

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 17-10070-H

DIN DEVEAUX,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

**Appeal from the United States District Court
for the Northern District of Georgia**

ORDER:

Din Deveau is a Georgia prisoner serving a total 30-year sentence, with 20 years to be served in custody, after he pled guilty to incest, statutory rape, child molestation, contributing to the delinquency of a minor, and cruelty to children in the first degree (Count 11). In 2016, Deveau filed the instant habeas corpus petition, pursuant to 28 U.S.C. § 2254, raising two claims.

In Claim 1, Deveau asserted that his guilty plea was not knowing and voluntary because: (a) he was “operating in a fog” as a result of taking “powerful muscle relaxers” at the time; (b) he did not know all the facts; and (c) the judge changed his sentence from 10 years’ probation on Count 11 to 20 years in custody. In Claim 2, Deveau argued that his due process and Eighth Amendment rights were violated because his sentence: (a) was illegal, since the judge sentenced him above the mandatory minimum sentence; and (b) was excessive. The district

court ultimately denied all of Deveaux's claims as procedurally barred or meritless. Deveaux now seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") to appeal the district court's denial of his § 2254 petition.

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted). If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2).

Claim 1:

Reasonable jurists would agree that Deveaux was procedurally barred from raising Claim 1(b) in his § 2254 petition. See *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). The district court correctly concluded that Claim 1(b) was procedurally defaulted, as Deveaux never raised this claim in state court. Although Deveaux had argued, in his state habeas petition, that his plea was not knowing and voluntary because he was suffering pain from being in his wheelchair, he never argued that he was taking muscle relaxers that inhibited his ability to understand the proceeding. Thus, because Deveaux failed to raise this claim in his first state habeas petition, he would be precluded from raising it in a successive state petition. Moreover, Deveaux does not assert any cause for the procedural default.

As to Deveaux's Claim 1(a), such claim is vague and conclusory because he does not specify what facts he allegedly was unaware of when pleading guilty. However, to the extent that Deveaux's Claim 1(a) relates to the sentencing issue in Claim 1(c), as discussed below, such claim does not warrant a COA.

In Claim 1(c), Deveaux argued that his plea was not knowing and voluntary because his sentence was changed without his knowledge. Specifically, Deveaux argued that the trial court indicated that his sentence as to Count 11 would be 10 years' probation, but amended it to 20 years in custody in the final judgment. However, it is unclear how any alleged change in Deveaux's sentence as to Count 11 would have impacted his total sentence, which consisted of multiple concurrent terms of 30 years, with 20 to serve in custody. Moreover, the plea transcript indicates that the trial court made clear to Deveaux that, if he pled guilty, the court would sentence him to 30 years, with 20 to be served in prison, and provided him with an opportunity to discuss this with his counsel. Accordingly, reasonable jurists would not debate whether the state habeas court's finding, that Deveaux's plea was knowing and voluntary, was contrary to federal law or an unreasonable finding of fact. Therefore, a COA is not warranted on this claim.

Claim 2:

As to Claim 2(a), Deveaux's argument that his sentence was illegal under Georgia law is a matter of state law, which is not cognizable in a federal habeas petition. *See Carrizales v. Wainwright*, 699 F.2d 1053, 1055 (11th Cir. 1983). Although Deveaux frames this claim in terms of due process, such a label is insufficient to invoke federal review, when Deveaux's argument centers around Georgia's application of Georgia criminal law. *See Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988). Accordingly, reasonable jurists would not debate whether Deveaux's Claim 2(a) states a valid claim of the denial of a constitutional right. Moreover,

Deveaux's Claim 2(a) is patently meritless, as the plain language of the statute clearly shows an intent that a defendant be sentenced to *at least* the minimum term of imprisonment, not *only* to the minimum term of imprisonment. See O.C.G.A. § 17-10-6.2(b). Accordingly, no COA is warranted as to Claim 2(a).

As to Claim 2(b), the state habeas court specifically found that Deveaux's sentence was not grossly disproportionate to the offense given that: (a) he could have been sentenced to maximum of 242 years' imprisonment if convicted on all counts for which he was charged; and (b) the victims of his crimes were minor children, one of whom was his own daughter. Thus, the state habeas court properly weighed the gravity of Deveaux's offenses and the harshness of his overall penalty in concluding that his sentence was not excessive in violation of the Eighth Amendment. Accordingly, reasonable jurists would not debate whether the state court unreasonably applied federal law or made an unreasonable determination in light of the facts, and therefore, a COA is not warranted on Claim 2(b).

Accordingly, a COA is DENIED and IFP status is DENIED as moot.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10070-H

DIN DEVEAUX,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

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

Before: MARCUS and ROSENBAUM, Circuit Judges.

BY THE COURT:

Din Deveaux has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's April 26, 2017, order denying his motions for a certificate of appealability and *in forma pauperis* status. Upon review, Deveaux's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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

DIN DEVEAUX,	:	CIVIL ACTION NO.
GDC ID # 918933, Case # 740507,	:	1:16-CV-02733-LMM
Petitioner,	:	
	:	
v.	:	
	:	
SHAWN EMMONS, Warden,	:	HABEAS CORPUS
Respondent.	:	28 U.S.C. § 2254

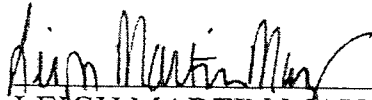
ORDER

On December 2, 2016, the Court adopted the Magistrate Judge's Final Report and Recommendation (Doc. 8), without objection from Petitioner; denied Petitioner's habeas corpus petition; and denied him a certificate of appealability. (Doc. 10). Petitioner now seeks leave to file an out-of-time appeal. (Doc. 12). He submitted his motion for leave on December 28, 2016, within the 30-day deadline for filing an appeal in a civil case, *see* Fed. R. App. P. 4, and the Court received it on January 3, 2017, also within the 30-day deadline, due to the New Year's holiday. The Court received Petitioner's notice of appeal on the same day. (Doc. 13). Because Petitioner timely filed his notice of appeal, his motion (Doc. 12) is **DISMISSED as moot.**

Petitioner may not proceed on appeal without a certificate of appealability, *see*

28 U.S.C. § 2253(c)(1)(A), and therefore his motion for leave to proceed *in forma pauperis* (Doc. 14) is **DENIED** as moot.

IT IS SO ORDERED this 20th day of January, 2017.



LEIGH MARTIN MAY

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DIN DEVEAUX,

Petitioner,

vs.

SHAWN EMMONS,

Respondent.

CIVIL ACTION FILE

NO. 1:16-cv-2733-LMM

J U D G M E N T

This petition for a writ of habeas corpus having come before the court, Honorable Leigh Martin May, United States District Judge, for consideration, and the petition having been considered and the court having rendered its opinion, it is

Ordered and Adjudged that the petition for a writ of habeas corpus be, and the same hereby is **denied** and **dismissed**.

Dated at Atlanta, Georgia, this 2nd day of December, 2016.

JAMES N. HATTEN
CLERK OF COURT

By: s/ Harry F. Martin
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
December 2, 2016
James N. Hatten
Clerk of Court

By: s/ Harry F. Martin
Deputy Clerk

Appendix "B"

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against cruel and unusual punishment and O.C.G.A. § 17-10-6.2.

(Doc. 1 at 5). **IT IS RECOMMENDED** that the petition be **DENIED**.

I. Petitioner's Non-Defaulted Grounds For Relief.

A federal court may not grant habeas corpus relief for claims previously decided on the merits by a state court unless the decision (1) “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) “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). A state court’s determination of a factual issue is presumed correct unless the petitioner rebuts that presumption “by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

In *Williams v. Taylor*, 529 U.S. 362, 412 (2000), the Supreme Court explained that, in applying 28 U.S.C. § 2254(d), a federal habeas court first ascertains the “clearly established Federal law” based on “the holdings, as opposed to the dicta, of [the Supreme Court’s] decisions as of the time of the relevant state-court decision.” The federal habeas court then considers whether the state court decision is “contrary to” that clearly established federal law, i.e., whether the state court “applies a rule that contradicts the governing law set forth” in Supreme Court cases, or “confronts a set of

facts that are materially indistinguishable from” those in a Supreme Court decision “and nevertheless arrives at a result different from” that decision. *Id.* at 405-06.

If the federal habeas court determines that the state court decision is not contrary to clearly established federal law, it then considers whether the decision is an “unreasonable application” of that law, i.e., whether “the state court identifies the correct governing legal principle” from the Supreme Court’s decisions, “but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “For purposes of § 2254(d)(1), an *unreasonable* application of federal law is different from an *incorrect* application of federal law.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotations omitted). “Under § 2254(d)(1)’s ‘unreasonable application’ clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly[, but r]ather, that application must also be unreasonable.” *Williams*, 529 U.S. at 411. “As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was *an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.*” *Richter*, 562 U.S. at 103

(emphasis added).

Although a federal court is not prohibited from considering the findings and conclusions that support a lower court's ruling on a petitioner's claims, in this Circuit the relevant ruling is the one issued by the last state appellate court to consider the claims on their merits. *See Hittson v. GDCP Warden*, 759 F.3d 1210, 1231 (11th Cir. 2014) (noting that "the highest state court decision reaching the merits of a habeas petitioner's claim is the relevant state court decision [for a federal habeas court to] review under AEDPA" (internal quotations omitted), which for a Georgia petitioner's state habeas claim is the decision of the Supreme Court of Georgia, even if the Supreme Court "summarily denied" the petitioner's CPC application without offering any rationale for its ruling).

[T]here is no AEDPA requirement that a state court explain its reasons for rejecting a claim; "Section 2254(d) applies even where there has been a summary denial." *Cullen v. Pinholster*, 563 U.S. 170, 187 (2011). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Richter*, 562 U.S. at 99. [A federal court's] task in these situations is to review the record before the Georgia Supreme Court to "determine what arguments or theories supported or, as here, could have supported, the state court's decision." *Id.* at 102. [The petitioner] may only obtain federal habeas relief "by showing there was no reasonable basis for the state court to deny relief." *Id.* at 98.

Id. at 1232-33 (footnote omitted; citations altered); *see Wilson v. Warden*, 834 F.3d 1227, 1230 (11th Cir. 2016) (*en banc*) (“conclud[ing] that federal courts need not ‘look through’ a summary decision on the merits to review the reasoning of the lower state court”); *id.* at 1235 (noting that when the Supreme Court of Georgia has denied a CPC application without explanation, the petitioner “must establish that there was no reasonable basis for the [court] to deny” it; but also noting that “[a] summary denial of a certificate of probable cause is not on the merits for any claim that was procedurally barred below”).

And, except in “limited circumstances,” “[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits” *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013).

A. Ground 1: Unknowing And Involuntary Plea

In ground 1 of his federal habeas petition, Petitioner asserts that his guilty plea was not knowing and voluntary because (a) he did not know all the facts, (b) he pled guilty while “operating in a fog” under the influence of powerful muscle relaxers and (c) he was sentenced on count 11 to 10 years’ probation while in court, but his sentence was later changed, outside of his presence, to 20 years’ imprisonment. (Doc.

1 at 5; Doc. 1-1 at 1-2). Petitioner alleges that had he known he would receive a 20-year custodial sentence instead of 10 years' probation, he would not have pled guilty and would have insisted on going to trial. (Doc. 1-1 at 2).

Petitioner was indicted by the DeKalb County Grand Jury for incest, statutory rape, [2] counts [each] aggravated child molestation, aggravated sexual battery [and] contributing to the delinquency of a minor[;] cruelty to children in the first degree[; and 3] counts child molestation. Petitioner entered a plea of guilty to incest, [7] counts child molestation, statutory rape, [2] counts contributing to delinquency of a minor and cruelty to children in the first degree. [He] was sentenced to [30] years[,] to serve [20] in custody.

(Doc. 7-4 at 1-2 (citations omitted)).¹

In ground 6 of his state habeas petition, Petitioner alleged that "his guilty plea was not voluntarily, knowingly, and intelligently entered in that [his] attorney did not inform [him] that the trial court was not obligated to follow the State's recommendation, trial counsel did not inform [him] of all the charges he was facing, and [he] suffered undue stress and pain as a result of having to sit in a wheelchair all day." (*Id.* at 10; *see* Doc. 1 at 9). The state habeas court rejected this claim, stating:

¹Petitioner received 30 years, with 20 years to serve in custody, on count 1 (incest); 20 years to serve in custody, concurrently with his count 1 sentence, on each of 9 counts: count 2 (statutory rape), counts 3-5 and 7-10 (child molestation), and count 11 (cruelty to children); and 1 year to serve concurrently on each of counts 6 and 12 (contributing to the delinquency of a minor). (Doc. 7-9 at 40).

The evidence in the instant case shows that Petitioner was advised of the charges against him and that trial counsel informed Petitioner that the trial court was not bound by the State's sentencing recommendation. The record shows that Petitioner's guilty plea was freely and voluntarily entered. Trial counsel and the trial court advised Petitioner of the constitutional rights [he] would be waiving by choosing to plead guilty. Petitioner was advised of the possible maximum sentences [he] could be facing if he went to trial. The trial court made a finding on the record at Petitioner's guilty plea hearing that his plea was freely and voluntarily entered.

(Doc. 7-4 at 12).

In ground 7 of his state habeas petition, Petitioner alleged that "the trial court failed to follow the State's recommendation and did not allow Petitioner the opportunity to withdraw his guilty plea."² (*Id.* at 12; *see* Doc. 1 at 9). The state habeas court rejected this claim also, stating:

The record shows that the State gave the trial court a recommendation of [25] years to serve [15] years in prison which represented the agreement reached between Petitioner and the State. Following the State's recommendation, Petitioner's trial counsel was given the opportunity to speak on Petitioner's behalf, and he asked the trial court to accept the State's recommendation. The trial court then asked to hear from the

²Aside from grounds 6 and 7 — and grounds 3 and 8, discussed below — Petitioner also claimed in his state habeas petition that he received ineffective assistance of counsel (grounds 1, 5); "he made a hasty decision to plead guilty due to being under extreme stress and discomfort from his disability" (ground 2); and "the charges against him were broken up and compounded to reflect multiple acts when in fact they were isolated individual occurrences, several of which were fabricated" (ground 4). (Doc. 7-4 at 2, 5, 8; *see* Doc. 1 at 8). Petitioner has not raised any of these claims in his federal habeas petition.

victim[s'] families about how Petitioner's crimes have affected the children involved. The trial court asked the State to read onto the record the mandatory minimum and maximum sentences for each of Petitioner's charges. After hearing from the State, Petitioner's attorney, the mothers of both child victims, and listening to the sentence ranges for each of Petitioner's crimes, the trial court stated "if [Petitioner] wants to enter a plea today, I will sentence him to [30] years to serve [20] in custody and the standard requirements of the sex offender probation." The trial court then provided Petitioner and his attorney the opportunity to discuss the trial court's sentence. Petitioner was provided with time to consider the fact that the trial court was declining to accept the State's recommendation and [he] was given the opportunity to decline to enter the guilty plea. After a brief recess, Petitioner went back on the record and entered a plea of guilty to the charges and accepted the trial court's sentence of [30] years to serve [20].

Trial counsel testified at the evidentiary hearing that he advised Petitioner that the trial court was not bound by the State's sentence recommendation. At Petitioner's guilty plea hearing, the State asked Petitioner if he understood that the trial court is not bound by any promises or recommendations and that the trial court could impose the maximum sentence if it chose, to which Petitioner responded that he understood.

The record shows that Petitioner was advised that the [trial court] did not have to follow the State's recommendation for sentencing. The record further shows that Petitioner was given the opportunity not to enter a plea of guilty after the trial court informed him that it would impose a harsher sentence than that recommended by the State and requested by Petitioner's attorney. Petitioner knew that the trial court intended to sentence him to [30] years to serve [20] and chose to enter a plea and accept that sentence.

(Doc. 7-4 at 12-13 (citations omitted)).

Petitioner has not challenged the findings and conclusions set forth above, and the Court discerns no basis for concluding that the state habeas court's conclusion that Petitioner's plea was knowing and voluntary, as summarily affirmed by the Supreme Court of Georgia, was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 103; *see also Farley v. Sec'y, Dep't of Corr.*, 8:11-CV-2706-T-27EAJ, 2014 U.S. Dist. LEXIS 164061, at *36 (M.D. Fla. Nov. 24, 2014) (" 'A reviewing federal court may set aside a state court guilty plea only for failure to satisfy due process: If a defendant understands the charges against him, understands the consequences of a guilty plea, and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea . . . will be upheld on federal review.' " (internal quotations omitted) (quoting *Stano v. Dugger*, 921 F.2d 1125, 1141 (11th Cir. 1991))); *Beier v. Butler*, 8:99-CV-754-T-27TBM, 2009 U.S. Dist. LEXIS 8536, at *12 (M.D. Fla. Jan. 23, 2009) ("A reviewing federal court may set aside a state court guilty plea only for failure to satisfy due process. A knowing and voluntary plea satisfies due process." (citing *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969))).

The state habeas court's order, and the transcript of Petitioner's plea hearing (*see* Doc. 7-9 at 125-46), make clear that Petitioner understood the charges against him and

the consequences of his guilty plea, and that — after a recess to allow Petitioner and his attorney time to discuss the trial court’s rejection of the State’s sentencing recommendation, thereby increasing Petitioner’s custodial sentence by 5 years — Petitioner chose *voluntarily* to plead guilty.

And Petitioner did not claim in state court that he was operating in a fog at his guilty plea hearing due to the effect of powerful muscle relaxers. He therefore procedurally defaulted his ground 1(b) claim, which is procedurally barred from federal habeas review on the merits, as discussed below.³

B. Ground 2: Excessive Sentence

In ground 2 of his federal habeas petition, Petitioner claims that the state trial court violated his right to due process and subjected him to cruel and unusual punishment by sentencing him to 20 years’ imprisonment, in defiance of O.C.G.A. § 17-10-6.2(b), which requires a trial court to put in writing any deviation from a defendant’s mandatory minimum sentence. He also asserts that his sentence on count

³In point of fact, although Petitioner did mention at his plea hearing that he was “taking a prescription medication for a muscle relaxer,” he denied that the drug interfered with his “ability to hear and understand” and he affirmed that he was “able to think clearly.” (Doc. 7-9 at 139-40). And the hearing itself was relatively brief, comprising a mere 18 pages of transcript, and thus unlikely to cause unusual stress to Petitioner, whose legs had been paralyzed in 2000, i.e., for more than 10 years at the time of the hearing. (*See id.* at 135).

11 is excessive because he pled guilty to 10 years' probation on that count, but instead received a sentence of 20 years' imprisonment. (Doc. 1 at 5; Doc. 1-1 at 2-3).

In ground 3 of his state habeas petition, Petitioner alleged that "his sentence is excessive because the trial court failed to consider that [he] had never been charged with similar offenses before and failed to accept the State's recommendation." (Doc. 7-4 at 6-7; *see* Doc. 1 at 8). In ground 8, Petitioner alleged that "his right to due process of law and the prohibition against cruel and unusual punishment were violated in that [his] sentences [are] both excessive and illegal under Georgia law." (Doc. 7-4 at 14; *see* Doc. 1 at 9). The state habeas court rejected these claims, stating:

Petitioner was convicted of incest, statutory rape, [7] counts of child molestation, [2] counts of contributing to the delinquency of a minor, and cruelty to children in the first degree. Pursuant to O.C.G.A. § 16-6-22, a person convicted of incest shall be punished by no less than [10] and no more than [30] years imprisonment for a first offense. A person convicted of statutory rape faces a mandatory minimum sentence of [1] year in prison and no more than [20] years. O.C.G.A. § 16-6-3(a). Each of Petitioner's seven convictions of child molestation carries a mandatory minimum sentence of [5] years imprisonment and a possible maximum sentence of [20] years imprisonment per count. O.C.G.A. § 16-6-4(a). A conviction for contributing to the delinquency of a minor carries a possible maximum sentence of [1] year imprisonment per conviction. O.C.G.A. § 16-12-1(b)(1). Finally, Petitioner's conviction for cruelty to children in the first degree carries a mandatory minimum sentence of [5] years imprisonment and a potential maximum sentence of [20] years imprisonment. O.C.G.A. § 16-5-70(e)(1). If Petitioner had gone to trial and been convicted, he could have been legally sentenced to a maximum

sentence of [212] years in prison as a first offender. Accordingly, [his] sentence of [30] years to serve [20] in incarceration is neither excessive [n]or illegal.

Under the Eighth Amendment to the United States Constitution and under Art. I, Sec. I, Par. XVII to the Georgia Constitution, a sentence is cruel and unusual if it is grossly out of proportion to the severity of the crime. Moreover, whether a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the evolving standards of decency that mark the progress of a maturing society. As shown above, Petitioner faced a possible maximum sentence of up to [212] years in prison for the crimes he committed. Further, the victims of Petitioner's crimes were minor children, one of which is his own daughter. It cannot be said that [his] sentence of [30] years to serve [20] is grossly disproportionate to the severity of his crimes.

(Doc. 7-4 at 14-15 (citations omitted); *see id.* at 7-8).

Petitioner has also failed to challenge these findings and conclusions, and the Court discerns no basis for concluding that the state habeas court's rulings on Petitioner's federal habeas ground 2 claims, as summarily affirmed by the Supreme Court of Georgia, are "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 103. Indeed, the Court is hard-pressed to discern how a reduction in one of Petitioner's *nine* concurrent 20-year sentences could possibly affect his overall sentence or the length of time he will remain imprisoned, even if the claim is not procedurally barred, as discussed below. And, given the

various crimes to which Petitioner pled guilty and the maximum sentences he might have received, Petitioner's sentence does not constitute cruel and unusual punishment or a violation of his federal due process rights. Although a "petitioner's claim that his sentence exceeds the maximum authorized by state law properly falls within the scope of federal habeas corpus review because the eighth amendment bars a prison sentence beyond the legislatively created maximum," *Graber v. Sec'y*, 417 Fed. Appx. 882, 882 (11th Cir. 2011) (internal quotations omitted), that is not the claim Petitioner has raised here, and the Court is unaware of any other state-law sentencing claim that might properly implicate the Cruel and Unusual Punishment Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment.⁴

II. Petitioner's Procedurally Defaulted Claims Are Barred From Merits Review.

A. The Bar To Claims Procedurally Defaulted In State Court

⁴And, to the extent Petitioner challenges his sentence based on an alleged violation of O.C.G.A. § 17-10-6.2(b), that challenge is not amenable to federal habeas review. *See Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) ("[I]t is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts."); *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988) ("[A] habeas petition grounded on issues of state law provides no basis for habeas relief. In the area of state sentencing guidelines in particular, we consistently have held that federal courts can not review a state's alleged failure to adhere to its own sentencing procedures. This limitation on federal habeas review is of equal force when a petition, which actually involves state law issues, is couched in terms of equal protection and due process." (citations and internal quotations omitted)).

Federal habeas review is generally barred for a claim that was procedurally defaulted in state court, i.e., a claim “not resolved on the merits in the state proceeding” based on “an independent and adequate state procedural ground.” *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977).

[P]rocedural default can arise in two ways. First, where the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the Petitioner’s federal claims are barred, *Sykes* requires the federal court to respect the state court’s decision. Second, if the petitioner simply never raised a claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred due to a state-law procedural default, the federal court may foreclose the Petitioner’s filing in state court; the exhaustion requirement and procedural default principles combine to mandate dismissal.

Bailey v. Nagle, 172 F.3d 1299, 1302-03 (11th Cir. 1999) (citations omitted); see *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (noting that if (a) petitioner failed to exhaust state remedies and (b) state courts would now find his claim procedurally barred, “there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented [her] claims”); *Owen v. Sec’y for the Dep’t of Corr.*, 568 F.3d 894, 907-08 (11th Cir. 2009) (same).

B. Lifting The Federal Procedural Bar

The procedural bar to federal habeas review may be lifted if the petitioner can demonstrate either (1) cause for the default and actual prejudice from the alleged

violation of federal law, or (2) a fundamental miscarriage of justice, i.e., that he will remain incarcerated despite his actual innocence unless the federal court considers his defaulted claim. *See Coleman*, 501 U.S. at 750; *Murray v. Carrier*, 477 U.S. 478, 488-89, 495-96 (1986). To establish cause for a procedural default, a petitioner must show either that his counsel's assistance was so ineffective that it violated his Sixth Amendment right to counsel or "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray*, 477 U.S. at 488. "To establish 'prejudice,' a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different" had he presented his defaulted claim. *Henderson v. Haley*, 353 F.3d 880, 892 (11th Cir. 2003).

To establish a fundamental miscarriage of justice, i.e., "that constitutional error has resulted in the conviction of one who is actually innocent of the crime," a petitioner must present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," *Schlup v. Delo*, 513 U.S. 298, 324 (1995), and he "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence," *id.* at 327.

If a petitioner has procedurally defaulted a claim in state court and “makes no attempt to demonstrate cause or prejudice” or a fundamental miscarriage of justice, that “claim is not cognizable in a federal” habeas action. *Gray v. Netherland*, 518 U.S. 152, 162 (1996).

C. Analysis

1. Federal Habeas Ground 1(b)

In federal habeas ground 1(b), Petitioner claims that he pled guilty while “operating in a fog” under the influence of powerful muscle relaxers. (Doc. 1 at 5; Doc. 1-1 at 1-2). But in state court, Petitioner claimed only that his plea was involuntary because he “suffered undue stress and pain as a result of sitting in a wheelchair all day.” (Doc. 1 at 9). He did not mention the effect of muscle relaxers in state court, and thus he procedurally defaulted his federal habeas ground 1(b) claim. And because he has failed to assert either actual innocence or cause and prejudice to excuse the default, this claim is barred from federal habeas review on the merits. *See Netherland*, 518 U.S. at 162.

2. Petitioner’s Count 11 Claims

In federal habeas ground 1(c), Petitioner challenges the knowing and voluntary nature of his plea due to a change in his count 11 sentence after he entered his plea, and

in federal habeas ground 2 he claims his sentence is excessive due to that change. (Doc. 1 at 5; Doc. 1-1 at 1-3). But Petitioner did not raise these claims in his state habeas pleadings. (See Doc. 1 at 8-9; Doc. 6-1 at 6-7). He did testify at his state habeas hearing about his alleged 10-year probationary sentence, but he apparently did such a poor job of explaining the issue that the state habeas court simply failed to address it in its order denying his petition. (See *generally* Doc. 7-4). Petitioner testified as follows:

There was a discrepancy with . . . the sentencing in the end. Somehow my attorney was . . . going to object or have questions on . . . sentencing on specific counts Ten years of probation on Count 11, but that was run concurrent with I believe Count 1. When I received the sentencing, it was . . . different. It seemed to be a little different when . . . I finally received the final document. . . . Does that matter at all?

(Doc. 7-9 at 32). Based on this confusing testimony, it is arguable that Petitioner procedurally defaulted his federal habeas ground 1(c) and 2 claims in state court. But even if he did not, these claims fail on the merits anyway, as explained below.

It was only *after* Petitioner entered his plea that the trial court mentioned a probationary sentence of 10 years on count 11 — while stating that Petitioner’s 20-year custodial sentences on counts 1-5 and 7-10 would run *consecutively*, rather than concurrently, as intended. The court then stated: “I need to sit down and think about

this. We need to calculate these. So let me work on the sentence.” (*Id.* at 144-45). But at no time during his plea hearing was Petitioner led to believe that his overall sentence would be less than 30 years, with 20 years to serve in custody. It is apparent from the plea hearing transcript that the trial court’s mention of 10 years’ probation on count 11 was in the nature of a scrivener’s error, as was its mention of consecutive sentences, which the trial court planned to correct after “work[ing] on the sentence.” (*Id.* at 145). And Petitioner knew before he pled guilty, and thereafter, that his sentence would be 20 years to serve. Thus, even if Petitioner’s ground 1(c) and ground 2 count 11 claims are not procedurally barred, they fail on the merits.

III. Certificate Of Appealability

A state prisoner must obtain a certificate of appealability (COA) before appealing the denial of his federal habeas petition. 28 U.S.C. § 2253(c)(1)(A). A COA may issue only when the petitioner makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This standard is met when “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). A petitioner need not “show he will ultimately

succeed on appeal” because “[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate.” *Lamarca v. Sec’y, Dep’t of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 337, 342 (2003)). Because there is no reasonable argument to support a finding that Petitioner has presented a non-defaulted claim of sufficient merit to warrant federal habeas relief, a certificate of appealability should not issue in this case.

IV. Conclusion

For the foregoing reasons, **IT IS RECOMMENDED** that the Court **DENY** the petition for a writ of habeas corpus (Doc. 1), **DISMISS** this action, and **DENY** Petitioner a certificate of appealability.

The Clerk is **DIRECTED** to terminate the referral to the Magistrate Judge.

SO RECOMMENDED this 14th day of November, 2016.

/s/ J. CLAY FULLER
J. CLAY FULLER
United States Magistrate Judge

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