

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12648-K

HERMAN BRIGHT,

Petitioner-Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Herman Bright has filed a motion for reconsideration of this Court's order dated January 30, 2018, denying his motions for a certificate of appealability, leave to proceed *in forma pauperis*, and leave to allow use of the original record. Upon review, Bright's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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Appeal from the United States District Court
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ORDER:

Herman Bright is a Georgia prisoner serving a life sentence plus five years after a jury convicted him of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Bright has moved this Court for a certificate of appealability (“COA”) and leave to proceed on appeal *in forma pauperis* (“IFP”) in order to appeal the denial of his *pro se* 28 U.S.C. § 2254 petition. He has also asked this Court for permission to proceed on appeal using the original record. In his § 2254 petition, Bright raised 17 claims of ineffective assistance of appellate counsel.

By way of background, on October 30, 2008, several people were partying at Malachi Smith’s home when a shooting occurred, which killed Jerome Jenkins and injured Jamaal Wesley. That day, Bright arrived at Smith’s house around 6:30 p.m. and was seen arguing with Jenkins 30 minutes later. Three witnesses testified that they saw Bright shoot Jenkins. Wesley

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

HERMAN BRIGHT, Petitioner,	:	HABEAS CORPUS
	:	28 U.S.C. § 2254
	:	
v.	:	
	:	
HOMER BRYSON, Respondent.	:	CIVIL ACTION NO.
	:	1:15-CV-4158-AT-JFK

**ORDER ADOPTING MAGISTRATE JUDGE'S
FINAL REPORT AND RECOMMENDATION**

The matter is before the Court on Magistrate Judge Janet F. King's Final Report and Recommendation, which recommends that Petitioner's habeas corpus petition, which challenges his 2009 DeKalb County convictions, and a certificate of appealability be denied and that the action be dismissed [Doc. 25]; Petitioner's objections [Doc. 27]; and Petitioner's motion for an evidentiary hearing [Doc. 28], Respondent's response [31], and Petitioner's reply [32].

I. Objections to the Final Report and Recommendation

In reviewing a Magistrate Judge's Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." *United States v. Schultz*, 565

F.3d 1353, 1361 (11th Cir. 2009) (quoting *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988)) (internal quotation marks omitted). The District Judge must “give fresh consideration to those issues to which specific objection has been made by a party.” *Jeffrey S. v. State Bd. of Educ. of Ga.*, 896 F.2d 507, 512 (11th Cir. 1990) (citation and internal quotation marks omitted). Absent objection, the district judge “may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge,” 28 U.S.C. § 636(b)(1), and “need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation,” Fed. R. Civ. P. 72, advisory committee note, 1983 Addition, Subdivision (b).

A. Background¹

On October 29, 2008, several people gathered at Malachi Smith’s home, where there was partying and drinking into the 30th. At approximately 7:00 p.m. on the 30th, a shooting occurred, which killed Jerome Jenkins and injured Jamaal Wesley. *See Bright v. State*, 292 Ga. 273, 273-74, 736 S.E.2d 380, 382 (2013); (Trial Tr. at 174 [11-7 at 147].)² The gathering included, among others, the following people, who may

¹ The Court utilizes and restates much of the Magistrate Judge’s presentation, adjusted as necessary in conducting a *de novo* review.

² Respondent’s Exhibit Six, which includes the habeas transcript, appellate briefs, the trial transcript, and the indexed trial record, is not consecutively numbered in a consistent manner. Accordingly, when citing the trial transcript – which is located at electronic docket entries 11-6 at 136 through 11-12 at 148 – the Court will first cite the trial transcript and page number with the Court’s electronic (ECF) citation in brackets. The Court will likewise cite to other filings that are part of

be referred to in the transcripts by their first, last, or alternate names listed below (the Court hereafter will use last names): (1) Petitioner, Herman Bright, known as Lou; (2) the victim, Jenkins, known as Rome or Roman; (3) the homeowner, Smith, known as Ki; (4) Ashley Stephenson; (5) the surviving victim, Wesley, known as T; (6) Francisco Rizo, known as Cisco or Migo; (7) Brandon Rowe; (8) Mike Hatcher; and (9) Aja Harris, Jenkins's girlfriend.³ (Trial Tr. at 174-75, 499 [11-7 at 147-48, 11-10 at 42].)

The DeKalb County grand jury indicted Petitioner on the following six counts: (1) malice murder of Jenkins, (2) felony murder of Jenkins, (3&4) aggravated assault and possession of a firearm during the commission of a felony against Jenkins, and (5&6) aggravated assault and possession of a firearm during the commission of a felony against Wesley, DeKalb County criminal action 09CR1815-5. (Trial Ct. R. at 5-12 [11-16 at 29-36].) Petitioner pleaded not guilty and proceeded to trial represented by Alden Snead. (Trial Tr. at 1 [11-6 at 136].) The jury found Petitioner guilty on all crimes against Jenkins and not guilty on the crimes against Wesley. (Trial Ct. R. at 121-22 [11-17 at 3-4].) The trial court imposed a total sentence of life plus five years of confinement. (*Id.* at 123 [11-17 at 5].) Petitioner, represented by

Exhibit Six.

³ Smith, Hatcher, Wesley, and a man named Devern Gordon, known as Ju or Junior, lived at Smith's home. (Trial Tr. at 488, 494 [11-10 at 31, 37].)

Angela Brown Dillon, appealed. (Trial Ct. R. at 1-2 [11-16 at 25-26].) On January 7, 2013, the Georgia Supreme Court affirmed the judgment against Petitioner. *Bright*, 292 Ga. at 276, 736 S.E.2d at 383.

On September 4, 2013, Petitioner filed in the Superior Court of Chattooga County a state habeas corpus petition in which he asserted that he had received ineffective assistance of appellate counsel, civil action number 2013 CA 39546. (Resp't Ex. 1, ECF No. 11-1.) In September 2014, Petitioner filed in the DeKalb County trial court an extraordinary motion for a new trial based on Petitioner obtaining information that three state witnesses had received immunity deals of which he was not previously aware. (See Pet'r Ex. E, ECF No. 17-1.)⁴ The habeas hearing was held on January 12, 2015, (Habeas Hr'g Tr. at 1 [11-6 at 1]), and on June 23, 2015, the state habeas court denied relief, (Resp't Ex. 3, ECF No. 11-3). On October 19, 2015, the Georgia Supreme Court denied further review. (Resp't Ex. 5, ECF No. 11-5.)

In this Court, Petitioner raises seventeen grounds for relief in which he asserts that appellate counsel was ineffective for not arguing on appeal that trial counsel was ineffective –

⁴ Petitioner states that the trial court has not ruled on his motion. (Pet'r Suppl. to Am. Br. at 2, ECF No. 16.) As discussed further below, the matter was raised on Petitioner's state habeas proceedings and is deemed exhausted.

1. for not objecting to state exhibits 11, 11-B, 11-C, 22, and 34;
2. for not objecting and seeking a mistrial when the state's key witness Wesley testified about his informal agreement to have his false-statement charge dropped in exchange for testifying against Petitioner;
3. for not objecting to the prosecutor's improper impeachment of Smith, using inadmissible hearsay testimony from Stephenson that placed Petitioner's character into evidence;
4. for not objecting to the prosecutor's improper impeachment of Smith, using inadmissible hearsay testimony from Hatcher that placed Petitioner's character into evidence;
5. for not objecting to the prosecutor's improper impeachment of Smith, using inadmissible hearsay testimony from Wesley that placed Petitioner's character into evidence;
6. for not objecting to the prosecutor's improper impeachment of Smith, using inadmissible hearsay testimony from Rowe that placed Petitioner's character into evidence;
7. for not objecting to the prosecutor's improper impeachment of defense witness Tasha Jett, Petitioner's sister, with a bias accusation;
8. for not objecting to the prosecutor's improper impeachment of Smith with a bias accusation;
9. for not objecting to the prosecutor's improper closing that Jett admitted bias;
10. for not objecting to the prosecutor's improper closing that Smith admitted bias;
11. for not objecting and seeking a mistrial when the prosecutor in closing introduced facts not in evidence and mischaracterized defense witnesses' statements of bias;
12. for not objecting to the prosecutor's improper closing argument that vouched for the credibility of four state witnesses;

13. for not objecting to the prosecutor's improper closing argument on Petitioner's future dangerousness;
14. for not objecting to the jury instruction on constructive possession, which was contrary to the indictment;
15. for withdrawing a request to charge on provocation, which would have reduced the murder charge to manslaughter; and
16. for not requesting a jury instruction on self defense.

(Am. Pet. at 3-6, ECF No. 15.) In ground seventeen, Petitioner argues that appellate counsel was ineffective for failing to raise newly discovered evidence of a *Brady*⁵ violation. (*Id.* at 7.)

The Magistrate Judge has recommended that all grounds fail. (R&R at 10-41, ECF No. 25.) Petitioner objects to that recommendation on all grounds. (Objections, ECF No. 27.)

A state court's decision on counsel's effectiveness is reviewed (1) through the deferential lense of the federal habeas standard, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which asks whether the state court ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement," *Harrington v. Richter*, 562 U.S. 86, 103 (2011), and (2) through the deferential lense

⁵ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

of the *Strickland* standard,⁶ which requires a petitioner to show that “no competent counsel would have taken the action that his counsel did take” and that there is a reasonable probability that but for counsel’s deficiency the result of the proceedings would have been different, *Chandler v. United States*, 218 F.3d 1305, 1313-15 (11th Cir. 2000) (*en banc*). See *Johnson v. Sec’y, DOC*, 643 F.3d 907, 910-11 (11th Cir. 2011) (stating that the *Strickland* “standard for judging the performance of counsel ‘is a most deferential one.’ *Harrington*, [562 U.S. at 105]. When combined with the extra layer of deference that § 2254 provides, the result is double deference and the question becomes whether ‘there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.’ *Id.*”). The standard for relief on federal habeas corpus grounds asserting ineffective assistance of appellate counsel in failing to raise claims of ineffective assistance of trial counsel is exceptionally difficult to meet, and, on *de novo* review of each of Petitioner’s grounds for relief, the undersigned finds that Petitioner has failed to meet that standard.

B. Ground One

Smith testified that he owned a Glock 40 gun, ammunition, and clip, and stated that, after he arrived at his home after the shooting, he laid his gun on his porch, called the police, and waited for them to arrive. (Trial Tr. at 209-12 [11-8 at 5-8].)

⁶ To show constitutionally ineffective assistance of counsel, a petitioner must establish that (1) counsel’s representation was deficient and (2) counsel’s deficient representation prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 690-92 (1984).

It was established at trial that the shots fired on the day of the murder were from a nine millimeter gun and that the Glock used forty caliber ammunition. (*Id.* at 410-12 [11-9 at 137-39].) The gun, clip, ammunition, and pictures of the gun and ammunition were admitted into evidence without objection (state exhibits 11, 11-B, 11-C, 22, and 34.) (*Id.* at 210-12 [11-8 at 6-8]; *id.* at 412-14 [11-9 at 139-41].) The items, except the ammunition, went out with the jury. (*Id.* at 804-05 [11-12 at 131-32].)

In his state habeas proceedings, Petitioner argued that appellate counsel was ineffective for failing to raise trial counsel's failure to object to state exhibits 11, 11-B, 11-C, 22, and 34 – Smith's Glock pistol, ammunition, clip, and pictures of the same – or moving to have them stricken before they entered the jury room. (Resp't Ex. 2 at 13, ECF No. 11-2.)⁷ At the state habeas hearing, appellate counsel, Dillon, stated that she did not see anything objectionable in the exhibits and surmised that, as Smith's gun was the only gun found at the scene after the police arrived, the prosecutor likely introduced it to show that it was *not* the murder weapon and to foreclose the defense from attempting to argue that Smith fired the shots with that gun. (Habeas Hr'g Tr. at 32-33 [11-6 at 33-34].) The state habeas court found that

⁷ When a litigant fails to provide page numbering, the Court uses the Court's electronic page numbering.

the evidence was relevant and that Petitioner had failed to show that appellate counsel was ineffective for not raising the issue on appeal. (Resp't Ex. 3 at 5.)

Petitioner re-asserts the same claim in federal ground one. (Am. Pet. at 3; Pet'r Am. Br. at 13, ECF No. 5.) Petitioner, among other things, argues that the gun exhibits – when combined with Stephenson's and Hatcher's hearsay testimony⁸ that Smith coerced them to come up with stories to get Petitioner off – created an improper inference of Petitioner's guilt and that appellate counsel should have challenged trial counsel's failure to object to the exhibits. (Pet'r Am. Br. at 14-16.)

Under the *Strickland* standard, the Magistrate Judge observed that, as a general rule, trial counsel is not ineffective for failing to object to the evidentiary admission of a gun obtained during the investigation of a murder, which evidence shows is not the murder weapon. *See White v. State*, 293 Ga. 825, 828, 750 S.E.2d 165, 168 (2013). The Magistrate Judge, among other things, found as follows --

A gun found by police at the scene of a shooting upon their arrival is relevant, if only to the limited extent of shedding light on whether or not it was the murder weapon. The state court's rejection⁹ of this claim is not an unreasonable application of *Strickland* in that there is no reasonable probability that a claim of ineffective assistance of trial

⁸ Stephenson's and Hatcher's testimony is discussed below in grounds three and four.

⁹ The Magistrate Judge noted as follows – A reference to the state court's decision refers to the Georgia Supreme Court's decision denying Petitioner's application for further review. The state habeas court's decision, to the extent discussed in relation to any of Petitioner's grounds, serves only to show a possible "basis on which the state supreme court could have denied relief[.]" *Wilson v. Warden*, 834 F.3d 1227, 1239 (11th Cir. 2016), *cert. granted*, 2017 WL 737820 (U.S. Feb. 27, 2017) (No. 16-6855); (*see also* R&R at 8 n.5.). (R&R at 13-14 n.7.)

counsel on this issue would have changed the appellate outcome. See *White*, 293 Ga. at 828, 750 S.E.2d at 168. This conclusion is not changed by consideration of grounds three and four – the claims in regard to Stephenson’s and Hatcher’s hearsay testimony – which fail as discussed below.

(R&R at 13-14.)

Petitioner objects. Petitioner contends that the introduction of Smith’s gun and its going out with the jury was prejudicial when combined with the testimony that Smith had attempted to coerce witnesses to come up with stories to exculpate Petitioner. (Objections at 2-3.) Petitioner argues that the general rule in *White* is inapplicable (1) because *White* did not involve a situation where the gun belonged to a witness who allegedly had attempted to coerce other witnesses and (2) because *White* likely involved harmless error as White had confessed to the shooting.¹⁰ (*Id.* at 3.)

In reviewing *White*, the Court finds no reason for excluding the gun in Petitioner’s case. *White* involves a defendant who confessed to a shooting and retracted his confession at trial. *White*, 293 Ga. at 828, 750 S.E.2d at 168. In *White*, the gun was obtained based on the defendant’s statement that a gun had been loaned to his brother a few days before the murder. At trial the gun owner testified that his gun was back in his possession at the time of the murder, and a firearm expert

¹⁰ The court in *White* found that counsel was not ineffective for failing to object, and there is no indication that its decision was based on anything other than an analysis of whether counsel was ineffective.

testified that the lethal bullet did not come from the loaned gun. *Id.* The Georgia Supreme Court found that counsel was not required to object to gun evidence which reiterated to the jury that the gun was not the murder weapon and that there was no other weapon linking the defendant to the crime. *Id.* The Court agrees with the Magistrate Judge that Smith's gun, found by police at the scene of a shooting upon their arrival, had sufficient relevancy such that the state habeas court was reasonable in finding that Petitioner failed to show that appellate counsel was ineffective for failing to raise trial counsel's failure to object to the gun evidence. The jury was free to weigh and consider the evidence of Smith's gun, and the Court fails to see why evidence of Smith's gun would be excludable because of the light it lends to testimony on Smith's attempt to coerce witnesses.

Further, as the gun was properly admitted, it was permissible for the gun to go out with the jury. *See Hunter v. State*, 143 Ga. App. 541, 543, 239 S.E.2d 212, 214 (1977) ("There was no error in allowing the breathalyzer device to go out with the jury. The machine was properly introduced into evidence, and the jury may take all properly introduced demonstrative evidence into the jury room when it retires."); *Walker v. State*, 216 Ga. 15, 17, 114 S.E.2d 431, 433 (1960) ("Both as to the photographs and the two pistols which were allowed in evidence, it was not erroneous, as the movant contends, for them to be sent out with the jury as a part of

the State's evidence and remain with the jury during its deliberation of the case.”).
Petitioner's objections on ground one must be overruled.

C. Ground Two

Petitioner was aware before trial that Wesley would be a State witness and that a false statement charge against Wesley had been dropped. (Trial Ct. R. at 34, 57 [11-16 at 58, 81].) Wesley testified that he heard shots as he was coming down the hallway, that he saw Petitioner shooting at him, and that it was Petitioner who shot him. (Trial Tr. at 259-61, 270 [11-8 at 55-57, 66].) Wesley testified that his initial statement to medical personnel and the police had been that he was shot walking down the street and that, out of fear of Petitioner, he did not state that Petitioner had shot him. (*Id.* at 269-71 [11-8 at 65-67].) Wesley testified that he initiated contact with the police to give his second statement – his statement that Petitioner shot him – and that no one threatened him, made him any promises, or struck a deal with him to give the second statement. (*Id.* at 277-78 [11-9 at 4-5].) On cross-examination, Wesley stated that he was arrested for false statements, spent four days in jail, contacted officers when he got out, and was never prosecuted for false statements. (*Id.* at 281-82 [11-9 at 8-9].) Wesley responded “yes” when he was asked, “you know

that . . . charge has been dropped as a result of your giving [the second] statement?” (*Id.* at 282 [11-9 at 9].)¹¹

During the state habeas corpus proceedings, Petitioner argued that Dillon should have raised a *Brady*¹² violation based on trial counsel’s apparent ignorance in regard to a deal between the state and Wesley. (Habeas Hr’g Tr. at 65 [11-6 at 66].) Dillon testified that she had seen no evidence that the prosecution had failed to disclose the dismissal of charges against Wesley and that evidence of the dismissed charges was before the jury. (*Id.* at 66-67 [11-6 at 67-68].) After Dillon stated that the evidence was before the jury, Petitioner questioned her, “so my issue was – matter of fact, isn’t that an informal, considered an informal agreement?” (*Id.* at 67 [11-6 at 68].) Counsel responded, “if it wasn’t written it was informal.” (*Id.* at 67 [11-6 at 68].)

The state habeas court found as follows –

The Court finds that no evidence supports that the prosecution did not disclose to Petitioner’s trial counsel the charges against Wesley. To the contrary, the cross-examination of Wesley demonstrates trial counsel was aware of the charges. Petitioner refers to Wesley’s charge being dropped as an “immunity deal,” however, no authority or evidence

¹¹ In his federal brief, Petitioner misstates that Wesley responded “yes” when he was asked, “you know that the charge has been dropped as a result of you giving *testimony*?” (Pet’r Am. Br. at 16-17 (emphasis added).)

¹² *Brady*, 373 U.S. at 87 (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

supports that there was any deal. Therefore, the Court finds that his ground is without merit.

(Resp't Ex. 3 at 7.)

Petitioner asserts that appellate counsel was ineffective for failing to raise trial counsel's failure to object and seek a mistrial when the state's key witness Wesley testified about his informal agreement to have a false-statement charge dropped in exchange for his statement against Petitioner. (Am. Pet. at 3 (citing the Trial Tr. at 282).) Petitioner argues that trial counsel was ineffective for abandoning the issue when Wesley admitted on cross-examination that the charges were dropped as a result of his giving a statement against Petitioner and when the prosecutor maintained the position that there was no deal. (Pet'r Am. Br. at 18.)

Under *Strickland*, the Magistrate Judge found as follows –

Here, Wesley's testimony that the false-statement charge *was dropped as a result of* him giving the second statement does not show that there was ever an *agreement* that the charge *would be dropped if* he made a statement against Petitioner. Wesley in fact testified that he made the second statement without having received any promises. The testimony cited by Petitioner shows no evidence of any agreement to provide a second statement or any agreement to testify. The undersigned finds nothing unreasonable in the state court's rejection of the claim in ground two.

(R&R at 17.)

Petitioner objects and argues that his appellate counsel, Dillon, stated at the state habeas hearing that it was an informal agreement and asserts that under *Brady* informal agreements must be disclosed to the defense. (Objections at 4.)

[T]o prevail on a *Brady* claim, a petitioner must demonstrate that: (1) the government possessed evidence that is favorable to him, either because it is exculpatory, or because it is impeaching; (2) the government suppressed that evidence, either willfully or inadvertently; and (3) prejudice ensued. Prejudice exists—and evidence is material as to guilt or punishment—if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.

Smith v. United States, 627 F. App'x 852, 855 (11th Cir. 2015).¹³ Speculation is insufficient to establish a *Brady* claim. See *United States v. Naranjo*, 634 F.3d 1198, 1212 (11th Cir. 2011) (“[M]ere speculation or allegations that the prosecution possesses exculpatory information will not suffice to prove ‘materiality.’” (quoting *United States v. Jordan*, 316 F.3d 1215, 1252 n. 81 (11th Cir. 2003))); *Middleton v. Roper*, 455 F.3d 838, 854 (8th Cir. 2006) (rejecting an undisclosed-deal claim that was founded on speculation based on the sequence of events); *Meders v. Chatman*, No. CV-207-90, 2014 WL 3973912, at *31 (S.D. Ga. Aug. 14, 2014) (“Petitioner’s speculation, based on Creel and Arnold not being prosecuted for the murder, is insufficient to establish a *Giglio* violation.”).

¹³ A subset of *Brady* claims are based on the requirement that the government reveal a beneficial deal that it has offered to a witness in exchange for his or her testimony. See *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

The defense (before trial) and the jury (at trial) were fully aware that Wesley had changed his initial story and that the false statement charge against Wesley had been dropped. The defense cross examined Wesley on the issue, and the jury was free to weigh the evidence placed before it. The fact that the state dropped the false statement charge against Wesley *after* he changed his initial statement does not mean that the state had a deal with Wesley that it would drop the charge *if* he changed his statement and incriminated Petitioner. *See United States v. Curtis*, 380 F.3d 1311, 1315 (11th Cir. 2004) (“[T]he mere fact that the government subsequently filed a motion for substantial assistance in Bojan’s fraud case does not prove that it had promised to do so.”). Petitioner presents no evidence of a deal, and Dillon’s answer to Petitioner’s question is ambiguous in the context of the questioning by Petitioner at the state habeas hearing and cannot fairly be read as a statement by Dillon that she had reason to think that there was an informal agreement that the false-statement charge would be dropped in exchange for Wesley incriminating Petitioner and testifying. Petitioner’s speculation on the possibility of a deal is insufficient to show that the state court was unreasonable in rejecting his ground two claim.

D. Grounds Three through Six

Prior to voir dire, the state informed the court that it intended to present evidence that Petitioner “through emissaries of his” had threatened witnesses. (Trial Tr. at 27-28 [11-6 at 162, 11-7 at 1].) Petitioner objected that it would be hearsay and

improper character evidence, and the Court informed Petitioner that his objection was noted and indicated that it would allow the testimony if the proper foundation was laid. (*Id.* at 28 [11-7 at 1].)

Stephenson testified that she heard the gunshots, left, and saw Petitioner leaving at the same time. (*Id.* at 241 [11-8 at 37].) When Stephenson was asked to recall what she had told the police about a conversation with Smith after the shooting, she testified that Smith was upset because he thought that she had “told on” Petitioner and that Smith had said that he would pay her mother’s rent if she changed her story and got his friend, Petitioner, off. (*Id.* at 243-44 [11-8 at 39-40].) Stephenson testified that Smith had been “real disrespectful” and that she was concerned for her safety. (*Id.* at 247 [11-8 at 43].)

Wesley testified that, approximately one week after the shooting, he went with Rowe to Smith’s home, and Smith told them both to blame it on the victim’s girlfriend, Aja Harris. (*Id.* at 273 [11-8 at 69].) Counsel Snead objected that it was hearsay, and the court sustained the objection. (*Id.* at 274 [11-8 at 70].)

Rowe testified that he saw Petitioner shoot the victim. (*Id.* at 362 [11-9 at 89].)¹⁴ Rowe also testified that, when he went with Wesley to Smith’s home, Smith told them to “put it on Aja – put the murder on Aja, because she left.” (*Id.* at 374 [11-9 at 101].)

¹⁴ Rizo also testified that he saw Petitioner shoot the victim. (Trial Tr. at 308 [11-9 at 35].)

Hatcher testified that he saw Petitioner shoot the victim and that he returned to the house two days later and was there with Smith. (*Id.* at 510, 518 [11-10 at 53, 61].) Hatcher testified that Petitioner arrived and, while Smith was present, that Petitioner told Hatcher that he had heard that Rowe had been snitching and stated “well you tell him if he snitching, I’m going to murder him.” (*Id.* at 519 [11-10 at 62].) Hatcher further testified that after Petitioner left, he had a discussion with Smith about what he should say. (*Id.*) Hatcher testified,

I had run out of money. I couldn’t afford a hotel any more. I had to come back and stay at [Smith’s] house, downstairs in my room. And basically, I got the idea of what kind of person [Smith] is if I don’t go along with what he’s saying, I’m not going to have no place to stay. . . . So I mean he came up with this – with I think it was maybe two different stories of what we all should say so that he can get off – so that [Petitioner] can get off. And I went along with his story.

(*Id.* at 520 [11-10 at 62].)

Smith subsequently testified for the defense and stated that he had never offered to pay anyone’s rent to change their testimony. (*Id.* at 693 [ECF 11-12 at 20].)

In his state habeas proceedings, Petitioner claimed that Dillon had been ineffective for failing to raise trial counsel’s failure to object to Stephenson’s, Hatcher’s, Wesley’s, and Rowe’s hearsay testimony about Smith’s statements. (Habeas Hr’g Tr. at 27-29, 76 [11-6 at 28-30, 77].) The state habeas court found that Stephenson’s, Hatcher’s, and Rowe’s testimony did not qualify as hearsay because the statements were not introduced to prove the truth of the matter asserted therein and

because Smith testified at trial and was subject to cross-examination. (Resp't Ex. 3 at 6, 8.) The state habeas court found that the claim pertaining to Wesley's testimony was without merit as the trial court had sustained trial counsel's objection to the testimony. (*Id.* at 6-7.)

In federal grounds three through six, Petitioner asserts that appellate counsel was ineffective for failing to raise trial counsel's failure to object to the prosecutor's improper impeachment of state witness Smith¹⁵ using hearsay testimony from Stephenson, Hatcher, Wesley, and Rowe. (Am. Pet. at 4-5 (citing Trial Tr. at 243, 244, 247, 273-74, 373-74, 520).). Petitioner argues that the evidence improperly placed Petitioner's character into evidence using guilt by association; that no proper foundation was laid for impeaching Smith based on a prior inconsistent statement; and that the threatening conduct of Smith, a third party, had not been linked to Petitioner as required for evidence on influencing a witness. (Pet'r Am. Br. at 19-26.)

Under *Strickland*, the Magistrate Judge found as follows –

As a preliminary matter, trial counsel *did* object in regard to Wesley's testimony, and appellate counsel was reasonable not to raise on appeal a challenge to the contrary. Additionally, the Court otherwise finds nothing unreasonable in the state court's rejection of the claims in grounds three through six. The record indicates that the state intended to introduce evidence of Smith's attempts to coerce as substantive

¹⁵ Smith testified for both the state and the defense, and Georgia law in effect at the time of Petitioner's trial stated, "Any party, including the party calling the witness, may attack the credibility of a witness." O.C.G.A. 24-9-81 (2005).

evidence of attempts to coerce that were linked to Petitioner.^[16] (See Trial Tr. at 27-28 [11-6 at 162, 11-7 at 1].) As such, if the proper link was made, the reflection on Petitioner's character would not be error. There was evidence that Petitioner personally attempted to influence witnesses, i.e., Hatcher's testimony that Petitioner told Hatcher to tell Rowe that, if he had been snitching, Petitioner would murder him. Smith was present during that exchange, and Smith followed up Petitioner's comments by coming up with stories of what the witnesses should say to get Petitioner off. The evidence is sufficient to infer that Smith's attempts to influence were linked to Petitioner.^[17] Further, to the extent that Smith's statements – as related by Stephenson, Hatcher, and Rowe – were hearsay, Smith was available for cross examination. Had Dillon raised the matter on appeal, there is no reasonable probability that the appellate outcome would have been different.

(R&R at 22-23.)

Petitioner objects that there is an insufficient evidence of a connection between Petitioner and Smith's conduct and that a proper foundation was never laid for impeaching Smith.¹⁸ (Objections at 5-7.)

The evidence of a connection was sufficient. There was evidence that Petitioner personally attempted to influence witnesses and that Smith was present at the time.

¹⁶ The Magistrate Judge noted, "In light of the state's purpose, it does not appear that the state was attempting to impeach or challenge Smith's credibility by use of the challenged hearsay statements. Accordingly, the Court does not address whether a proper foundation was laid to impeach Smith. The issue is whether Smith's attempts at coercion were adequately linked to Petitioner." (R&R at 22 n.13.)

¹⁷ The Magistrate Judge explained that, under Georgia law, evidence of a third party attempt to influence a witness must be linked to the defendant before it is admissible. (See R&R at 21-22.)

¹⁸ Although Petitioner does not mention Smith's name in his objections on grounds three through six, grounds three through six all challenge the allegedly improper impeachment of Smith. (See Am. Pet. at 4-5.)

(Trial Tr. at 510, 518-519 [11-10 at 53, 61-62].) Smith immediately followed up Petitioner's comment on murdering snitches by coming up with stories on what the witnesses should say to get Petitioner off. (*Id.* at 520 [11-10 at 62].) As to a proper foundation for impeaching Smith, it does not appear that the statements by Stephenson, Wesley, Rowe, and Hatcher were introduced in order to impeach Smith. The prosecution stated that it intended to introduce the evidence, not to impeach Smith, but to show that Petitioner, through an emissary, had attempted to threaten witnesses. Stephenson, Wesley, Rowe, and Hatcher all testified based on their personal knowledge of what they had heard. Petitioner does not identify how the foundation for evidence on third-party threat/coercion was insufficient or show what argument appellate counsel could have raised on appeal that reasonably could have changed the outcome. *See Potter v. State*, 301 Ga. App. 411, 415, 687 S.E.2d 653, 657 (2009) ("[A]n objection of 'lack of foundation' generally is of little or no use For example, 'lack of foundation' can refer to a failure to establish that the item of evidence being offered is the same item it purports to be – often referred to as chain of custody, or it may refer to a failure to establish that the witness is testifying from personal knowledge."). Petitioner fails to show that the state court was unreasonable in finding Petitioner failed to show that appellate counsel was ineffective for failing to challenge trial counsel's failure to object to Stephenson's, Hatcher's, Wesley's, and Rowe's testimony that Smith attempted to influence them.

E. Grounds Seven and Eight

Jett, Petitioner's sister, testified that, on the afternoon and evening in question, Petitioner came to her house around three-thirty or four o'clock and that he never left the house the rest of the night. (Trial Tr. at 665-66 [11-11 at 28-29].) On cross examination, the prosecutor inquired, "you admit, you're biased. You don't want anything to happen to him, do you?" (*Id.* at 667 [11-11 at 30].) Jett responded, "of course not." (*Id.*) On cross examination of Smith, the prosecutor inquired, "you admit you are biased in this case. This is your friend, right?" (*Id.* at 697 [11-12 at 24].) Smith responded, "Yeah, everybody[.]" and when the prosecutor again asked if Petitioner was his friend, Smith responded, "Yes." (*Id.*)

Petitioner argued in his state habeas proceedings that appellate counsel was ineffective for failing to argue that trial counsel was ineffective in failing to object to the prosecutor's questioning of Jett and Smith on bias. (*See Resp't Ex. 3* at 9-10.) The state habeas court found that there was nothing to show that the witnesses were denied a proper opportunity to respond to the question and explain their answer, that the prosecutor's question was proper, and that appellate counsel was not ineffective on the issue. (*Id.*)

Petitioner argues in his federal grounds seven and eight that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for not objecting to the prosecutor improperly impeaching defense witnesses Jett and Smith by

asserting that they admitted bias, immediately followed by a question which would evoke a response that affirmed either care for a brother or friendship. (Am. Pet. at 5; Pet'r Am. Br. at 27-28.)

Under *Strickland*, the Magistrate Judge found as follows –

[There is] nothing unreasonable in the state court’s rejection of the claims in grounds seven and eight. It was proper to cross examine both Jett and Smith in order to show the jury that they had favorable feeling toward Petitioner, and the Court perceives no issue that appellate counsel could have raised that would have had a reasonable chance of changing the outcome on appeal.

(R&R at 25.)

Petitioner objects that the Magistrate Judge inaccurately framed the prosecutor’s bias statement as a question and asserts that the prosecutor’s bias comments were not questions but were crafted to confuse the jury and prejudice him. (Objection at 7-8.) Petitioner also contends that caring for a brother or friend is not bias. (*Id.* at 8.)

A witness may be positively biased because they care for a friend or relative, and it is important for a jury to be aware of such bias and its potential impact on witness testimony. *See United States v. Abel*, 469 U.S. 45, 52 (1984) (defining bias as “the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.”). The Magistrate Judge accurately set forth the prosecution’s statement and questions, and the Court overrules Petitioner’s objection on the manner in which the Magistrate Judge framed the statements and question. It is not objectionable for the prosecution to lead a witness on cross-examination. Although it would have been preferable for

the prosecutor to have used questions instead of statements followed by questions, it was proper to make the jury aware of the witnesses' relationships with Petitioner. As found by the state habeas court, there was nothing to show that the witnesses were denied a proper opportunity to respond to the question and to explain their answer. The Court cannot find that the state habeas court's conclusion on the claims in grounds seven and eight was unreasonable under AEDPA standards.

F. Grounds Nine through Eleven

In closing argument, the prosecutor stated, "his witnesses admit that they are biased. They have to. [Smith] and his sister, yeah, we are biased. We are here for him. They are not here for the truth, just for him. So that you can get it confused, twisted. That's all. Don't let that happen in this case. Don't let yourselves be fooled by this." (Trial Tr. at 764 [11-12 at 91].)

In his state habeas proceedings, Petitioner argued that appellate counsel was ineffective for failing to raise on direct appeal trial counsel's failure to object to the prosecutor's closing comments on Jett's and Smith's bias. (*See* Resp't Ex. 3 at 11.) The state habeas court found that the claims failed because Jett and Smith had admitted bias. (*Id.*)

Petitioner argues in federal grounds nine through eleven that appellate counsel was ineffective for not raising trial counsel's failure to object or seek a mistrial when the prosecutor's closing comments mischaracterized Jett and Smith's statements and

introduced facts not in evidence by stating that Jett and Smith admitted bias. (Am. Pet. at 5-6; Pet'r Am. Br. at 29-32.) Petitioner asserts that the particular comment by the prosecutor – yeah, we are biased – did not reflect any testimony actually provided by Jett or Smith. (Pet'r Am. Br. at 31.)

Under *Strickland*, the Magistrate Judge found as follows --

The prosecutor's comment – yeah, we are biased, is not an exact quote of either Jett or Smith. The comment was made in the context of summarizing both witnesses. In that context, it does not appear that the prosecutor intended it as a verbatim quote but as a statement that both Jett and Smith admitted that they were biased. It is not unreasonable to find that Jett and Smith both admitted bias when they responded affirmatively to the bias questions – reviewed above – without any attempt to explain their answer otherwise. As they both admitted bias, the Court finds nothing unreasonable in the state court's rejection of Petitioner's claims against appellate counsel on this matter.

(R&R 26-27.)

Petitioner objects that the Magistrate Judge wrongly determined that the witnesses admitted bias. (Objections at 10.)

The only question in federal court is whether the state habeas court's decision on the issue was *reasonable*. The federal court need not find that it would make the same decision as made by the state court. The federal court need find only that the state court decision was not unreasonable – that is so erroneous as to be “beyond any possibility for fairminded disagreement.” *Harrington*, 562 U.S. at 103. The Court cannot find that the state habeas court's decision was unreasonable. In response to

the bias statement/question, Jett affirmed that she did not want anything to happen to Petitioner. In response to the bias statement/question, Smith affirmed his friendship with Petitioner (and other evidence showed Smith's attempt to influence witnesses favorably to Petitioner). Further, neither Jett nor Smith were denied an opportunity to explain their answers to the bias statement/question. Under AEDPA's deferential standard of review for state court decisions, Petitioner's objection on this ground must be overruled.

G. Ground Twelve

During closing, the prosecutor stated the following --

Ashley Stephenson, Jamaal Wesley, Mike Hatcher and Brandon Rowe testified and told you that Malachi Smith tried to manipulate testimony.

Now, why is that believable? Because Malachi himself had to admit that he is biased for this defendant. He knows everything kind of went through him. It's his house. He knows all these people. He is trying to get him off.

(Trial Tr. at 766 [11-12 at 93].)

In his state habeas proceedings, Petitioner argued that appellate counsel was ineffective for failing to argue that trial counsel was ineffective in failing to object to the prosecutor's closing comments that vouched for the four witnesses, as quoted above. (*See* Resp't Ex. 3 at 11-12.) The state habeas court rejected the claim on the grounds that Petitioner failed to show that the prosecutor had misstated the evidence or that an objection by trial counsel was warranted. (*Id.* at 12.)

Petitioner argues in federal ground twelve that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to object to the prosecutor's improper closing argument, which used the prosecutor's improper comment on Smith's bias to vouch for the credibility of Stephenson's, Wesley's, Hatcher's, and Rowe's testimony that Smith had tried to influence their testimony. (Am. Pet. at 6; Pet'r Am. Br. at 33.)

Applying *Strickland*, the Magistrate Judge found as follows –

As stated in the discussion of grounds nine through eleven, it was reasonable to find that Smith admitted bias. Further, the prosecutor's comment – that evidence of Smith's bias was consistent with the testimony on his attempts to influence witnesses – reflected the evidence and was not improper. The undersigned finds nothing unreasonable in the state court's rejection of the claim in ground twelve.

(R&R at 28.)

Petitioner objects, again asserting that the prosecution should not have referred to the alleged admissions of bias. (Objections at 10.)

The claims in ground twelve are closely related to the claims in grounds seven through eleven, and, based on the reasons discussed above in grounds seven through eleven, the Court finds that Petitioner's objection provides no reason to find that the state habeas court's decision was unreasonable.

H. Ground Thirteen

In closing, the prosecutor made the following comments –

Nobody hid the fact that Jamaal Wesley initially told the police a story without naming anybody. . . . Jamaal was thinking of Jamaal at that point. He saw what he had done. These folks live in this neighborhood. They had to go back to that neighborhood. They don't want to come in here and snitch out on somebody. Because they know, as they say, snitches get stitches. That's what they say out there on the street.

We have all these witnesses in here now to face this man who they saw shoot and kill another man on October 30th of 2008. They live in that community. And they have to trust that you're going to uphold your duty and follow the law in this case and do the right thing. Because I can't promise them any more than that.

...

[Y]ou don't reward him. And you don't revictimize that community or that neighborhood. Don't reward him. That's what you do. You have an option in this case.

...

The other thing [your message] says is that people who come forth to the police who witness crimes, even under the threats of violence, even under intimidation, who come forward, who come in and testify of what they heard – well, we'll just dismiss that. I mean, these police out here on the front line trying to protect this community, relying on witnesses to come forward. And your verdict in this case will speak to that.

.... [Y]ou and your verdict reflects what we value.

(Trial Tr. at 768-69, 772, 778 [11-12 at 95-96, 99, 105].)

Petitioner argued in his state habeas proceedings that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for not objecting to the prosecutor's closing comments on Petitioner's future dangerousness. (*See* Resp't Ex. 3 at 12.) The state habeas court rejected the claim but did not address the specific language quoted above. (*Id.*)

Petitioner argues in federal ground thirteen that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for not objecting to the prosecutor's improper closing argument – stated above – on Petitioner's future dangerousness. (Am. Pet. at 6; Pet'r Am. Br. at 34-36.)

Under *Strickland*, the Magistrate Judge found as follows –

Under Georgia law, “it is improper for a prosecutor to argue to the jury during the guilt-innocence phase of a trial that if the defendant is found not guilty, the defendant will pose a threat of future dangerousness, and that the failure of defense counsel to object may be found to constitute deficient performance.” *Jones v. State*, 288 Ga. 431, 433-34, 704 S.E.2d 776, 799 (2011). “A prosecutor argues future dangerousness when the prosecutor asserts there will be more victims if the defendant is not found guilty . . . or the community or witnesses will be endangered if the defendant is not found guilty.” *Fulton v. State*, 278 Ga. 58, 64, 597 S.E.2d 396, 402 (2004). However, comments dealing with the importance of jury duty and the responsibility of jurors and comments that a guilty verdict will send a message to the community and other killers generally, even if improper for other reasons, are not comments that improperly refer to future dangerousness. *Sampson v. State*, 282 Ga. 82, 83 and n. 2, 646 S.E.2d 60, 63 and n.2 (2007).

To the extent that defense counsel is found deficient for failing to object to an argument on future dangerousness, “any such found deficiency will not amount to ineffective assistance of counsel unless the defendant can also establish that the failure to object was so prejudicial

to his defense that, but for this deficiency, there was a reasonable probability that the outcome of his trial would have been different.” *Jones*, 288 Ga. at 434, 704 S.E.2d at 779; and see *Walton v. State*, 272 Ga. 73, 74, 526 S.E.2d 333, 335 (2000) (finding that “any possible error [based on improper argument of future dangerousness] was harmless in light of the overwhelming evidence of guilt”).

The prosecutor commented on the general street rule that snitches get stitches in the context of discussing Wesley’s initial decision to make up a story as to how he was shot. Although perhaps ambiguous, the Court does not find that the comment was an improper reference to Petitioner’s future dangerousness. See *Hambrick v. State*, 278 Ga. App. 768, 772, 629 S.E.2d 442, 446 (2006) (“A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting for lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.” (quoting *Hammond v. State*, 260 Ga. 591, 597, 398 S.E.2d 168, 173-74 (1990)) (internal quotation marks omitted)). The prosecutor stated that sometimes witnesses come forward after being threatened, that police do their duty in reliance on witnesses coming forward, and that the jury’s role was important. The Court reads such comments as referring in general terms to the role of witnesses and juries and does not find that the prosecutor was referring to Petitioner’s future dangerousness. Further, even if trial counsel was deficient for failing to object and appellate counsel had raised the deficiency on appeal, a different appellate outcome is unlikely in light of the significant evidence against Petitioner, i.e., three witnesses testified that they saw Petitioner shoot the victim.

(R&R at 30-32.)

Petitioner objects on the grounds that it is clear that the prosecutor put forth a argument of future dangerousness. (Objections at 10-11.)

On *de novo* review, the Court agrees with the Magistrate Judge's recommendation, for the reasons as stated by the Magistrate Judge, as quoted above.

I. Ground Fourteen

In count four of the indictment, Petitioner was charged with the offense of possession of a firearm during commission of a felony in that on October 30, 2008, he "did unlawfully have on his person a firearm during the commission of the crime of Aggravated Assault, a crime involving the person of Jerome Jenkins."¹⁹ (Trial Ct. R. at 10 [11-16 at 34]; Trial Tr. at 781 [11-12 at 108].)

The court instructed the jury that the state had the burden "to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt." (Trial Tr. at 783 [11-12 at 110].) The court instructed the jury on possession of a firearm, both actual and constructive. (*Id.* at 794 [11-12 at 121].) The jury was provided a copy of the indictment and the jury charges. (*See id.* at 780 [11-12 at 107].)

In his state habeas proceedings, Petitioner argued that appellate counsel was ineffective for not arguing that trial counsel was ineffective for failing to object to the jury instruction on constructive possession. (Resp't Ex. 3 at 12-13.) The court rejected the claim without significant discussion. (*Id.* at 13.)

¹⁹ Count six, the firearm charge on which Petitioner was found not guilty, is not addressed.

Petitioner argues in federal ground fourteen that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to object to a jury instruction on constructive possession, which was contrary to the indictment, a constructive amendment thereof, and a comment on the evidence. (Am. Pet. at 6; Pet'r Am. Br. at 36-39.)

Under *Strickland*, the Magistrate Judge found as follows –

Under Georgia law, “[w]here the indictment charges that a defendant committed an offense in one specific way, it generally is error for a trial court to instruct the jury that the offense could be committed in another way.” *Jarnigan v. State*, 295 Ga. 603, 608, 761 S.E.2d 256, 261 (2014). However, the Georgia Supreme Court repeatedly has made it clear that “the potential harm of such an error is cured ‘where the court provides the jury with the indictment and instructs jurors that the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.’” *Id.* (quoting *Williams v. Kelley*, 291 Ga. 285, 286-87, 728 S.E.2d 666, 668 (2012)).

Here, the jury was provided with a copy of the indictment and the court instructed the jurors that the state had the burden of proving every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt. Based on *Jarnigan*’s discussion in regard to curing potential harm from an indictment/jury-instruction discrepancy, it is apparent that if appellate counsel had raised this issue on appeal there is no reasonable likelihood that it would have succeeded.

(R&R at 33-34.)

Petitioner objects on the grounds that the instruction was a comment on the evidence in regard to Smith’s gun and his alleged attempts to threaten witnesses.

(Objections at 11-12.) Based on the Georgia legal principle quoted above, the Court finds that had appellate counsel raised the jury-instruction and constructive amendment issue on appeal there is no reasonable likelihood that it would have succeeded. *See Jarnigan*, 295 Ga. at 608, 761 S.E.2d at 261.

J. Grounds Fifteen and Sixteen

Petitioner took the stand and testified that, on the day of the murder, he left Smith's house at about two-thirty, went to his sister's house, did not return to Smith's house that day, was not in any confrontation with anyone in the house, and did not shoot anyone. (Trial Tr. at 644-45 [11-11 at 7-8].) On cross-examination, Petitioner stated, "I was totally oblivious to even the incident happening at the house." (*Id.* at 661 [11-11 at 24].)

Petitioner originally requested jury charges on manslaughter (request 16), provocation (request 17), and justification (requests 20-21). (Trial Ct. R. at 107-08, 112-17 [11-16 at 131-32, 136-37].) Petitioner then informed the Court that he was not asking for a reduced charge of manslaughter and withdrew the requests on manslaughter (request 16) and provocation (request 17). (Trial Tr. at 685-87 [11-12 at 12-14].) Petitioner, however, stated that he wanted a justification charge (requests 20-21), which the court stated that it would not give, over Petitioner's objection. (*Id.* at 688-90 [11-12 at 15-117].) The court stated, "your defense is alibi, that he wasn't

there. . . . [I]f you're going forth with the alibi defense, I'm not going to give [a justification charge]." (*Id.* at 689-90 [11-12 at 16-17].)

In his state habeas proceedings, Petitioner argued that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for withdrawing the request to charge on provocation and for failing to request a jury instruction on self defense. (See Resp't Ex. 3 at 10-11.) Appellate counsel Dillon explained that she did not raise the issue on appeal because she did not think it was ineffective of trial counsel to avoid undermining Petitioner's alibi defense. (Habeas Hr'g Tr. at 58 [11-6 at 59].) The state habeas court found that counsel acted reasonably in light of the fact that Petitioner's defense was that he was not present at the time of the shooting. (Resp't Ex. 3 at 10-11.)

Petitioner argues in federal grounds fifteen and sixteen that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for withdrawing the request to charge on provocation, which would have reduced the murder charge to manslaughter, and for failing to request a jury instruction on self defense.

Under *Strickland*, the Magistrate Judge found as follows --

Counsel reasonably can decline to tender a jury instruction that is inconsistent with an alibi defense so as to avoid weakening the alibi defense. *Kubat v. Thieret*, 867 F.2d 351, 364-65 (7th Cir. 1989) (acknowledging the "general proposition that it is reasonable to forego a lesser included offense instruction where a defendant has presented an alibi defense"); see also *Wright v. Hopper*, 169 F.3d 695, 710 (11th Cir. 1999) (stating that the "alibi defense negates any 'plausible claim'

that the defendant could have still been a member of the robbery team, but not the triggerman, so Wright was not entitled to a lesser included offense instruction"). A defense which denies guilt on the grounds that someone else committed the crime "practically precludes" a request for a jury instruction on a lesser included offense or justification/excuse. *Black v. Goord*, 419 F. Supp. 2d 365, 381-82 (W.D. N.Y. 2006) (holding that counsel was not ineffective for failing to request jury charge on lesser included offense when defense was misidentification); *Reed v. State*, 204 Ga. App. 272, 273, 419 S.E.2d 45, 47 (1992) ("Reed relied exclusively on an alibi defense. Defenses such as self-defense, or accident, which would have called into question the issue of intent were not present in the case. Since any charge on intent was so far removed from the theory upon which the case was tried, even if incorrect, it would have been harmless.").

Grounds fifteen and sixteen fail. First, the record shows that trial counsel *did* request a jury instruction on self defense and then objected when the trial court did not allow the defense. Accordingly, Petitioner's claim based on trial counsel's alleged failure to request a self-defense charge is without merit. Moreover, as indicated by the state habeas court, it was or would have been reasonable of trial counsel not to ask for a jury charge that would contradict Petitioner's testimony that he left Smith's residence approximately four or five hours before the shooting and was not present at the time of the shooting.[] Petitioner fails to show anything unreasonable in the state court's rejection of the claims in grounds fifteen and sixteen.

(R&R at 35-37 (footnote omitted).)

Petitioner objects and argues that a manslaughter charge should have been given if either party, the defense or state, offered evidence of manslaughter.

(Objections at 12.)

The trial court generally should give a manslaughter instruction *when requested* if there is some evidence to support the lesser included offense of

manslaughter. *Campbell v. State*, 292 Ga. 766, 767, 740 S.E.2d 115, 117 (2013); *State v. Stonaker*, 236 Ga. 1, 2, 222 S.E.2d 354, 356 (1976) (“The trial [court judge] also may, of his own volition and in his discretion, charge on a lesser crime of that included in the indictment or accusation. However, his failure to do so, without a written request by the State or the accused, is not error.”). That does not mean, however, that counsel is ineffective for failing to request a voluntary manslaughter charge. Counsel is reasonable to forgo a lesser-included offense instruction that contradicts the theory of the case. See *Kubat*, 867 F.2d at 364-65; *Walker v. State*, 296 Ga. 161, 172, 766 S.E.2d 28, 38 (2014) (rejecting claim that counsel was ineffective for failing to request charge on lesser crime that was inconsistent with defendant’s assertion that he had not killed the victim either intentionally or unintentionally); *Merritt v. State*, 296 Ga. 98, 102, 765 S.E.2d 316, 319 (2014) (rejecting claim that counsel was ineffective for failing to request a manslaughter charge when manslaughter was inconsistent with the defense – based on the defendant’s factual assertions – that the victim was killed by others); *Brown v. State*, 285 Ga. 324, 328, 676 S.E.2d 221, 225 (2009) (rejecting claim that counsel was ineffective for failing to request a manslaughter charge that conflicted with defense theory of self-defense). The Court cannot find that the state habeas court’s decision on the claims in ground fifteen and sixteen was unreasonable under AEDPA.

K. Ground Seventeen

In a September 2014 extraordinary motion for a new trial, Petitioner brought to the trial court's attention two, post-trial notarized statements – allegedly made by Smith and a person named Jinard Simms.²⁰ (See Pet'r Ex. E.) The statement allegedly signed by Smith states the following –

Sometime after the Murder Trail [sic] of [Petitioner] I saw Francisco Rizzo [sic] at a car dealership. He confided in me that his testimony at the trail [sic] was not true, that he was given a deal by the prosecutor to have all 13 charges against him dropped in exchange for his testimony so he “did what I had to do”.

(Pet'r Ex. G, ECF No. 17-1.) The statement allegedly signed by Simms states the following –

I ran into Brandon Rowe and Ronald Hatcher (“Mike”) a few days after [Petitioner's] Murder Trail [sic], and they told me that their testimonies on the witness stand was not true.

They also admitted that they both had to wrestle to get Jamal Wesley's [sic] (“T”) gun away from Roman and shot him, Mike said. They had to because he went for T's gun.

Mike and Brandon both said that they come up with a story to blame [Petitioner] while driving T to the hospital. They both bragged of having immunity deals with the Police and Distract [sic] Attorney.

(*Id.*)²¹

²⁰ Petitioner states that the trial court has not ruled on his motion. (Pet'r Suppl. to Am. Br. at 2.)

²¹ The Smith statement shows that it was signed on January 12, 2014; the Simms statement shows that it was signed on January 12, 2015; and both were notarized on July 19, 2015. Although Petitioner refers to the Simms statement on September 2014, the statement was not signed by Simms

In his state habeas proceedings, Petitioner argued that appellate counsel was ineffective for failing to raise a *Brady* violation and that he had proof of the violation in the form of affidavits from two witnesses – “that was they saying they had witnesses came to them about immunity deals,” and the state habeas court stated that it would give him thirty days to file the affidavits. (Habeas Hr’g Tr. at 9, 11-13 [11-6 at 10, 12-14].) Appellate counsel Dillon testified that Petitioner had informed her that he and his father had been approached by Smith, who “had talked to them about people recanting their statements and immunity deals and things like that.” (*Id.* at 19 [11-6 at 20].) Counsel stated that she sent an investigator to talk with Smith but they were not able to track down the witnesses to whom Smith referred, that she investigated to the best of her ability, and that she was not able to substantiate the allegations. (*Id.* at 19-20 [11-6 at 20-21].) It is not apparent whether Petitioner ever submitted copies of Smith’s or Simms’s statements to the state habeas court. However, the state habeas court denied relief. (*See Resp’t Ex. 3 at 7.*)

Petitioner argues in federal ground seventeen that appellate counsel was ineffective for failing to raise newly discovered evidence of *Brady* violations, as shown by the notarized statements by Smith and Simms. (Am. Pet. at 7; Pet’r Suppl. to Am. Br. at 3.) Petitioner states that he informed appellate counsel of the evidence and that she was ineffective for failing to raise the issue on appeal. (Pet’r Suppl. to Am.

until January 2015.

Br. at 3.) Respondent argues that the claim was never raised in the state courts and is procedurally defaulted. (Resp't Br. at 25.)

Under *Strickland*, the Magistrate Judge found as follows –

Contrary to Respondent's argument, Petitioner raised the claim in his state habeas proceedings. Even though it is unclear whether Petitioner presented to the state habeas court copies of the notarized statements – the state court's rejection of the claim does not result in a decision that is contrary to federal law or an unreasonable application of federal law. Petitioner fails to establish that the government possessed any evidence favorable to Petitioner that it did not disclose. Neither Smith nor Simms had any first hand knowledge of the shooting, and their notarized statements contain only hearsay statements by Rizo, as related by Smith, and hearsay statements by Hatcher and Rowe, as related by Simms. Dillon testified that she was aware that there was talk, after trial, of people recanting their statements; that she had sent an investigator to talk with Smith; and that they had not been able to track down the witnesses who allegedly had recanted their testimony. (Habeas Hr'g Tr. at 19-20 [11-6 at 20-21]). Petitioner does not indicate what more Dillon could have done to track down Rizo, Hatcher, or Rowe, and Petitioner, to date, has not come forward with any affidavit from either Rizo, Hatcher, or Rowe. What remains are the hearsay statements, and they are insufficient to demonstrate a *Brady* violation that Dillon should have raised on appeal and that would have had a reasonable probability of changing the appellate outcome. Ground seventeen fails.

(R&R at 39-41.)

Petitioner objects that Smith's and Simms's statements are not hearsay because Smith and Simms "are direct witnesses to what the state's witnesses told them" and their statements impeach the state's witnesses and provide substantial evidence that a crime of murder never happened. (Objections at 14.)

It is apparent that Petitioner is submitting Smith's and Simms's affidavits to prove that Rizzo, Rowe, and Hatcher stated that their trial testimonies were untrue and that they received deals with the state. The Court agrees with the Magistrate Judge that the statements are hearsay. *See United States v. Woods*, 684 F.3d 1045, 1062 (11th Cir. 2012) (stating that hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted). Petitioner's ground seventeen fails.

Additionally, although the Court does not specifically discuss the Magistrate Judge's findings and reasoning to which Petitioner has not particularly objected, the Court has reviewed the R&R in its entirety and finds no error. Accordingly, after conducting a *de novo* review of the entirety of the record, the Court finds that the Magistrate Judge's analysis is legally correct and based on the record presented. Therefore, the Magistrate Judge's Report and Recommendation shall be adopted.

II. Motion for an Evidentiary Hearing

In seeking an evidentiary hearing, Petitioner asserts that a hearing is required to consider his ground seventeen claim of actual innocence and that affording the state's decision a presumption of correctness is unwarranted because the state court did not fairly adjudicate the issues. (Mot. for Evidentiary Hr'g, ECF No. 28.) The remainder of Petitioner's motion is identical to his objections. (*Id.* at 3-15.) Therein, Petitioner asserts (1) that the facts were not adequately developed to the extent that the state habeas judge "prevented Petitioner from ascertaining from the appellate

counsel the proper foundation that must be laid” to impeach a witness and (2) that he was frustrated at the state hearing and believed that it was fruitless. (*Id.* at 7, 11.)

Respondent opposes the motion on the grounds that Petitioner fails to meet the federal standard for a hearing. (Resp’t Resp. to Mot. for Evidentiary Hr’g, ECF No. 31.) Petitioner’s replies that he is entitled to hearing under *Townsend v. Sain*, 372 U.S. 293 (1963), relies on his ground seventeen claim of actual innocence, and generally repeats his grounds for relief. (Pet’r Reply §§ 1 and 2, ECF No. 32.)

Under AEDPA, § 2254(e)(2) expressly limits the extent to which hearings are permissible, and *Townsend* generally applies only to pre-AEDPA habeas corpus petitions. *Kelley v. Sec’y for Dep’t of Corr.*, 377 F.3d 1317, 1334, 1336-37 (11th Cir. 2004). Section 2254(e)(2) dictates –

If [a federal habeas corpus petitioner] 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.

28 U.S.C. § 2254(e)(2). When a petitioner may properly be held responsible for “fail[ing] to develop” the factual basis of his claims in state court, a hearing is allowed only if he meets the conditions in § 2254(e)(2)(A) and (B). *Hall v. Head*, 310 F.3d 683, 698 (11th Cir. 2002) (finding that “failed to develop” in § 2254(e)(2) applied based on petitioner’s and his counsel’s lack of diligence in state court).

When a petitioner “has not ‘failed to develop’ the facts under § 2254(e)(2)’s opening clause, . . . he [or she] will be excused from showing compliance with the balance of the subsection’s requirements.” *Williams v. Taylor*, 529 U.S. 420, 437 (2000). Generally, exemption from § 2254(e)(2)’s conditions applies to a petitioner who diligently attempted to develop the factual basis for his claim, was thwarted through no fault of his own, and then seeks in federal court to develop that factual basis. *See id.*, 529 U.S. at 431-33. In those circumstances, a federal district court retains discretion to hold an evidentiary hearing on material facts that the petitioner diligently attempted to develop, but could not develop, in state court. *See id.*; *Ledford v. Head*, No. 1:02-CV-1515-JEC, 2006 WL 2938714, *2-3 (N.D. Ga. 2006) (discussing the district court’s discretion to grant a hearing when the habeas petitioner diligently attempted in state court to develop the factual basis for his claim, but his attempt was denied through no fault of his own).

Petitioner does not show either that he meets § 2254(e)(2) requirements or that he is exempt from those requirements. Petitioner does not meet the

requirements by showing a qualifying new rule of constitutional law or by showing a factual predicate that could not have been previously discovered through the exercise of due diligence. Petitioner also does not show that he was prevented from developing facts in state court and that he is, thus, exempt from § 2254(e)(2) requirements. Petitioner's question to appellate counsel on the foundation for impeachment was a legal question, and it does not pertain to the development of *facts*. Further, Petitioner's expression of frustration with the state habeas hearing is insufficient to show that he was prevented, through no fault of his own, from developing the facts in his state proceedings. Absent an assertion of diligent, but thwarted, attempts to develop the factual basis of a claim or claims, Petitioner is not entitled to a hearing based on the exemption from § 2254(e)(2) requirements.

Petitioner also is not entitled to a hearing based on his claim of actual innocence, as presented in ground seventeen (arguing that appellate counsel was ineffective for failing to raise the evidence of innocence that was shown in statements by Smith and Simms). To make a credible showing of actual innocence, Petitioner must "with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial," demonstrate that "it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995). Unless the petitioner makes a threshold showing of actual innocence, no hearing is

required. *Sibley v. Culliver*, 377 F.3d 1196, 1206 (11th Cir. 2004). An evidentiary hearing is not required when “[i]t is unlikely that an evidentiary hearing on the allegations contained in the affidavits would produce the sort of reliable evidence of actual innocence that *Schlup* demands.” *Id.* at 1206-07 (quoting *Patterson v. Bartlett*, 56 Fed. Appx. 762, 764 (9th Cir. 2002)) (internal quotation marks omitted).

As discussed earlier in this Order, Smith’s and Simms’ affidavits provide only hearsay statements, and Petitioner has failed to come forward with any viable new evidence that satisfies the requirement that he make a threshold showing of actual innocence. Petitioner is not entitled to a hearing.

III. Conclusion

Accordingly,

IT IS ORDERED that Plaintiff’s objections [Doc. 27] are **OVERRULED** and that the Magistrate Judge’s Final Report and Recommendation [Doc. 25], as enlarged upon in this Order, is **ADOPTED** as the Order of the Court.

IT IS ORDERED that the petition, as amended [Doc. 15], and a certificate of appealability are **DENIED** and that this action is **DISMISSED**.

IT IS FURTHER ORDERED that Petitioner’s motion for an evidentiary hearing [Doc. 28] is **DENIED**.

IT IS SO ORDERED this 8th day of May, 2017.

A handwritten signature in cursive script, reading "Amy Totenberg", written over a horizontal line.

AMY TOTENBERG
UNITED STATES DISTRICT JUDGE

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

HERMAN BRIGHT,	:	HABEAS CORPUS
Petitioner,	:	28 U.S.C. § 2254
	:	
v.	:	
	:	
HOMER BRYSON,	:	CIVIL ACTION NO.
Respondent.	:	1:15-CV-4158-AT-JFK

**UNITED STATES MAGISTRATE JUDGE'S
FINAL REPORT AND RECOMMENDATION**

Petitioner, Herman Bright, challenges via 28 U.S.C. § 2254 the constitutionality of his 2009 DeKalb County convictions. The matter is before the Court on the petition, as amended and supplemented [15, 16],¹ and Respondent's amended answer-response [24]. The undersigned recommends that the petition be denied and that this action be dismissed.

¹Petitioner submitted an original petition with nineteen grounds [1], brief in support with eighteen grounds [4], and amended brief in support with nineteen grounds [5]; sought to amend by deleting his nineteenth ground [12]; submitted an amended petition with seventeen grounds and supplement to his amended brief [15, 16]; and then submitted a motion [22] to dismiss grounds seventeen through nineteen from his amended brief. Petitioner's amended petition (seventeen grounds) [15] and supplement to his amended brief (supporting argument for ground seventeen) [16] constitute the operative petition in this action. (See Order of July 7, 2016, ECF No. 23). The first sixteen grounds in the operative petition are the same as the first sixteen grounds in the amended brief in support [5], and the Court will refer to Petitioner's arguments in his amended brief when discussing the first sixteen grounds.

I. Background

On October 29, 2008, several people gathered at Malachi Smith's home, where there was partying and drinking into the 30th. At approximately 7:00 p.m. on the 30th, a shooting occurred, which killed Jerome Jenkins and injured Jamaal Wesley. See Bright v. State, 292 Ga. 273, 273-74, 736 S.E.2d 380, 382 (2013); (Trial Tr. at 174 [11-7 at 147]).² The gathering included, among others, the following people, who may be referred to in the transcripts by their first, last, or alternate names listed below (the Court hereafter will use last names): (1) Petitioner, Bright, known as Lou; (2) the victim, Jenkins, known as Rome or Roman; (3) the homeowner, Smith, known as Ki; (4) Ashley Stephenson; (5) the surviving victim, Wesley, known as T; (6) Francisco Rizo, known as Cisco or Migo; (7) Brandon Rowe; (8) Mike Hatcher; and (9) Aja Harris, Jenkins's girlfriend.³ (Trial Tr. at 174-75, 499 [11-7 at 147-48, 11-10 at 42]).

²Respondent's Exhibit Six, which includes the habeas transcript, appellate briefs, the trial transcript, and the indexed trial record, is not consecutively numbered in a consistent manner. Accordingly, when citing the trial transcript – which is located at electronic docket entries 11-6 at 136 through 11-12 at 148 – the Court will first cite the trial transcript and page number with the Court's electronic (ECF) citation in brackets. The Court will likewise cite to other filings that are part of Exhibit Six.

³Smith, Hatcher, Wesley, and a man named Devern Gordon, known as Ju or Junior, lived at Smith's home. (Trial Tr. at 488, 494 [11-10 at 31, 37]).

The DeKalb County grand jury indicted Petitioner on the following six counts: (1) malice murder of Jenkins, (2) felony murder of Jenkins, (3&4) aggravated assault and possession of a firearm during the commission of a felony against Jenkins, and (5&6) aggravated assault and possession of a firearm during the commission of a felony against Wesley, DeKalb County criminal action 09CR1815-5. (Trial Ct. R. at 5-12 [11-16 at 29-36]). Petitioner pleaded not guilty and proceeded to trial represented by Alden Snead. (Trial Tr. at 1 [11-6 at 136]). The jury found Petitioner guilty of all crimes against Jenkins and not guilty on the crimes against Wesley. (Trial Ct. R. at 121-22 [11-17 at 3-4]). The trial court imposed a total sentence of life plus five years of confinement. (Id. at 123 [11-17 at 5]).

Petitioner filed a motion for a new trial, as amended by new counsel, Angela Brown Dillon. (Id. at 124-25, 131-33 [11-17 at 6-7, 13-15]). A hearing was held. (Mot. for New Trial Hr'g Tr. at 1-12 [11-16 at 10-21]). On April 3, 2012, the trial court denied the motion. (Trial Ct. R. at 143-45 [11-17 at 26-28]). Petitioner, again represented by Dillon, appealed. (Trial Ct. R. at 1-2 [11-16 at 25-26]). On January 7, 2013, the Georgia Supreme Court affirmed the judgment against Petitioner. Bright, 292 Ga. at 276, 736 S.E.2d at 383.

On September 4, 2013, Petitioner filed in the Superior Court of Chattooga County a state habeas corpus petition in which he asserted that he had received ineffective assistance of appellate counsel, civil action number 2013 CA 39546. (Resp't Ex. 1, ECF No. 11-1). In September 2014, Petitioner filed in the DeKalb County trial court an extraordinary motion for a new trial based on Petitioner obtaining information that three state witnesses had received immunity deals of which he was not previously aware. (See Pet'r's Ex. E, ECF No. 17-1).

The habeas hearing was held on January 12, 2015. (Habeas Hr'g Tr. at 1 [11-6 at 1]). In an order filed on June 23, 2015, the state habeas court denied relief. (Resp't Ex. 3, ECF No. 11-3). On October 19, 2015, the Georgia Supreme Court denied further review. (Resp't Ex. 5, ECF No. 11-5).

In this Court, Petitioner raises seventeen grounds for relief in which he asserts that appellate counsel was ineffective for not arguing on appeal that trial counsel was ineffective –

1. for not objecting to state exhibits 11, 11-B, 11-C, 22, and 34;
2. for not objecting and seeking a mistrial when the state's key witness Wesley testified about his informal agreement to have his false-statement charge dropped in exchange for testifying against Petitioner;

3. for not objecting to the prosecutor's improper impeachment of Smith, using inadmissible hearsay testimony from Stephenson that placed Petitioner's character into evidence;
4. for not objecting to the prosecutor's improper impeachment of Smith, using inadmissible hearsay testimony from Hatcher that placed Petitioner's character into evidence;
5. for not objecting to the prosecutor's improper impeachment of Smith, using inadmissible hearsay testimony from Wesley that placed Petitioner's character into evidence;
6. for not objecting to the prosecutor's improper impeachment of Smith, using inadmissible hearsay testimony from Rowe that placed Petitioner's character into evidence;
7. for not objecting to the prosecutor's improper impeachment of defense witness Tasha Jett, Petitioner's sister, with a bias accusation;
8. for not objecting to the prosecutor's improper impeachment of Smith with a bias accusation;
9. for not objecting to the prosecutor's improper closing that Jett admitted bias;
10. for not objecting to the prosecutor's improper closing that Smith admitted bias;
11. for not objecting and seeking a mistrial when the prosecutor in closing introduced facts not in evidence and mischaracterized defense witnesses' statements of bias;
12. for not objecting to the prosecutor's improper closing argument that vouched for the credibility of four state witnesses;
13. for not objecting to the prosecutor's improper closing argument on Petitioner's future dangerousness;

14. for not objecting to the jury instruction on constructive possession, which was contrary to the indictment;
15. for withdrawing a request to charge on provocation, which would have reduced the murder charge to manslaughter; and
16. for not requesting a jury instruction on self defense. (Am. Pet. at 3-6, ECF No. 15). In ground seventeen, Petitioner argues that appellate counsel was ineffective for failing to raise newly discovered evidence of a Brady⁴ violation. (Id. at 7).

Respondent argues that the Court should defer to the state habeas court's decision in regard to the claims raised in grounds one through sixteen and argues that ground seventeen is procedurally defaulted and provides no grounds for federal relief. (Resp't's Br. at 6-27, ECF No. 24-1).

II. Federal Habeas Corpus Standard

A federal court may issue a writ of habeas corpus on behalf of a person held in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). The availability of collateral relief, however, is limited. A habeas petitioner is presumed guilty, not innocent, Herrera v. Collins, 506 U.S. 390, 399-400 (1993), and "in habeas proceedings, unlike direct

⁴Brady v. Maryland, 373 U.S. 83, 87 (1963).

appeals, the petitioner bears the burden of establishing his right to relief[.]” Blankenship v. Hall, 542 F.3d 1253, 1274 (11th Cir. 2008). Further, the federal habeas statute requires a petitioner to exhaust his state court remedies and requires federal courts to give deference to state court adjudications. 28 U.S.C. § 2254(b)-(e); Pope v. Sec’y for Dep’t of Corr., 680 F.3d 1271, 1284 (11th Cir. 2012) (stating that exhaustion requires a petitioner to “‘fairly present[.]’ every issue raised in his federal petition to the state’s highest court, either on direct appeal or on collateral review” (quoting Mason v. Allen, 605 F.3d 1114, 1119 (11th Cir. 2010))); Hill v. Humphrey, 662 F.3d 1335, 1343 (11th Cir. 2011) (en banc) (stating that federal court review of exhausted claims under § 2254 is “greatly circumscribed and is highly deferential” (quoting Payne v. Allen, 539 F.3d 1297, 1312 (11th Cir. 2008)) (internal quotation marks omitted)).

Federal relief is limited to petitioners who demonstrate that the state court adjudication 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[.]” 28 U.S.C. § 2254(d)(1), or “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)(2). A state court’s factual determinations are

presumed correct unless the petitioner presents clear and convincing evidence that those determinations were erroneous. 28 U.S.C. § 2254(e)(1).⁵

“A state court’s adjudication is contrary to federal law if it ‘arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.’” Wellons v. Warden, 695 F.3d 1202, 1206 (11th Cir. 2012) (alterations in original) (quoting Williams v. Taylor, 529 U.S. 362, 413 (2000)). “A state court’s adjudication is unreasonable if the state court ‘identifies the

⁵The federal court reviews the state court’s final decision on the merits, which in state habeas proceedings is the final decision by the Georgia Supreme Court. Wilson v. Warden, 834 F.3d 1227, 1235 (11th Cir. 2016), petition for cert. filed, (U.S. Nov. 10, 2016) (No. 16-6855). If the final decision is a reasoned opinion, the opinion is evaluated. Id. If the final decision has no reasoned opinion – such as a summary denial of further review by the Georgia Supreme Court, federal courts must determine whether the petitioner has established that there is no reasonable basis for the decision. Id. Federal courts may look to the reasoning of the trial-level court –

When the reasoning of the state trial court was reasonable, there is necessarily at least one reasonable basis on which the state supreme court could have denied relief and our inquiry ends. In this way, federal courts can use previous opinions as evidence that the relevant state court decision under review is reasonable. But the relevant state court decision for federal habeas review remains the last adjudication on the merits, and federal courts are not limited to assessing the reasoning of the lower court.

Id. at 1239.

correct governing legal principle from th[e] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" Id. (alteration in original) (quoting Williams, 529 U.S. at 413). To show unreasonableness, "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." Clark v. Att'y General., Fla., 821 F.3d 1270, 1282 (11th Cir. 2016) (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)) (internal quotation marks omitted), cert. denied, No. 1607312, 2017 WL 670569 (U.S. Feb. 21, 2017).

Further, even if a federal petitioner meets § 2254(d)'s rigorous standard – "a precondition to the grant of habeas relief . . . , not an entitlement to it[.]" the court must then determine whether the error is harmless under Brecht v. Abrahamson, 507 U.S. 619, 631 (1993). Fry v. Pliler, 551 U.S. 112, 119, 121 (2007) ("We hold that in § 2254 proceedings a [federal] court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in Brecht[.]").

This Court has reviewed the pleadings and exhibits and finds that the record contains sufficient facts upon which the issues may be resolved. As Petitioner has

made no showing as required by 28 U.S.C. § 2254(e)(2), no federal evidentiary hearing is permitted, and the case is now ready for disposition.

III. Discussion

A. Ground One

Smith testified that he owned a Glock 40 gun, ammunition, and clip, and stated that, after he arrived at his home after the shooting, he laid his gun on his porch, called the police, and waited for them to arrive. (Trial Tr. at 209-12 [11-8 at 5-8]). It was established at trial that the shots fired on the day of the murder were from a nine millimeter gun and that the Glock used forty caliber ammunition. (Id. at 410-12 [11-9 at 137-39]).

In his state habeas proceedings, Petitioner argued that appellate counsel was ineffective for failing to raise trial counsel's failure to object to state exhibits 11, 11-B, 11-C, 22, and 34 – Smith's Glock pistol, ammunition, clip, and pictures of the same. (See Resp't Ex. 3 at 5). At the state habeas hearing, appellate counsel, Dillon, stated that she did not see anything objectionable in the exhibits and surmised that, as Smith's gun was the only gun found at the scene after the police arrived, the prosecutor likely introduced it to show that it was *not* the murder weapon and to foreclose the defense from attempting to argue that Smith fired the shots with that gun. (Habeas Hr'g Tr. at

32-33 [11-6 at 33-34]). The state habeas court found that the evidence was relevant and that Petitioner had failed to show that appellate counsel was ineffective for not raising the issue on appeal. (Resp't Ex. 3 at 5).

Petitioner re-asserts the same claim in federal ground one. (Am. Pet. at 3; Pet'r's Am. Br. at 13, ECF No. 5). Petitioner argues that there was no controversy that Smith's Glock was *not* the gun used in the shooting and that admitting it was plain error under Nichols v. State, 282 Ga. 401, 651 S.E.2d 15 (2007). (Pet'r's Am. Br. at 13-14). Petitioner argues that the gun exhibits – when combined with Stephenson's and Hatcher's hearsay testimony⁶ that Smith coerced them to come up with stories to get Petitioner off – created an improper inference of Petitioner's guilt and that appellate counsel should have raised trial counsel's failure to object to the exhibits. (Id. at 14-16).

A criminal defendant possesses a Sixth Amendment right to “reasonably effective” legal assistance. Strickland v. Washington, 466 U.S. 668, 687 (1984). To show constitutionally ineffective assistance of counsel, a petitioner must establish that (1) counsel's representation was deficient and (2) counsel's deficient representation

⁶Stephenson's and Hatcher's testimony is discussed below in grounds three and four.

prejudiced him. Id. at 690-92; Atkins v. Singletary, 965 F.2d 952, 958-59 (11th Cir. 1992) (“[W]hen applying Strickland, we are free to dispose of ineffectiveness claims on either of its two grounds.”).

The first prong requires a petitioner to show that “in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” Strickland, 466 U.S. at 690. The second prong requires a petitioner to show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694. Claims of ineffective assistance of appellate counsel also are governed by Strickland. Owen v. Fla. Dep’t of Corr., 686 F.3d 1181, 1202 (11th Cir. 2012). To succeed on a claim of ineffective assistance of appellate counsel, the petitioner must demonstrate that counsel’s performance was objectively unreasonable and that, if counsel had not performed unprofessionally, there is a reasonable probability that the appellate outcome would have been favorable to the petitioner. See Brooks v. Comm’r, Ala. Dep’t of Corr., 719 F.3d 1292, 1300 (11th Cir. 2013).

Under Georgia law, it is error to admit evidence of firearms that belong to a defendant on trial for a shooting when those firearms do “not shed any light

whatsoever on the circumstances of the shooting.” Nichols, 282 Ga. at 403-04, 651 S.E.2d at 18 (finding that rifle and shotgun found in Nichols’s home nine days after the shooting were irrelevant to whether Nichols was violent or to whether he acted in self defense in shooting a pistol at a convenience store nine days earlier). As a general rule, however, trial counsel is not ineffective for failing to object to the admission into evidence of a gun obtained during the investigation of a murder, which evidence shows is not the murder weapon. See White v. State, 293 Ga. 825, 828, 750 S.E.2d 165, 168 (2013).

The rule in Nichols is inapplicable because the Glock gun at issue in this case did not belong to Petitioner, as was the case with the guns in Nichols, which belonged to Nichols. Here, the evidence shows that the gun belonged to Smith, and there is no indication that the gun was admitted to establish anything about Petitioner, as had occurred to the defendant in Nichols. A gun found by police at the scene of a shooting upon their arrival is relevant, if only to the limited extent of shedding light on whether or not it was the murder weapon. The state court’s rejection⁷ of this claim is not an

⁷In this ground and all the grounds below, a reference to the state court’s decision refers to the Georgia Supreme Court’s decision denying Petitioner’s application for further review. The state habeas court’s decision, to the extent discussed in relation to any of Petitioner’s grounds, serves only to show a possible “basis on which the state supreme court could have denied relief[.]” Wilson, 834 F.3d

unreasonable application of Strickland in that there is no reasonable probability that a claim of ineffective assistance of trial counsel on this issue would have changed the appellate outcome. See White, 293 Ga. at 828, 750 S.E.2d at 168. This conclusion is not changed by consideration of grounds three and four – the claims in regard to Stephenson’s and Hatcher’s hearsay testimony – which fail as discussed below.

B. Ground Two

Wesley testified that he heard shots as he was coming down the hallway, that he saw Petitioner shooting at him, and that it was Petitioner who shot him. (Trial Tr. at 259-61, 270 [11-8 at 55-57, 66]). Wesley testified that his initial statement to medical personnel and the police had been that he was shot walking down the street and that, out of fear of Petitioner, he did not state that Petitioner had shot him. (Id. at 269-71 [11-8 at 65-67]). Wesley testified that he initiated contact with the police to give his second statement – his statement that Petitioner shot him – and that no one threatened him, made him any promises, or struck a deal with him to give the second statement. (Id. at 277-78 [11-9 at 4-5]). On cross-examination, Wesley stated that he was arrested for false statements, spent four days in jail, contacted officers when he got out, and was never prosecuted for false statements. (Id. at 281-82 [11-9 at 8-9]). Wesley responded

at 1239; see also supra n.5.

“yes” when he was asked, “you know that . . . charge has been dropped as a result of your giving [the second] statement?” (Id. at 282 [11-9 at 9]).⁸

During the state habeas corpus proceedings, Petitioner argued that Dillon should have raised a Brady⁹ violation based on trial counsel’s apparent ignorance in regard to a deal between the state and Wesley. (Habeas Hr’g Tr. at 65 [11-6 at 66]). Dillon testified that she had seen no evidence that the prosecution had failed to disclose the dismissal of charges against Wesley. (Id.). The state habeas court found as follows

—

The Court finds that no evidence supports that the prosecution did not disclose to Petitioner’s trial counsel the charges against Wesley. To the contrary, the cross-examination of Wesley demonstrates trial counsel was aware of the charges. Petitioner refers to Wesley’s charge being dropped as an “immunity deal,” however, no authority or evidence supports that there was any deal. Therefore, the Court finds that his ground is without merit.

(Resp’t Ex. 3 at 7).

⁸In his federal brief, Petitioner misstates that Wesley responded “yes” when he was asked, “you know that the charge has been dropped as a result of you giving testimony?” (Pet’r’s Am. Br. at 16-17).

⁹Brady, 373 U.S. at 87 (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

Petitioner asserts that appellate counsel was ineffective for failing to raise trial counsel's failure to object and seek a mistrial when the state's key witness Wesley testified about his informal agreement to have a false-statement charge dropped in exchange for his statement against Petitioner. (Am. Pet. at 3 (citing the Trial Tr. at 282)). Petitioner argues that trial counsel was ineffective for abandoning the issue when Wesley admitted on cross-examination that the charges were dropped as a result of his giving a statement against Petitioner and when the prosecutor maintained the position that there was no deal. (Pet'r's Am. Br. at 18).

Strickland again applies. As generally known by reasonable counsel, the Due Process Clause requires the government to reveal a beneficial deal that it has offered to a witness in exchange for his or her testimony. Giglio v. United States, 405 U.S. 150, 154-55 (1972) (holding that, when government's case depended almost entirely on co-conspirator's testimony, due process is offended by non-disclosure of promise not to prosecute co-conspirator if he testified); see also Brady, 373 U.S. at 87. However, speculation in regard to a possible agreement to testify is insufficient to show that the government failed to reveal an agreement in violation of due process. See Goodwin v. Johnson, 132 F.3d 162, 187-88 (5th Cir. 1997).

Here, Wesley's testimony that the false-statement charge *was dropped as a result of* him giving the second statement does not show that there was ever an *agreement* that the charge *would be dropped if* he made a statement against Petitioner. Wesley in fact testified that he made the second statement without having received any promises. The testimony cited by Petitioner shows no evidence of any agreement to provide a second statement or any agreement to testify. The undersigned finds nothing unreasonable in the state court's rejection of the claim in ground two.

C. Grounds Three through Six

Prior to voir dire, the state informed the court that it intended to present evidence that Petitioner "through emissaries of his" had threatened witnesses. (Trial Tr. at 27-28 [11-6 at 162, 11-7 at 1]). Petitioner objected that it would be hearsay and improper character evidence, and the Court informed Petitioner that his objection was noted and indicated that it would allow the testimony if the proper foundation was laid. (Trial Tr. at 28 [11-7 at 1]).

Stephenson testified that she heard the gunshots, left, and saw Petitioner leaving at the same time. (Trial Tr. at 241 [11-8 at 37]). When Stephenson was asked to recall what she had told the police about a conversation with Smith after the shooting, she testified that Smith was upset because he thought that she had "told on" Petitioner and

that Smith had said that he would pay her mother's rent if she changed her story and got his friend, Petitioner, off. (Trial Tr. at 243-44 [11-8 at 39-40]). Stephenson testified that Smith had been "real disrespectful" and that she was concerned for her safety. (Id. at 247 [11-8 at 43]).

Wesley testified that, approximately one week after the shooting, he went with Rowe to Smith's home, and Smith told them both to blame it on the victim's girlfriend, Aja Harris. (Trial Tr. at 273 [11-8 at 69]). Counsel Snead objected that it was hearsay, and the court sustained the objection. (Id. at 274 [11-8 at 70]).

Rowe testified that he saw Petitioner shoot the victim. (Trial Tr. at 362 [11-9 at 89]).¹⁰ Rowe also testified that, when he went with Wesley to Smith's home, Smith told them to "put it on Aja – put the murder on Aja, because she left." (Id. at 374 [11-9 at 101]).

Hatcher testified that he saw Petitioner shoot the victim and that he returned to the house two days later and was there with Smith. (Trial Tr. at 510, 518 [11-10 at 53, 61]). Hatcher testified that Petitioner arrived and, while Smith present, that Petitioner told Hatcher that he had heard that Rowe had been snitching and stated "well you tell

¹⁰Rizo also testified that he saw Petitioner shoot the victim. (Trial Tr. at 308 [11-9 at 35]).

him if he snitching, I'm going to murder him.” (Id. at 519 [11-10 at 62]). Hatcher further testified that after Petitioner left, he had a discussion with Smith about what he should say. (Id.) Hatcher testified,

I had run out of money. I couldn't afford a hotel any more. I had to come back and stay at [Smith's] house, downstairs in my room. And basically, I got the idea of what kind of person [Smith] is if I don't go along with what he's saying, I'm not going to have no place to stay. . . . So I mean he came up with this – with I think it was maybe two different stories of what we all should say so that he can get off – so that [Petitioner] can get off. And I went along with his story.

(Trial Tr. at 520 [11-10 at 62]).

Smith subsequently testified for the defense and stated that he had never offered to pay anyone's rent to change their testimony. (Trial Tr. at 693 [ECF 11-12 at 20]).

In his state habeas proceedings, Petitioner claimed that Dillon had been ineffective for failing to raise trial counsel's failure to object to Stephenson's, Hatcher's, Wesley's, and Rowe's hearsay testimony about Smith's statements. (Habeas Hr'g Tr. at 27-29, 76 [11-6 at 28-30, 77]). The state habeas court found that Stephenson's, Hatcher's, and Rowe's testimony did not qualify as hearsay because the statements were not introduced to prove the truth of the matter asserted therein and because Smith testified at trial and was subject to cross-examination. (Resp't Ex. 3 at 6, 8). The state habeas court found that the claim pertaining to Wesley's testimony

was without merit as the trial court had sustained trial counsel's objection to the testimony. (Id. at 6-7).

In federal grounds three through six, Petitioner asserts that appellate counsel was ineffective for failing to raise trial counsel's failure to object to the prosecutor's improper impeachment of state witness Smith¹¹ using hearsay testimony from Stephenson, Hatcher, Wesley, and Rowe. (Am. Pet. at 4-5 (citing Trial Tr. at 243, 244, 247, 273-74, 373-74, 520)). Petitioner argues that the evidence improperly placed Petitioner's character into evidence using guilt by association; that no proper foundation was laid for impeaching Smith based on a prior inconsistent statement; and that the threatening conduct of Smith, a third party, had not been linked to Petitioner as required for evidence on influencing a witness. (Pet'r's Am. Br. at 19-26).

Strickland again applies. Under Georgia law, "[a]s long as the declarant testifies . . . and is available for cross-examination . . . , the purpose behind the hearsay rule is satisfied with regard to his declarations." State v. Woods, 311 Ga. App. 577, 578, 716 S.E.2d 622, 625 (2011) (quoting Conley v. State, 257 Ga. App. 563, 564, 571 S.E.2d 554 (2002)) (internal quotation marks omitted).

¹¹Smith testified for both the state and the defense, and Georgia law in effect at the time of Petitioner's trial stated, "Any party, including the party calling the witness, may attack the credibility of a witness." O.C.G.A. 24-9-81 (2005).

Thus, even our Supreme Court has noted that the modern trend regarding hearsay evidence is to allow the out-of-court declaration where the declarant is present and may be cross-examined.[] As long as the declarant testifies at trial and is available for cross-examination by the defendant, the purpose behind the hearsay rule is satisfied with regard to his declarations.[] Here, the record shows that both the doctor and the victim testified at trial, and both were subject to a full cross-examination by defense counsel. Therefore, we find the trial court did not err in admitting the officers' statements.

Conley, 257 Ga. App. at 564, 571 S.E.2d at 555 (footnotes omitted).

Further, under Georgia law, "[e]vidence of a defendant's attempt to influence or intimidate a witness is circumstantial evidence of guilt, even in the situation in which the defendant does not personally make the attempt, that is, action by a third party to influence a witness not to testify or to testify falsely is relevant and admissible into evidence in a criminal prosecution on the issue of the defendant's guilt when the accused is shown to have authorized the attempt." Lindsey v. State, 295 Ga. 343, 348, 760 S.E.2d 170, 174-75 (2014). Evidence of a third person's attempt to influence a witness generally is not admissible unless the attempt is linked to the defendant. Scott v. State, 305 Ga. App. 710, 714, 700 S.E.2d 694, 698 (2010) (citing Kell v. State, 280 Ga. 669, 672, 631 S.E.2d 679, 681 (2006)).

The State can show a defendant's attempt to influence a witness because it is evidence of consciousness of guilt. . . . This includes attempts to influence witnesses made through intermediaries. . . . But evidence of a

threat or attempt to influence a witness made by a third party must be linked to the defendant in order to be relevant to any material issues.

Johnson v. State, 255 Ga. App. 721, 722, 566 S.E.2d 440, 442 (2002) (citations omitted) (finding some evidence that third party did not act independently from defendant).¹²

As a preliminary matter, trial counsel *did* object in regard to Wesley's testimony, and appellate counsel was reasonable not to raise on appeal a challenge to the contrary. Additionally, the Court otherwise finds nothing unreasonable in the state court's rejection of the claims in grounds three through six. The record indicates that the state intended to introduce evidence of Smith's attempts to coerce as substantive evidence of attempts to coerce that were linked to Petitioner.¹³ (See Trial Tr. at 27-28 [11-6 at

¹²In Johnson, both the defendant and the third party, on different occasions, offered the victim money to drop the case; the third party had been an involved presence as the case proceeded against the defendant; the third party offered to protect the victim from the defendant; and the third party and the defendant had telephoned the victim together one time. Johnson, 255 Ga. App. at 722-23, 566 S.E.2d at 442. The appellate court affirmed the trial court's decision allowing the victim to testify that the third party had offered him money to drop the case. Id., 255 Ga. App. at 722, 566 S.E.2d at 442.

¹³In light of the state's purpose, it does not appear that the state was attempting to impeach or challenge Smith's credibility by use of the challenged hearsay statements. Accordingly, the Court does not address whether a proper foundation was laid to impeach Smith. The issue is whether Smith's attempts at coercion were adequately linked to Petitioner.

162, 11-7 at 1])). As such, if the proper link was made, the reflection on Petitioner's character would not be error. There was evidence that Petitioner personally attempted to influence witnesses, i.e., Hatcher's testimony that Petitioner told Hatcher to tell Rowe that, if he had been snitching, Petitioner would murder him. Smith was present during that exchange, and Smith followed up Petitioner's comments by coming up with stories of what the witnesses should say to get Petitioner off. The evidence is sufficient to infer that Smith's attempts to influence were linked to Petitioner. Further, to the extent that Smith's statements – as related by Stephenson, Hatcher, and Rowe – were hearsay, Smith was available for cross examination. Had Dillon raised the matter on appeal, there is no reasonable probability that the appellate outcome would have been different.

D. Grounds Seven and Eight

Jett, Petitioner's sister, testified that, on the afternoon and evening in question, Petitioner came to her house around three-thirty or four o'clock and that he never left the house the rest of the night. (Trial Tr. at 665-66 [11-11 at 28-29]). On cross examination, the prosecutor inquired, "you admit, you're biased. You don't want anything to happen to him, do you?" (*Id.* at 667 [11-11 at 30]). Jett responded, "of course not." (*Id.*). On cross examination of Smith, the prosecutor inquired, "you

admit you are biased in this case. This is your friend, right?” (Id. at 697 [11-12 at 24]). Smith responded, “Yeah, everybody[,]” and when the prosecutor again asked if Petitioner was his friend, Smith responded, “Yes.” (Id.).

Petitioner argued in his state habeas proceedings that appellate counsel was ineffective for failing to argue that trial counsel was ineffective in failing to object to the prosecutor’s questioning of Jett and Smith on bias. (See Resp’t Ex. 3 at 9-10). The state habeas court found that there was nothing to show that the witnesses were denied a proper opportunity to respond to the question and explain their answer, that the prosecutor’s question was proper, and that appellate counsel was not ineffective on the issue. (Id.).

Petitioner argues in his federal grounds seven and eight that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for not objecting to the prosecutor improperly impeaching defense witnesses Jett and Smith by asserting that they admitted bias, immediately followed by a question which would evoke an affirmative response. (Am. Pet. at 5; Pet’r’s Am. Br. at 27).

Strickland again applies. Under Georgia law, each party has the right of a thorough and sifting cross-examination and may use leading questions on cross examination. O.C.G.A. § 24-6-611(b), (c). Further, “[t]he state of a witness’s feelings

towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury." O.C.G.A. § 24-6-622. Thus, "[i]t is proper for the State when cross-examining a defense witness to bring out the relationship between the witness and the accused for the purpose of showing bias" Rivers v. State, 296 Ga. 396, 402, 768 S.E.2d 486, 492 (2015).

The Court finds nothing unreasonable in the state court's rejection of the claims in grounds seven and eight. It was proper to cross examine both Jett and Smith in order to show the jury that they had favorable feeling toward Petitioner, and the Court perceives no issue that appellate counsel could have raised that would have had a reasonable chance of changing the outcome on appeal.

E. Grounds Nine through Eleven

In closing argument, the prosecutor stated, "his witnesses admit that they are biased. They have to. [Smith] and his sister, yeah, we are biased. We are here for him. They are not here for the truth, just for him. So that you can get it confused, twisted. That's all. Don't let that happen in this case. Don't let yourselves be fooled by this." (Trial Tr. at 764 [11-12 at 91]).

In his state habeas proceedings, Petitioner argued that appellate counsel was ineffective for failing to raise on direct appeal trial counsel's failure to object to the

prosecutor's closing comments on Jett's and Smith's bias. (See Resp't Ex. 3 at 11). The state habeas court found that the claims failed because both Jett and Smith had admitted bias. (Id.).

Petitioner argues in federal grounds nine through eleven that appellate counsel was ineffective for not raising trial counsel's failure to object or seek a mistrial when the prosecutor's closing comments mischaracterized Jett and Smith's statements and introduced facts not in evidence by stating that Jett and Smith admitted bias. (Am. Pet. at 5-6; Pet'r's Am. Br. at 29-32). Petitioner asserts that the particular comment by the prosecutor – yeah, we are biased – did not reflect any testimony actually provided by Jett or Smith. (Pet'r's Am. Br. at 31).

Strickland again applies. The prosecutor's comment – yeah, we are biased, is not an exact quote of either Jett or Smith. The comment was made in the context of summarizing both witnesses. In that context, it does not appear that the prosecutor intended it as a verbatim quote but as a statement that both Jett and Smith admitted that they were biased. It is not unreasonable to find that Jett and Smith both admitted bias when they responded affirmatively to the bias questions – reviewed above – without any attempt to explain their answer otherwise. As they both admitted bias, the Court

finds nothing unreasonable in the state court's rejection of Petitioner's claims against appellate counsel on this matter.

F. Ground Twelve

During closing, the prosecutor stated the following --

Ashley Stephenson, Jamaal Wesley, Mike Hatcher and Brandon Rowe testified and told you that Malachi Smith tried to manipulate testimony.

Now, why is that believable? Because Malachi himself had to admit that he is biased for this defendant. He knows everything kind of went through him. It's his house. He knows all these people. He is trying to get him off.

(Trial Tr. at 766 [11-12 at 93]).

In his state habeas proceedings, Petitioner argued that appellate counsel was ineffective for failing to argue that trial counsel was ineffective in failing to object to the prosecutor's closing comments that vouched for the four witnesses, as quoted above. (See Resp't Ex. 3 at 11-12). The state habeas court rejected the claim on the grounds that Petitioner failed to show that the prosecutor had misstated the evidence or that an objection by trial counsel was warranted. (Id. at 12).

Petitioner argues in federal ground twelve that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to object to the prosecutor's improper closing argument, which used the prosecutor's improper

comment on Smith's bias to vouch for the credibility of Stephenson, Wesley, Hatcher, and Rowe's testimony that Smith had tried to influence their testimony. (Am. Pet. at 6; Pet'r's Br. at 33).

Strickland again applies. As stated in the discussion of grounds nine through eleven, it was reasonable to find that Smith admitted bias. Further, the prosecutor's comment – that evidence of Smith's bias was consistent with the testimony on his attempts to influence witnesses – reflected the evidence and was not improper. The undersigned finds nothing unreasonable in the state court's rejection of the claim in ground twelve.

G. Ground Thirteen

In closing, the prosecutor made the following comments –

Nobody hid the fact that Jamaal Wesley initially told the police a story without naming anybody. . . . Jamaal was thinking of Jamaal at that point. He saw what he had done. These folks live in this neighborhood. They had to go back to that neighborhood. They don't want to come in here and snitch out on somebody. Because they know, as they say, snitches get stitches. That's what they say out there on the street.

We have all these witnesses in here now to face this man who they saw shoot and kill another man on October 30th of 2008. They live in that community. And they have to trust that you're going to uphold your duty and follow the law in this case and do the right thing. Because I can't promise them any more than that.

...

[Y]ou don't reward him. And you don't revictimize that community or that neighborhood. Don't reward him. That's what you do. You have an option in this case.

...

The other thing [your message] says is that people who come forth to the police who witness crimes, even under the threats of violence, even under intimidation, who come forward, who come in and testify of what they heard – well, we'll just dismiss that. I mean, these police out here on the front line trying to protect this community, relying on witnesses to come forward. And your verdict in this case will speak to that.

... [Y]ou and your verdict reflects what we value.

(Trial Tr. at 768-69, 772, 778 [11-12 at 95-96, 99, 105]).

Petitioner argued in his state habeas proceedings that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for not objecting to the prosecutor's closing comments on Petitioner's future dangerousness. (See Resp't Ex. 3 at 12). The state habeas court rejected the claim but did not address the specific language quoted above. (Id.)

Petitioner argues in federal ground thirteen that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for not objecting to the

prosecutor's improper closing argument – stated above – on Petitioner's future dangerousness. (Am. Pet. at 6; Pet'r's Am. Br. at 34-36).

Strickland again applies. Under Georgia law, “it is improper for a prosecutor to argue to the jury during the guilt-innocence phase of a trial that if the defendant is found not guilty, the defendant will pose a threat of future dangerousness, and that the failure of defense counsel to object may be found to constitute deficient performance.” Jones v. State, 288 Ga. 431, 433-34, 704 S.E.2d 776, 799 (2011). “A prosecutor argues future dangerousness when the prosecutor asserts there will be more victims if the defendant is not found guilty . . . or the community or witnesses will be endangered if the defendant is not found guilty.” Fulton v. State, 278 Ga. 58, 64, 597 S.E.2d 396, 402 (2004). However, comments dealing with the importance of jury duty and the responsibility of jurors and comments that a guilty verdict will send a message to the community and other killers generally, even if improper for other reasons, are not comments that improperly refer to future dangerousness. Sampson v. State, 282 Ga. 82, 83 and n. 2, 646 S.E.2d 60, 63 and n.2 (2007).

To the extent that defense counsel is found deficient for failing to object to an argument on future dangerousness, “any such found deficiency will not amount to ineffective assistance of counsel unless the defendant can also establish that the failure

to object was so prejudicial to his defense that, but for this deficiency, there was a reasonable probability that the outcome of his trial would have been different.” Jones, 288 Ga. at 434, 704 S.E.2d at 779; and see Walton v. State, 272 Ga. 73, 74, 526 S.E.2d 333, 335 (2000) (finding that “any possible error [based on improper argument of future dangerousness] was harmless in light of the overwhelming evidence of guilt”).

The prosecutor commented on the general street rule that snitches get stitches in the context of discussing Wesley’s initial decision to make up a story as to how he was shot. Although perhaps ambiguous, the Court does not find that the comment was an improper reference to Petitioner’s future dangerousness. See Hambrick v. State, 278 Ga. App. 768, 772, 629 S.E.2d 442, 446 (2006) (“A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting for lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.” (quoting Hammond v. State, 260 Ga. 591, 597, 398 S.E.2d 168, 173-74 (1990)) (internal quotation marks omitted)). The prosecutor stated that sometimes witnesses come forward after being threatened, that police do their duty in reliance on witnesses coming forward, and that the jury’s role was important. The Court reads such comments as referring in general terms to the role of witnesses and juries and does not find that the prosecutor was referring to Petitioner’s future

dangerousness. Further, even if trial counsel was deficient for failing to object and appellate counsel had raised the deficiency on appeal, a different appellate outcome is unlikely in light of the significant evidence against Petitioner, i.e., three witnesses testified that they saw Petitioner shoot the victim.

H. Ground Fourteen

In count four of the indictment, Petitioner was charged with the offense of possession of a firearm during commission of a felony in that on October 30, 2008, he “did unlawfully have on his person a firearm during the commission of the crime of Aggravated Assault, a crime involving the person of Jerome Jenkins.”¹⁴ (Trial Ct. R. at 10 [11-16 at 34]; Trial Tr. at 781 [11-12 at 108]).

The court instructed the jury that the state had the burden “to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.” (Trial Tr. at 783 [11-12 at 110]). The court instructed the jury on possession of a firearm, both actual and constructive. (Trial Tr. at 794 [11-12 at 121]). The jury was provided a copy of the indictment and the jury charges. (See Trial Tr. at 780 [11-12 at 107]).

¹⁴Count six, on which Petitioner was found not guilty, is not addressed.

In his state habeas proceedings, Petitioner argued that appellate counsel was ineffective for not arguing that trial counsel was ineffective for failing to object to the jury instruction on constructive possession. (Resp't Ex. 3 at 12-13). The court rejected the claim without significant discussion. (Id. at 13).

Petitioner argues in federal ground fourteen that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to object to a jury instruction on constructive possession, which was contrary to the indictment and a constructive amendment thereof. (Am. Pet. at 6; Pet'r's Am. Br. at 36-39).

Strickland again applies. Under Georgia law, “[w]here the indictment charges that a defendant committed an offense in one specific way, it generally is error for a trial court to instruct the jury that the offense could be committed in another way.” Jarnigan v. State, 295 Ga. 603, 608, 761 S.E.2d 256, 261 (2014). However, the Georgia Supreme Court repeatedly has made it clear that “the potential harm of such an error is cured ‘where the court provides the jury with the indictment and instructs jurors that the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.’” Id. (quoting Williams v. Kelley, 291 Ga. 285, 286-87, 728 S.E.2d 666, 668 (2012)).

Here, the jury was provided with a copy of the indictment and the court instructed the jurors that the state had the burden of proving every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt. Based on Jarnigan's discussion in regard to curing potential harm from an indictment/jury-instruction discrepancy, it is apparent that if appellate counsel had raised this issue on appeal there is no reasonable likelihood that it would have succeeded.

I. Grounds Fifteen and Sixteen

Petitioner took the stand and testified that, on the day of the murder, he left Smith's house at about two-thirty, went to his sister's house, did not return to Smith's house that day, was not in any confrontation with anyone in the house, and did not shoot anyone. (Trial Tr. at 644-45 [11-11 at 7-8]). On cross-examination, Petitioner stated, "I was totally oblivious to even the incident happening at the house." (Id. at 661 [11-11 at 24]).

Petitioner originally requested a jury charges on manslaughter, provocation, and justification (requests 16, 17, 20-21). (Trial Ct. R. at 107-08, 112-17 [11-16 at 131-32, 136-37]). Petitioner withdrew the requests on manslaughter (request 16) and provocation (request 17). (Trial Tr. at 685-87 [11-12 at 12-14]). Petitioner, however,

stated that he wanted a justification charge (requests 20-21), which the court stated that it would not give, over Petitioner's objection. (Id. at 688-90 [11-12 at 15-117]). The court stated, "your defense is alibi, that he wasn't there. . . . [I]f you're going forth with the alibi defense, I'm not going to give [a justification charge]." (Id. at 689-90 [11-12 at 16-17]).

In his state habeas proceedings, Petitioner argued that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for withdrawing the request to charge on provocation and for failing to request a jury instruction on self defense. (See Resp't Ex. 3 at 10-11). The state habeas court found that trial counsel acted reasonably in light of the fact that Petitioner's defense was that he was not present at the time of the shooting. (Id.).

Petitioner argues in federal grounds fifteen and sixteen that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for withdrawing the request to charge on provocation, which would have reduced the murder charge to manslaughter, and for failing to request a jury instruction on self defense.

Strickland again applies. Counsel reasonably can decline to tender a jury instruction that is inconsistent with an alibi defense so as to avoid weakening the alibi defense. Kubat v. Thieret, 867 F.2d 351, 364-65 (7th Cir. 1989) (acknowledging the

“general proposition that it is reasonable to forego a lesser included offense instruction where a defendant has presented an alibi defense”); see also Wright v. Hopper, 169 F.3d 695, 710 (11th Cir. 1999) (stating that the “alibi defense negates any ‘plausible claim’ that the defendant could have still been a member of the robbery team, but not the triggerman, so Wright was not entitled to a lesser included offense instruction”). A defense which denies guilt on the grounds that someone else committed the crime “practically precludes” a request for a jury instruction on a lesser included offense or justification/excuse. Black v. Goord, 419 F. Supp. 2d 365, 381-82 (W.D. N.Y. 2006) (holding that counsel was not ineffective for failing to request jury charge on lesser included offense when defense was misidentification); Reed v. State, 204 Ga. App. 272, 273, 419 S.E.2d 45, 47 (1992) (“Reed relied exclusively on an alibi defense. Defenses such as self-defense, or accident, which would have called into question the issue of intent were not present in the case. Since any charge on intent was so far removed from the theory upon which the case was tried, even if incorrect, it would have been harmless.”).

Grounds fifteen and sixteen fail. First, the record shows that trial counsel *did* request a jury instruction on self defense and then objected when the trial court did not allow the defense. Accordingly, Petitioner’s claim based on trial counsel’s alleged

failure to request a self-defense charge is without merit. Moreover, as indicated by the state habeas court, it was or would have been reasonable of trial counsel not to ask for a jury charge that would contradict Petitioner's testimony that he left Smith's residence approximately four or five hours before the shooting and was not present at the time of the shooting.¹⁵ Petitioner fails to show anything unreasonable in the state court's rejection of the claims in grounds fifteen and sixteen.

J. Ground Seventeen

In a September 2014 extraordinary motion for a new trial, Petitioner brought to the trial court's attention two, post-trial notarized statements – allegedly made by Smith and a person named Jinard Simms.¹⁶ (See Pet'r's Ex. E, ECF No. 17-1). The statement allegedly signed by Smith states the following –

Sometime after the Murder Trail [sic] of [Petitioner] I saw Francisco Rizzo [sic] at a car dealership. He confided in me that his testimony at the trail [sic] was not true, that he was given a deal by the prosecutor to have all 13 charges against him dropped in exchange for his testimony so he "did what I had to do".

¹⁵Further, although there is a right to plead alternative legal theories, the Court is aware of no right to plead alternative facts, "one set of which is entirely opposite the other." Witt v. Corelogic Saferent, LLC, No. 3:15-CV-386, 2016 WL 4424955, at *11 n.11 (E.D. Va. Aug. 18, 2016).

¹⁶Petitioner states that the trial court has not ruled on his motion. (Pet'r's Suppl. to Am. Br. at 2).

(Id., Ex. G). The statement allegedly signed by Simms states the following –

I ran into Brandon Rowe and Ronald Hatcher (“Mike”) a few days after [Petitioner’s] Murder Trail [sic], and they told me that their testimonies on the witness stand was not true.

They also admitted that they both had to wrestle to get Jamal Wesley”s [sic] (“T”) gun away from Roman and shot him, Mike said. They had to because he went for T’s gun.

Mike and Brandon both said that they come up with a story to blame [Petitioner] while driving T to the hospital. They both bragged of having immunity deals with the Police and Distract [sic] Attorney.

(Id.).¹⁷

In his state habeas proceedings, Petitioner argued that appellate counsel was ineffective for failing to raise a Brady violation and that he had proof of the violation in the form of affidavits from two witnesses – “that was they saying they had witnesses came to them about immunity deals,” and the state habeas court stated that it would give him thirty days to file the affidavits. (Habeas Hr’g Tr. at 9, 11-13 [11-6 at 10, 12-14]). Appellate counsel Dillon testified that Petitioner had informed her that he and his father had been approached by Smith, who “had talked to them about people

¹⁷The Smith statement shows that it was signed on January 12, 2014; the Simms statement shows that it was signed on January 12, 2015; and both were notarized on July 19, 2015. Although Petitioner refers to the Simms statement on September 2014, the statement was not signed by Simms until January 2015.

recanting their statements and immunity deals and things like that.” (Id. at 19 [11-6 at 20]). Counsel stated that she sent an investigator to talk with Smith but they were not able to track down the witnesses to whom Smith referred, that she investigated to the best of her ability, and that she was not able to substantiate the allegations. (Id. at 19-20 [11-6 at 20-21]). It is not apparent whether Petitioner ever submitted copies of Smith’s or Simms’s statements to the state habeas court. However, the state habeas court denied relief. (See Resp’t Ex. 3 at 7).

Petitioner argues in federal ground seventeen that appellate counsel was ineffective for failing to raise newly discovered evidence of Brady violations, as shown by the notarized statements by Smith and Simms. (Am. Pet. at 7; Pet’r’s Suppl. to Am. Br. at 3, ECF No. 16). Petitioner states that he informed appellate counsel of the evidence and that she was ineffective for failing to raise the issue on appeal. (Pet’r’s Suppl. to Am. Br. at 3). Respondent argues that the claim was never raised in the state courts and is procedurally defaulted. (Resp’t Br. at 25).

Strickland again applies, and, as stated earlier, due process does not allow the prosecution to suppress evidence favorable to an accused. Brady, 373 U.S. at 87. To establish a Brady claim, the petitioner must “prove that (1) the government possessed evidence favorable to him; (2) the defendant did not possess the evidence and could

not have obtained it with reasonable diligence; (3) the government suppressed the favorable evidence; and (4) the evidence was material.” Davis v. Terry, 465 F.3d 1249, 1254 (11th Cir. 2006).

Post-trial hearsay statements about witnesses’ claims of prosecutorial pressure to testify falsely, without a direct affidavit from the witnesses, are highly suspect. Williams v. United States, 239 F. App’x 553, 555, 558 (11th Cir.2007) (stating that Brady violation was not shown in affidavit that contained only hearsay statement by codefendant about alleged governmental misconduct). Further, “a Brady claim fails when it is only speculative that the materials at issue would have led to exculpatory information.” Wright v. Sec’y, Florida Dep’t of Corr., 761 F.3d 1256, 1281 (11th Cir. 2014), cert. denied, _ U.S. _, 135 S. Ct. 2380 (2015).

Contrary to Respondent’s argument, Petitioner raised the claim in his state habeas proceedings. Even though it is unclear whether Petitioner presented to the state habeas court copies of the notarized statements – the state court’s rejection of the claim does not result in a decision that is contrary to federal law or an unreasonable application of federal law. Petitioner fails to establish that the government possessed any evidence favorable to Petitioner that it did not disclose. Neither Smith nor Simms had any first hand knowledge of the shooting, and their notarized statements contain

only hearsay statements by Rizo, as related by Smith, and hearsay statements by Hatcher and Rowe, as related by Simms. Dillon testified that she was aware that there was talk, after trial, of people recanting their statements; that she had sent an investigator to talk with Smith; and that they had not been able to track down the witnesses who allegedly had recanted their testimony. (Habeas Hr'g Tr. at 19-20 [11-6 at 20-21]). Petitioner does not indicate what more Dillon could have done to track down Rizo, Hatcher, or Rowe, and Petitioner, to date, has not come forward with any affidavit from either Rizo, Hatcher, or Rowe. What remains are the hearsay statements, and they are insufficient to demonstrate a Brady violation that Dillon should have raised on appeal and that would have had a reasonable probability of changing the appellate outcome. Ground seventeen fails.

IV. Certificate of Appealability (“COA”)

Under Rule 11 of the Rules Governing § 2254 Cases, “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).” The Court will issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The applicant “must

demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Melton v. Sec'y, Fla. Dep't of Corr., 778 F.3d 1234, 1236 (11th Cir. 2015) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)) (internal quotation marks omitted), cert. denied, __ U.S. __, 136 S. Ct. 324 (2015).

The undersigned recommends that a COA should be denied because it is not reasonably debatable that Petitioner has failed to meet his heavy burden in federal habeas corpus proceedings of establishing the lack of any reasonable basis for the Georgia Supreme Court's final decision in his state habeas proceedings. If the Court adopts this recommendation and denies a COA, Petitioner is advised that he "may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." Rule 11(a), Rules Governing § 2254 Cases in the United States District Courts.

V. Conclusion

For the reasons stated above,

It is **RECOMMENDED** that the instant petition for a writ of habeas corpus, as amended and supplemented [15, 16], and a COA be **DENIED** and that this action be **DISMISSED**.

The Clerk is **DIRECTED** to withdraw the reference to the Magistrate Judge.

IT IS SO RECOMMENDED this 27th day of February, 2017.



JANET F. KING
UNITED STATES MAGISTRATE JUDGE

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