM MASON BY PETITIONER GRIFFIN:**

17 Q Have you ever filed or did an appeal on similar
18 transaction before?

19 A Yes.

20 Q How many cases? Have you ever won any cases on
21 similar transactions filed into the Supreme Court?

22 A I have had the Supreme Court and Court of Appeals
23 rule that it was error, but harmless on more than one
24 occasion.

25 Q So you never got a case reversed off similar

1 transaction in the Supreme Court before?

2 A Not that I recall.

3 PETITIONER GRIFFIN: That's all I have, Your Honor.

4 THE COURT: You may go down, Mr. Mason. Please
5 stay with us for just a little bit until we finish the
6 evidence in this case.

7 (Witness steps down)

8 THE COURT: Do you have any other witnesses?

9 PETITIONER GRIFFIN: I'd like to call Mark Casto,
10 my trial attorney.

11 THE COURT: Well, is he here? Did you subpoena
12 this witness?

13 PETITIONER GRIFFIN: Yes, sir.

14 THE COURT: You subpoenaed him?

15 PETITIONER GRIFFIN: Yeah, I put him on my habeas,
16 writ of habeas corpus.

17 THE COURT: I know you put him on there indicating
18 he was your trial attorney. But you didn't send him
19 any subpoena to require his presence today?

20 PETITIONER GRIFFIN: No, sir.

21 THE COURT: Okay. Well, he's not here.

22 PETITIONER GRIFFIN: How I was supposed to have
23 subpoenaed him?

24 THE COURT: You have prepared the petition, you've
25 researched your case.

1 PETITIONER GRIFFIN: Yes, sir.

2 THE COURT: You could research subpoenaing
3 witnesses just as easy as you've researched what you've
4 done. Do you wish to give your own sworn testimony?

5 PETITIONER GRIFFIN: Yes, sir.

6 THE COURT: Please swear him for the Court, Mr.
7 Crowder.

8 MR. CROWDER: Please raise your right hand. Do you
9 solemnly swear or affirm the testimony you are about to
10 give in this matter will be the truth, the whole truth,
11 and nothing but the truth? So help you God.

12 PETITIONER GRIFFIN: Yes, sir.

13 THE COURT: All right.

14 PETITIONER GRIFFIN: Your Honor, I was convicted by
15 a Taylor County jury in 2007. I appealed all the way
16 to the Georgia Supreme Court where my conviction was
17 affirmed in 2011. In July of 2011, I filed this writ
18 of habeas corpus in which I enumerate several errors.
19 First, ineffective assistance of counsel against
20 appellate counsel. Appellate counsel failed in the
21 performance of his duties. Appellate counsel rendered
22 ineffective by failing to raise the merits--

23 MR. CROWDER: Your Honor, this sounds more like
24 legal argument than evidence to me.

25 THE COURT: Mr. Griffin--

1 PETITIONER GRIFFIN: No, it ain't no legal
2 argument.

3 THE COURT: --what you are reading there is not
4 testimony, it is argument. I'm going to let you give
5 that to me in writing. That works to your benefit
6 because I will have it in my hand when I decide your
7 case. It's not evidence. Everything that you've just
8 said is in the form of argument. Now, if you have
9 evidence, if you have direct testimony about some of
10 your grounds, please give them to me at this time.

11 PETITIONER GRIFFIN: So I can turn some of my
12 transcripts in to you as evidence or you already got
13 the transcripts and all that?

14 THE COURT: I don't have it yet, but I anticipate
15 that the Respondent will be offering the transcript and
16 trial records. Is that correct, Mr. Crowder?

17 MR. CROWDER: It is, Your Honor.

18 THE COURT: So if you want to keep yours for your
19 own further, you know, use, they are going to put one
20 in.

21 PETITIONER GRIFFIN: Yes, Your Honor.

22 THE COURT: Is there anything else you want to
23 testify about?

24 PETITIONER GRIFFIN: No, Your Honor.

25 THE COURT: All right, Mr. Crowder.

1 MR. CROWDER: Your Honor, I have no other
2 witnesses. The only additional evidence I have is
3 documentary. Respondent's 1 is certified copies of the
4 trial records from Taylor County.

5 THE COURT: That will be admitted.

6 MR. CROWDER: And Respondent's 2 are certified
7 copies of all of the transcripts up through the motion
8 for new trial phase.

9 THE COURT: And they will be admitted.

10 MR. CROWDER: And Respondent's 3 is the appellate
11 brief that's already been admitted.

12 THE COURT: Okay.

13 MR. CROWDER: That's all the evidence I have.

14 THE COURT: Mr. Griffin, when the court reporter
15 prepares the transcript of this hearing it will be
16 served on you.

17 PETITIONER GRIFFIN: Yes, sir.

18 THE COURT: At that point the clock starts ticking
19 and you have thirty days from that point to send me
20 your brief. Just send it to the clerk, Mr. Johnson,
21 and he will get it to me.

22 PETITIONER GRIFFIN: All right.

23 THE COURT: Okay, that completes your case today.

24 PETITIONER GRIFFIN: Yes, Your Honor.

25 <<<PROCEEDING CONCLUDED>>>

APPENDIX H

Griffin's Post-Hearing Brief filed in the Superior Court of Telfair County, Georgia,
Civil Action Case No.: 11-CV-264

Griffin v. Warden, et al

IN THE SUPERIOR COURT OF TELFAIR COUNTY
STATE OF GEORGIA

JEFFERY J. GRIFFIN,

Petitioner,

vs.

DAVID FRAIZER, Warden,
Respondent.

Civil Action No.: 11-CV-264

CLERK OF SUPERIOR COURT
TELFAIR COUNTY, GA

MAR 20 2012

Ben Johnson

HABEAS CORPUS

BRIEF OF THE PETITIONER

STATEMENT OF THE CASE

Jeffery Griffin, hereinafter to be referred to as the Petitioner, along with co-defendant Dontavious Bunkley was indicted by a Taylor County Grand Jury on February the 14th of 2005 for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a crime. All of these charges stemmed from the November the 17th of 2004 shooting death of Antonio Gray.

The Petitioner and his co-defendant were tried jointly before a jury from July the 12th through the 15th of 2007. The Petitioner was found not guilty of malice murder, but guilty of felony murder, aggravated assault, and possession of a firearm during the commission of a crime. The Petitioner was sentenced to life in prison plus 5 years.

The Petitioner filed a timely motion for new trial which was denied on April the 21st of 2010. The Petitioner filed a timely notice of appeal in the Supreme Court of Georgia. See Griffin v. State,

S10A1766. The Petitioner's convictions were affirmed on March the 18th of 2011. On July the 22nd of 2011 the Petitioner filed this instant petition in the Superior Court of Telfair County.

ENUMERATION OF ERRORS

- I. Ineffective Assistance Of Counsel - Appellate Counsel Failed In The Performance Of His Duties.
- II. Ineffective Assistance Of Counsel - Trial Counsel Failed In The Performance Of His Duties.
- III. Ineffective Assistance Of Counsel - Trial Counsel Failed In The Performance Of His Duties.
- IV. Judicial Error - The Trial Court Erred By Allowing A State's Witness To Be Present In The Courtroom Prior To Testifying.
- V. Ineffective Assistance Of Counsel - Trial Counsel Failed In The Performance Of His Duties.
- VI. Judicial Error - The Trial Court Erred By Allowing Similar Transaction Evidence To Be Presented.
- VII. Prosecutorial Misconduct - The Prosecutor Assassinated The Petitioner's Character.

Issue Of Law I. Ineffective Assistance Of Counsel- Appellate
Counsel Failed In The Performance Of His Duties.

Appellate Counsel rendered ineffective assistance by failing to raise the meritorious claims herein listed on direct appeal.

A criminal defendant is entitled to the assistance of counsel on a first appeal. "The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right." Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed. 2d 821 (1984). "Nominal representation on an appeal, as of right, like nominal representation at trial, does not suffice to render the proceeding constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." Evitts v. Lucey, *supra*.

Counsel rendered ineffective assistance on appeal when he failed to raise all of the trial errors. "Appellate counsel's performance was deficient because counsel failed to raise a nonfrivolous trial error for consideration," Battles v. Chapman, 269 Ga. 702, 506 S.E.2d 838 (1998). "When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the [reviewing] court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal." Battles v. Chapman, *supra*.

On appeal, counsel only raised a single issue, similar transaction, which, was clearly weaker than the issues herein raised by the Petitioner. "Appellate counsel's performance was substandard because counsel asserted only a single weak issue," Matire v.

Wainwright, 811 F.2d 1430 (11th Cir. 1987). "Counsel omitted

significant and obvious issues while pursuing issues that were clearly and significantly weaker. "Mayo v. Henderson, 13 F. 3d 528 (2nd Cir. 1994)." The ignored issue was so clearly stronger than the errors presented that the tactical decision must be deemed an unreasonable one which only an incompetent attorney would have adopted. There was a reasonable probability that the outcome of the proceeding, both on appeal and at trial, would have been different had appellate counsel raised the error on appeal." Battles v. Chapman, supra.

Issue Of Law II. Ineffective Assistance Of Counsel- Trial Counsel Failed In The Performance Of His Duties.

Trial Counsel rendered ineffective assistance by failing to file a motion for severance of trial from the co-defendant, thus denying the Petitioner a fair trial.

The testimony of co-defendant, Dontavious Bunkley, was crucial to the Petitioner's defense. Only Bunkley could exonerate the Petitioner. His testimony was exculpatory in nature. Therefore, Trial Counsel should have filed a motion to sever the trials of the Petitioner and Bunkley.

"A successful motion for severance requires a showing that a joint trial will prejudice the accused." Green v. State, 274 Ga. 686, 558 S.E. 2d 707 (2002). The prosecution stated that the Petitioner gave Bunkley the gun he shot the victim with and that even if he, (the Petitioner), didn't know that Bunkley was going to use it to shoot the victim he was still culpable. Only Bunkley could have offered testimony that would have exonerated the Petitioner. Counsel could have easily established that severance was necessary.

"In order to be entitled to a severance on the ground defendant

wishes to call his co-defendant as a witness, movant must demonstrate: (1) a bonafide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant will in fact testify if the cases are severed." Stevens v. State, 165 Ga. App. 814, 302 S.E. 2d 724 (1984).

"One of the grounds for granting a severance is the need of one defendant to use the exculpatory testimony of a co-defendant."

House v. State, 203 Ga. App. 55, 416 S.E. 2d 108 (1992). "On motion, severance should be granted where it is deemed appropriate to promote a fair determination of each defendant's guilt or innocence of each offense." Padgett v. State, 239 Ga. 556, 238 S.E. 2d 98 (1977).

"Counsel's failure to file a motion to sever the trials was ineffective assistance." Benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined proper functioning of adversarial process that trial cannot be relied on as having produced a 'just result'." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

"There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, supra.

Issue Of Law III. Ineffective Assistance Of Counsel-Trial Counsel Failed In The Performance Of His Duties.

Trial Counsel rendered ineffective assistance by failing to object to the key State's witness being present in the courtroom prior to testifying.

Page 5 The purpose of sequestering witnesses is to preserve the integrity

of the testimony. If a witness is allowed to remain in the courtroom during the testimony of others, the witness should testify first, and if he or she fails to do so, there must be an adequate reason presented to the court. "Clear import of OCGA § 24-9-61, sequestration rule, is to prevent or preserve integrity of testimony, with ultimate goal of arriving at truth." O'Kelly v. State, 175 Ga. App. 503, 333 S.E. 2d 838. "When a witness has been excepted from the sequestration, that witness should be presented first or explanation made to the trial court why the witness cannot be called first." Simonton v. State, 151 Ga. App. 431, 260 S.E. 2d 487 (1979); Parham v. State, 135 Ga. App. 315, 217 S.E. 2d 493 (Pless v. State, 142 Ga. App. 694, 236 S.E. 2d 842 (1977)); and Sweet v. State, 203 Ga. App. 290, 416 S.E. 2d 845 (1992).

Trial Counsel rendered ineffective assistance by failing to object to a key witness's being allowed to be present in the courtroom during the testimony of other witnesses without having first testified or it being explained to the court, on the record, why the key witness could not have done so. "Right to counsel is right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970). "Defense counsel has duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, *supra*. "If right to counsel is to serve its purpose, defendants cannot be left to mercies of incompetent counsel." McMann v. Richardson, *supra*.

Issue Of Law IV. Judicial Error - The Trial Court Erred By Allowing A State's Witness To Be Present In The Courtroom Prior To Testifying.

The Trial Court erred in allowing GBI Agent Brunner to be present in the courtroom after the rule of sequestration had been invoked. This Key witness was then able to bolster and color the testimony of another State's Key witness.

The rule of sequestration had been invoked, yet the Trial Court, in error, allowed a Key State's witness to remain in the courtroom during the testimony of other witnesses. "Sequestration of witnesses is a basic and fundamental right to a fair trial in every case and it should not be violated except from necessity." Smith v. State, 262 S.E. 2d 116.

Not only was the Key witness allowed to remain in the courtroom during the testimony of other witnesses, she was allowed to testify last. "A witness should not, save in very exceptional circumstances, be allowed to remain in courtroom after rule of sequestration is invoked and then also be allowed to testify after the other witnesses have been heard." James v. State, 143 Ga. App. 696, 240 S.E. 2d 146 (1976). "Witness who is allowed to remain in courtroom should be examined first, out of the hearing of other witnesses, unless there is reason for not following this rule." Stuart v. State, 123 Ga. App. 311, 180 S.E. 2d 581. "The purpose of the rule of sequestration is to prevent a witness who has not testified from having his testimony affected by that of another witness." Clements v. State, 279 Ga. App. 773, 632 S.E. 2d 702 (2006).

Issue Of Law V. Ineffective Assistance Of Counsel - Trial Counsel Failed In The Performance Of His Duties.

Page 7 Trial Counsel failed to object to prejudicial remarks made by the

Prosecutor, thus denying the Petitioner a fair trial

The Prosecutor called the Petitioner a killer during his closing argument. This was clearly an attack on the character of the Petitioner, yet Trial Counsel failed to object. "Counsel's function in representing a criminal defendant is to assist defendant, and hence counsel owes client duty of loyalty..." Strickland v. Washington, supra. "From counsel's function as assistant to defendant derive the overarching duty to advocate defendant's cause." Strickland v. Washington, supra.

The assistance of counsel provided by trial counsel fell well below the assistance envisioned by the Sixth Amendment's Counsel Clause. In fact, he abandoned the Petitioner to the mercy of the Prosecutor. "Right to counsel is the right to effective assistance." Harrell v. State, 139 Ga. App. 556, 228 S.E. 2d 723 (1976); and Jones v. State, 243 Ga. 820, 256 S.E. 2d 907 (1976). "The guarantee to the assistance of counsel to a criminal defendant requires that such representation must be effective." Beavers v. Balcom, 636 F.2d 114 (5th Cir. 1981). "Effective assistance is that which assures due process." Hanes v. State, 240 Ga. 327, 240 S.E. 2d 833 (1976). "Due process of law requires that the court-appointed counsel be competent to serve and give more than casual or perfunctory service. Lip service only will not do." Coates v. Lawrence, 46 F. Supp. 414 (S.D. Ga. 1993). "Defense counsel's performance was not only ineffective, but counsel abandoned the required duty of loyalty to his client, he acted with reckless disregard for his client's best interest." Osbourne v. Schillinger, 861 F.2d 612, (10th Cir. 1988).

Issue Of Law VI. Judicial Error - The Trial Court Erred By
Allowing Similar Transaction Evidence To Be
Presented.

The Trial Court erred by allowing the State to present similar transaction evidence of an alleged crime that occurred four months prior to this crime. The Trial Court abused its discretion in allowing the evidence to be presented to the jury.

In our great country we pride ourselves on our fairness. At trial, the prosecution is allowed to present evidence of a similar transaction. When dealing with prior convictions this is fair because the allegation has been adjudicated by a finding of guilt. Not so when the prosecution is allowed to present evidence of a similar transaction which has not resulted in a conviction. When this occurs a defendant is unfairly prejudiced.

The Georgia Court of Appeals has held that the prosecution "need not prove that the conduct resulted in a criminal conviction or [a] criminal charge." Harris v. State, 222 Ga. App. 52, 473 S.E. 2d 232 (1996). This ruling should be overruled as unconstitutional due to the degree of its prejudicial effects, unfairness, and its Unamericaness. The Sixth Amendment to the Constitution of the United States, provides the guarantee of a fair trial to a criminal defendant. It has been held that evidence of independent crimes is not admissible if the evidence's "relevance to the issues at trial" is outweighed by its prejudicial impact. See Rice v. State, 217 Ga. App. 456, 458 S.E. 2d 368 (1995). The evidence presented at trial by the Prosecution was of a charge, not a conviction, and its

prejudicial impact far outweighed its relevance. Therefore, the Trial Court erred by allowing its presentation.

Issue Of Law VIII. Prosecutorial Misconduct-The Prosecutor Assassinated The Petitioner's Character.

The Prosecutor called the Petitioner a "killer" in his closing argument and also said that even if the Petitioner did not know his co-defendant was going to shoot the gun its still felony murder on the Petitioner's behalf, thus denying the Petitioner a fair trial.

The Prosecution cannot just say anything it wishes to say. It must substantiate its statements by evidence presented to the jury at trial. In the case at bar the statements made by the Prosecution were inflammatory and prejudicial in nature. "It was improper for counsel representing the State to say, in his argument to the jury, that he would not appear in the case if he 'did not believe the defendant to be as guilty as any man that was ever tried in the courthouse' and the court should not have approved of such argument as legitimate." Bronzack v. State, 109 Ga. 514, 35 S.E. 123 (1900).

"Counsel is never justified in expressing the opinion, however he may entertain it, that one whom he is pursuing is guilty. Such opinion is not legal evidence, and in no circumstances, and at no step of the proceedings, is he entitled to thrust it into the case, either by direct words or by implication." Bronzack v. State, supra. "The opinion of counsel, as to the guilt or innocence of the defendant, should not, we have seen, be by them expressed to the jury. The jury, alone and unbiased, are to decide defendant's guilt or innocence."

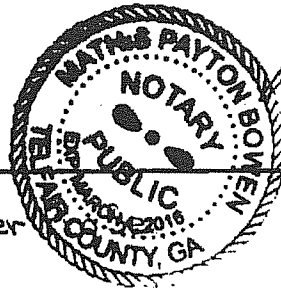
OCGAS 17-8-75, provides that, "where counsel in the hearing of the jury makes statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same." In the case at bar the Court failed to prevent the Prosecutor from making the prejudicial statements." District attorney may not state to the jury the district attorney's personal belief in the defendant's guilt." Castel v. State, 250 Ga. 776, 301 S.E. 2d 234 (1983).

CONCLUSION

The Petitioner has clearly established that reversible errors occurred at trial. Therefore, the Petitioner respectfully moves the Honorable Court to grant him relief from his convictions and sentences.

Respectfully submitted this 20th day of March, 2012.

Jeffery J. Griffin
Jeffery J. Griffin, Petitioner



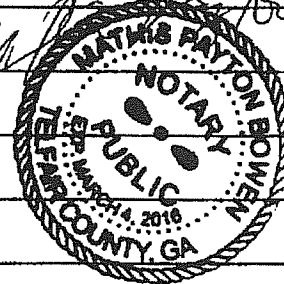
Mathis Payton Bowen

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing document upon the individual listed below by hand delivery or depositing a copy in the United States mail with proper postage affixed thereon and addressed as follows:

Honorable Phillip R. West
c/o Gene Johnson Clerk of Telfair Superior Court
Telfair County Courthouse 19 East Oak Street Suite C
McRae, Ga. 31055.

This 20th day of March 2012



Respectfully,

Jeffery J. Griffin
Jeffery J. Griffin
Petitioner

cc: Honorable Phillip R. West

Matthew B. Crowder #143007

CERTIFIED COPY

GEORGIA, TELFAIR COUNTY

This is to certify that the document consisting of 12 page(s) to which this certification is affixed is a true and correct copy of said document as the same appears of record in the office of the Clerk of Superior Court of Telfair County, Georgia.

This

20th day of May, 2014

Debra J. Johnson
Clerk, Superior Court of
Telfair County, Georgia

APPENDIX I

Final Order denying Griffin's petition for Writ of Habeas Corpus filed in the Superior Court of Telfair County, Georgia, Civil Action Case No.: 11-CV-264

Griffin v. Warden, et al

**IN THE SUPERIOR COURT OF TELFAIR COUNTY
STATE OF GEORGIA**

FILED IN OFFICE
CLERK SUPERIOR COURT
TELFAR COUNTY, GA

**JEFFERY J. GRIFFIN,
GDC-1196338,**

PETITIONER,

v.

DAVID FRAZIER, WARDEN,

RESPONDENT.

:
:
:
:
:
:
:
:
:
:

CIVIL ACTION NO: 11-CV-264

MAY 17 2013
Delinda Thomas

FINAL ORDER

Petitioner, JEFFERY J. GRIFFIN, filed this petition for Writ of Habeas Corpus challenging the validity of his July 15, 2005, jury trial convictions for felony murder, aggravated assault, and possession of a firearm during the commission of a crime in the Superior Court of Taylor County. Based on the record established at the February 27, 2012, evidentiary hearing, this Court denies relief based upon the following findings of fact and conclusions of law.

PROCEDURAL HISTORY

On February 14, 2005, Petitioner was indicted by the Taylor County Grand Jury for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a crime. (Habeas Hearing Transcript February 27, 2012, pp. 35-38, hereinafter "HT"). Following a jury trial, Petitioner was convicted on July 15, 2005, of felony murder, aggravated assault, and possession of a firearm during the commission of a crime. (HT 124-26). Petitioner was sentenced to life imprisonment plus five (5) years. (HT 127).

Petitioner, by and through trial counsel, filed a Motion for New Trial in the Superior Court of Taylor County on July 19, 2005, in which he alleged that the verdict was contrary to evidence and without evidence to support it, that the verdict was decidedly and strongly against

the weight of the evidence, that the verdict was contrary to law and the principles of justice and equity, and that the trial court committed errors of law warranting a new trial. (HT 129-31).

Petitioner, by and through new counsel, filed an Amended Motion for New Trial in the Superior Court of Taylor County on August 10, 2009, in which he alleged that the trial court erred in admitting similar transaction evidence. (HT 145-46).

The Superior Court of Taylor County entered an Order denying Petitioner's Motion for New Trial on April 20, 2010. (HT 156).

Petitioner filed a Notice of Appeal in the Superior Court of Taylor County on April 26, 2010. (HT 26). Petitioner enumerated as error on appeal that the trial court erred in admitting similar transaction evidence. (HT 1471). The Supreme Court of Georgia affirmed the trial court's decision on March 18, 2011. Griffin v. State, 288 Ga. 833 (2011).

Petitioner filed the instant petition pro se on July 22, 2011. At the evidentiary hearing, Petitioner's former appellate attorney testified and was subjected to cross-examination.

Petitioner also testified on his own behalf.

GROUND ONE

In Ground One, Petitioner alleges that he received ineffective assistance of counsel at the appellate level because appellate counsel failed to argue on appeal; that Petitioner received ineffective assistance of counsel at the trial level because trial counsel failed to file a motion to sever Petitioner's trial from that of his co-defendant, which denied Petitioner a fair trial; that Petitioner received ineffective assistance of counsel at the trial level because trial counsel failed to object to the State's key witness being present in the courtroom prior to testifying; that the trial court erred by allowing a State's witness to be present in the courtroom prior to testifying after

the Rule of Sequestration had been invoked; that Petitioner received ineffective assistance of counsel at the trial level because trial counsel failed to object to prejudicial remarks made by the prosecutor which denied Petitioner a fair trial; that the trial court erred by allowing the State to present similar transaction evidence; and that there was prosecutorial misconduct at Petitioner's trial because the prosecutor assassinated his character.

Findings of Fact

Petitioner was represented at the appellate level by William Mason. (HT 1468). Appellate counsel received his law degree from Mercer University in 1984 and has been a solo practitioner since that time. (HT 2). Approximately fifty (50) percent of his work is in criminal law. (HT 2-3).

Appellate counsel testified that in preparing Petitioner's appeal he reviewed the transcript of Petitioner's trial, reviewed the Clerk's file, discussed the case with trial counsel, and discussed the case with Petitioner. (HT 3, 8-9). He testified that he raised every claim in the appeal that he thought had merit. (HT 4, 10). He testified that he did not see a viable argument that trial counsel should have moved to sever the trial. (HT 10). He testified that he did not see any viable argument relating to the Georgia Bureau of Investigation agent being allowed to remain in the courtroom in violation of the rule against sequestration. (HT 10). He testified that he did not see a viable argument on appeal based on the prosecutor making prejudicial remarks or based on trial counsel being ineffective for failing to object to any prejudicial remarks by the prosecutor. (HT 10-11).

Conclusions of Law

The test for establishing ineffective assistance of counsel was set forth in Strickland v.

Washington, 466 U.S. 668 (1984). Under this two-prong test, Petitioner must show that: 1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment, Strickland, 466 U.S. at 687; and 2) that this deficient performance prejudiced the defense, that is, that counsel's errors were so serious as to deprive Petitioner of a fair trial with a reliable result. Id. at 694. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision not to raise a particular issue was an unreasonable decision which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002).

Petitioner has failed to show that appellate counsel's performance was deficient or that he was prejudiced by it. The record shows that appellate counsel argued on appeal that the trial court erred in allowing similar transaction evidence. The record further shows that appellate counsel did not see a viable argument on appeal that trial counsel should have moved to sever the trial, a viable argument on appeal relating to the Georgia Bureau of Investigation agent being allowed to remain in the courtroom in violation of the rule against sequestration, a viable argument on appeal based on the prosecutor making prejudicial remarks, or a viable argument on appeal that trial counsel was ineffective for failing to object to prejudicial remarks by the prosecutor. Petitioner has failed to show that appellate counsel's failure to raise these claims on direct appeal was an unreasonable decision which only an incompetent attorney would make.

Accordingly, Ground One provides no basis for relief.

GROUND TWO

In Ground Two, Petitioner alleges that he received ineffective assistance of counsel at the trial level because trial counsel failed to file a motion to sever Petitioner's trial from that of his co-defendant, which denied Petitioner a fair trial.

Findings of Fact and Conclusions of Law

O.C.G.A. § 9-14-48 (d) provides that:

The [habeas] 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.

When a criminal defendant has new counsel on appeal, said new counsel must raise claims of ineffective assistance of trial counsel at the first possible stage of post-conviction review. White v. Kelso, 261 Ga. 32 (1991). Failure to object or to enumerate as error on appeal any alleged error results in a waiver of said issue and a procedural bar to its consideration in habeas corpus, absent a showing of cause and actual prejudice to overcome the default. Black v. Hardin, 255 Ga. 239 (1985). "Cause" may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland. "Actual prejudice" may be shown through satisfying the prejudice prong of Strickland or by 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.

As shown above, Petitioner failed to raise this claim in his direct appeal to the Supreme Court of Georgia. As a result, without a showing of cause and actual prejudice to overcome this

procedural bar, Petitioner is precluded from raising this claim in the instant action. As shown above, appellate counsel thoroughly investigated the case, raised every issue which he found to have merit, and did not see a viable issue on appeal relating to any failure by trial counsel to move to sever Petitioner's trial from that of his co-defendant. Petitioner has failed to show that he received ineffective assistance of counsel at the appellate level and has thus failed to overcome the procedural bar to consideration of this claim.

Accordingly, Ground Two provides no basis for relief.

GROUND THREE

In Ground Three, Petitioner alleges that he received ineffective assistance of counsel at the trial level because trial counsel failed to object to the State's key witness being present in the courtroom prior to testifying.

Findings of Fact and Conclusions of Law

O.C.G.A. § 9-14-48 (d) provides that:

The [habeas] 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.

When a criminal defendant has new counsel on appeal, said new counsel must raise claims of ineffective assistance of trial counsel at the first possible stage of post-conviction review. White v. Kelso, 261 Ga. 32 (1991). Failure to object or to enumerate as error on appeal any alleged error results in a waiver of said issue and a procedural bar to its consideration in habeas corpus, absent a showing of cause and actual prejudice to overcome the default. Black v. Hardin, 255

Ga. 239 (1985). “Cause” may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland. “Actual prejudice” may be shown through satisfying the prejudice prong of Strickland or by 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.

As shown above, Petitioner failed to raise this claim in his direct appeal to the Supreme Court of Georgia. As a result, without a showing of cause and actual prejudice to overcome this procedural bar, Petitioner is precluded from raising this claim in the instant action. As shown above, appellate counsel thoroughly investigated the case, raised every issue which he found to have merit, and did not see a viable issue on appeal relating to any failure by trial counsel to object to the State’s key witness being present in the courtroom prior to testifying. Petitioner has failed to show that he received ineffective assistance of counsel at the appellate level and has thus failed to overcome the procedural bar to consideration of this claim.

Accordingly, Ground Three provides no basis for relief.

GROUND FOUR

In Ground Four, Petitioner alleges that the trial court erred by allowing a State’s witness to be present in the courtroom prior to testifying after the Rule of Sequestration had been invoked.

Findings of Fact and Conclusions of Law

O.C.G.A. § 9-14-48 (d) provides that:

The [habeas] 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.

Failure to object or to enumerate as error on appeal any alleged error results in a waiver of said issue and a procedural bar to its consideration in habeas corpus, absent a showing of cause and actual prejudice to overcome the default. Black v. Hardin, 255 Ga. 239 (1985). “Cause” may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland. “Actual prejudice” may be shown through satisfying the prejudice prong of Strickland or by 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.

As shown above, Petitioner failed to raise this claim in his direct appeal to the Supreme Court of Georgia. As a result, without a showing of cause and actual prejudice to overcome this procedural bar, Petitioner is precluded from raising this claim in the instant action. As shown above, appellate counsel thoroughly investigated the case, raised every issue which he found to have merit, and did not see a viable issue on appeal relating to the trial court allowing a State’s witness to be present in the courtroom prior to testifying after the Rule of Sequestration had been invoked. Petitioner has failed to show that he received ineffective assistance of counsel at the appellate level and has thus failed to overcome the procedural bar to consideration of this claim.

Accordingly, Ground Four provides no basis for relief.

GROUND FIVE

In Ground Five, Petitioner alleges that he received ineffective assistance of counsel at the trial level because trial counsel failed to object to prejudicial remarks made by the prosecutor which denied Petitioner a fair trial.

Findings of Fact and Conclusions of Law

O.C.G.A. § 9-14-48 (d) provides that:

The [habeas] 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.

When a criminal defendant has new counsel on appeal, said new counsel must raise claims of ineffective assistance of trial counsel at the first possible stage of post-conviction review. White v. Kelso, 261 Ga. 32 (1991). Failure to object or to enumerate as error on appeal any alleged error results in a waiver of said issue and a procedural bar to its consideration in habeas corpus, absent a showing of cause and actual prejudice to overcome the default. Black v. Hardin, 255 Ga. 239 (1985). “Cause” may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland. “Actual prejudice” may be shown through satisfying the prejudice prong of Strickland or by 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.

As shown above, Petitioner failed to raise this claim in his direct appeal to the Supreme

Court of Georgia. As a result, without a showing of cause and actual prejudice to overcome this procedural bar, Petitioner is precluded from raising this claim in the instant action. As shown above, appellate counsel thoroughly investigated the case, raised every issue which he found to have merit, and did not see a viable issue on appeal relating to any failure by trial counsel to object to prejudicial remarks made by the prosecutor. Petitioner has failed to show that he received ineffective assistance of counsel at the appellate level and has thus failed to overcome the procedural bar to consideration of this claim.

Accordingly, Ground Five provides no basis for relief.

GROUND SIX

In Ground Six, Petitioner alleges that the trial court erred by allowing the State to present similar transaction evidence.

Findings of Fact and Conclusions of Law

As stated above, Petitioner enumerated as error on appeal that the trial court erred in admitting similar transaction evidence. Issues decided on direct appeal may not be re-litigated in habeas corpus if there has been no change in the facts or the law. Bruce v. Smith, 274 Ga. 432 (2001). Petitioner has failed to show any change in the facts or the law which would necessitate reconsideration of this claim in the instant action.

Accordingly, Ground Six provides no basis for relief.

GROUND SEVEN

In Ground Seven, Petitioner alleges that there was prosecutorial misconduct at his trial because the prosecutor assassinated his character.

Findings of Fact and Conclusions of Law

O.C.G.A. § 9-14-48 (d) provides that:

The [habeas] 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.

Failure to object or to enumerate as error on appeal any alleged error results in a waiver of said issue and a procedural bar to its consideration in habeas corpus, absent a showing of cause and actual prejudice to overcome the default. Black v. Hardin, 255 Ga. 239 (1985). “Cause” may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland. “Actual prejudice” may be shown through satisfying the prejudice prong of Strickland or by 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.

As shown above, Petitioner failed to raise this claim in his direct appeal to the Supreme Court of Georgia. As a result, without a showing of cause and actual prejudice to overcome this procedural bar, Petitioner is precluded from raising this claim in the instant action. As shown above, appellate counsel thoroughly investigated the case, raised every issue which he found to have merit, and did not see a viable issue on appeal relating to prejudicial remarks made by the prosecutor. Petitioner has failed to show that he received ineffective assistance of counsel at the appellate level and has thus failed to overcome the procedural bar to consideration of this claim.

Accordingly, Ground Seven provides no basis for relief.

CERTIFICATION

Petitioner has been served with a copy of the transcript of the February 27, 2012, evidentiary hearing. A copy of the Entry of Service form in which Petitioner acknowledges receiving the transcript is attached hereto.

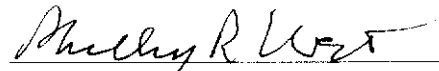
CONCLUSION

WHEREFORE, the instant petition for Writ of Habeas Corpus is **DENIED**.

If Petitioner desires to appeal this Order, Petitioner must file a written application for certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within thirty (30) days from the date of filing of this Order. Petitioner must also file a Notice of Appeal with the Clerk of the Superior Court of Telfair County within the same thirty (30) day period.

The Clerk of the Superior Court of Telfair County is hereby DIRECTED to mail a copy of this Order to Petitioner, Respondent, and Daniel M. King, Jr. Special Assistant Attorney General.

SO ORDERED this 13th day of May, 2013.


PHILLIP R. WEST, Senior Judge
State of Georgia

Order Presented by:
DANIEL M. KING, JR.
Special Assistant Attorney General
617 Bellevue Avenue
P.O. Box 4329
Dublin, Georgia 31040
(478) 275-2255

Civil Action No. 11-CV-264Date Filed 9-17-12

Court Reporter

Attorney's Address

Cindy Brimes
123 Bazar Goolsby Road
Eastman GA 31023

Name and Address of Party to be Served.

Jeffery J. Griffin

~~Smith State Prison~~ Macon State
Glenmonte GA 30424 PrisonSuperior Court ☒
State Court ☐
Juvenile Court ☐Magistrate Court ☐
Probate Court ☐Georgia, Telfair COUNTYJeffery J. Griffin
BDC 1196338

Plaintiff

VS.

David Frazier
Warden, Telfair State Prison

Defendant

Garnishee

SHERIFF'S ENTRY OF SERVICE

I have this day served the defendant Pet. transcript of evidentiary hearing personally with a copy
☐ of the within action and summons. held 2/27/12

Rec'd by *Jeffery Griffin

I have this day served the defendant _____ by leaving a
copy of the action and summons at his most notorious place of abode in this County.☐ Delivered same into hands of _____ described as follows:
age, about _____ years; weight _____ pounds; height, about _____ feet and _____ inches, domiciled at the residence of
defendant.☐ Served the defendant _____ a corporation
by leaving a copy of the within action and summons with _____
in charge of the office and place of doing business of said Corporation in this County.☐ I have this day served the above styled affidavit and summons on the defendant(s) by posting a copy of the same to the door of the premises designated in said
affidavit, and on the same day of such posting by depositing a true copy of same in the United States Mail, First Class in an envelope properly addressed to the
defendant(s) at the address shown in said summons, with adequate postage affixed thereon containing notice to the defendant(s) to answer said summons at the
place stated in the summons.☐ Diligent search made and defendant _____
not to be found in the jurisdiction of this Court.

This _____ day of _____, 20 _____

FEB 20 2013

Belinda Thomas

DEPUTY

SHERIFF DOCKET _____ PAGE _____

CERTIFICATE OF SERVICE

I certify that I have this date served the **Final Order** to the below listed parties by mailing true and accurate copies of the same to the following address:

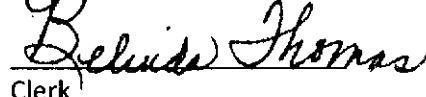
Re: Case# 11-CV-264

Jeffery J. Griffin GDC-1196338
Telfair State Prison
P. O. Box 549
Helena, Ga. 31037

William Danforth, Warden
Telfair State Prison
P. O. Box 549
Helena, Ga. 31037

Matthew B. Crowder of Counsel
To Special Asst Attorney General
Daniel M. King, Jr.
P. O. Box 4329
Dublin, Ga. 31040

This 17th day of May, 2013



Clerk

Telfair Superior Court

APPENDIX J
28 U.S.C. § 2254

Griffin v. Warden, et al

28 U.S. Code § 2254 - State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, ch. 646, 62 Stat. 967; Pub. L. 89–711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub. L. 104–132, title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)