

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12116-B

CHARLES GIVENS,

Petitioner-Appellant,

versus

LT. MARTY ALLEN,

Respondent-Appellee.

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

Before: TJOFLAT and WILSON, Circuit Judges.

BY THE COURT:

Charles William Givens has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's September 29, 2017, order denying his motions for a certificate of appealability and leave to proceed *in forma pauperis*. Upon review, Givens's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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LT. MARTY ALLEN,

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

ORDER:

Appellant's motion for a certificate of appealability, as construed from his notice of appeal, is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Appellant's motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

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

CHARLES GIVENS,	:	
GDC ID # 839324, Case # 754528,	:	CIVIL ACTION
Petitioner,	:	NO. 2:16-cv-00150-WCO-JCF
	:	
v.	:	
	:	
MARTY ALLEN,	:	HABEAS CORPUS
Respondent.	:	28 U.S.C. § 2254

ORDER

The above-captioned case is before the court for consideration of the magistrate judge's final report and recommendation ("R&R") dated March 21, 2017 [16]. The magistrate judge recommends denying petitioner Charles Givens' habeas corpus petition, dismissing the action, and denying petitioner a certificate of appealability. Petitioner timely filed objections to the R&R.

In his objections, petitioner argues that his defense counsel failed to properly investigate his case before counseling him to plead guilty. Once again, this assertion is contrary to the record and the findings of the state habeas court. He also argues that he was never told that he was waiving all known and unknown defenses by entering a guilty plea. However, as discussed in the magistrate judge's R&R, a defendant need only be aware of the direct consequences of his plea. The question of known or

unknown defenses is not relevant to this inquiry. *See United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003). Lastly, petitioner argues that his defense counsel never pursued an expert in his case. This issue, while likely a losing argument on the merits, is also irrelevant in light of petitioner's voluntary and knowing guilty plea. *See Hutchins v. Sec'y for the Dep't of Corr.*, 273 F. App'x 777, 777 (11th Cir. 2008) (“[A] knowing and voluntary guilty plea waives all constitutional challenges to a conviction.”).

After careful review of the record, the court **APPROVES** and **ADOPTS** the R&R [16] as the order of this court. Accordingly, the petition for a writ of habeas corpus [1] is hereby **DENIED**, this action is hereby **DISMISSED**, and petitioner is **DENIED** a certificate of appealability.

IT IS SO ORDERED, this 26th day of April, 2017.

s/William C. O'Kelley
William C. O'Kelley
Senior United States District Judge

involuntary (grounds 6, 8). (Doc. 13-7 (State Habeas Court Order) at 2-3, 12-13, 16). After the state habeas court denied the petition (*id.*), the Supreme Court of Georgia summarily denied Petitioner's application for a certificate of probable cause ("CPC") to appeal the denial (Doc. 13-8). In his federal habeas petition, Petitioner raises five grounds for relief (Doc. 1-1; *see* Doc. 1-2 at 6), as discussed in detail below.

I. Merits Review

A. General Standards Of Habeas Corpus Review

A federal court may not grant habeas corpus relief for claims previously decided on the merits by a state court unless the decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's determination of a factual issue is presumed correct unless the petitioner rebuts that presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

In *Williams v. Taylor*, 529 U.S. 362, 412 (2000), the Supreme Court explained that, in applying 28 U.S.C. § 2254(d), a federal habeas court first ascertains the "clearly established Federal law" based on "the holdings, as opposed to the dicta, of

[the Supreme Court's] decisions as of the time of the relevant state-court decision.” The federal habeas court then considers whether the state court decision is “contrary to” that clearly established federal law, i.e., whether the state court “applies a rule that contradicts the governing law set forth” in Supreme Court cases, or “confronts a set of facts that are materially indistinguishable from” those in a Supreme Court decision “and nevertheless arrives at a result different from” that decision. *Id.* at 405-06.

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

for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was *an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.*" *Richter*, 562 U.S. at 103 (emphasis added).

Although a federal court is not prohibited from considering the findings and conclusions that support a lower court's ruling on a petitioner's claims, in this Circuit the relevant ruling is the one issued by the last state appellate court to consider the claims on their merits. *See Hittson v. GDCP Warden*, 759 F.3d 1210, 1231 (11th Cir. 2014) (noting that "the highest state court decision reaching the merits of a habeas petitioner's claim is the relevant state court decision [for a federal habeas court to] review under AEDPA" (internal quotations omitted), which for a Georgia petitioner's state habeas claim is the decision of the Supreme Court of Georgia, even if the Supreme Court "summarily denied" the petitioner's CPC application without offering any rationale for its ruling); *see also Wilson v. Warden*, 834 F.3d 1227, 1230 (11th Cir. 2016) (*en banc*) ("conclud[ing] that federal courts need not 'look through' a summary decision on the merits to review the reasoning of the lower state court"); *id.* at 1235 (noting that when the Supreme Court of Georgia has denied a CPC application without

explanation, the petitioner “must establish that there was no reasonable basis” for the denial); *but see Butts v. GDCP Warden*, No. 15-15691, 2017 U.S. App. LEXIS 4161, at *4 (11th Cir. Mar. 9, 2017) (“Because it does not matter to the result, and to avoid any further complications if the United States Supreme Court disagrees with our *Wilson* decision, we have decided this appeal on the same basis that the district court did: by using the more state-trial-court focused approach in applying § 2254(d).”).

B. Merits Review Of Ineffective-Assistance-Of-Counsel Claims

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth the standard for evaluating a claim of ineffective assistance of counsel, which “is an attack on the fundamental fairness of the proceeding whose result is challenged.” *Id.* at 697. The analysis involves two components, but a court need not address both if the petitioner “makes an insufficient showing on one.” *Id.*

First, a federal habeas court determines “whether, in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.” *Id.* at 690. The court “must be highly deferential” in scrutinizing counsel’s performance and “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. In other words, the petitioner “must overcome the

presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Id.* (Internal quotations omitted). “Given the strong presumption in favor of competence, the Petitioner’s burden of persuasion—though the presumption is not insurmountable—is a heavy one.” *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (*en banc*).

Second, a federal habeas court determines whether counsel’s challenged acts or omissions prejudiced the petitioner, i.e., whether “there is a reasonable probability” — one “sufficient to undermine confidence in the outcome” — that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “The likelihood of a different result must be substantial, not just conceivable.” *Richter*, 562 U.S. at 112 (noting that “the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case” (internal quotations omitted)).

“Surmounting Strickland’s high bar is never an easy task. . . . Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. . . . The question is whether an attorney’s representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.” *Id.* at 105 (citations and internal quotations

omitted).

Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. . . . Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. *The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.*

Id. (citations and internal quotations omitted) (emphasis added).

II. Analysis

A. Ground 1: Guilty Plea Not Knowing And Voluntary

In ground 1 of his federal habeas petition, Petitioner asserts that his “plea was not given voluntarily, knowingly and intelligently.” (Doc. 1-1 at 1). He argues that the trial court and his trial counsel “failed to disclose the ‘direct vs. collateral’ consequences [of his plea], and[/]or the rehabilitative scheme of the sentence imposed.” (*Id.*). Petitioner argues further that his plea was unknowing and involuntary because (1) the indictment did not inform him of the necessary mens rea element of the charged offenses, and his attorney never explained that element to him; (2) the trial court did not inform Petitioner of all of the rights he was waiving by pleading guilty, including the waiver of “all known and unknown defenses”; and (3) in the absence of

a notice from the state of its intent to seek the death penalty, he received no explanation of the different procedural prerequisites for a sentence of life imprisonment without parole, which depended, he asserts, upon whether he pled guilty or was convicted by a jury. (Doc. 1-2 at 7-10; *see id.* at 19-26; Doc. 15 at 16-17).

In rejecting Petitioner's ground 1 claim (grounds 6 and 8 of his state habeas petition), the state habeas court made the following findings of fact:

On the day he pled guilty, Petitioner signed a waiver of rights form. On the . . . form, Petitioner checked affirmatively or negatively for each question, which informed [him] . . . of the charges against him, the maximum punishments he faced for them, and that [he] had the right to a trial by jury, to confront witnesses, and against self-incrimination. Petitioner initialed further that he understood his rights and elected to plead guilty. Petitioner signed the waiver.^[1]

At [his] guilty plea hearing, Petitioner – wholly apprised of the charges against [him], the maximum punishments he faced for them, and the rights he waived by pleading guilty – pled guilty, indicating he did so freely, knowingly, and voluntarily.

Petitioner's counsel, Jerilyn Bell, explained to [him] how malice murder and the *mens rea* element would be proven to a jury if the case

¹The waiver form (Doc. 13-4 at 100-02) includes the following handwritten responses: (1) to the question asking about the maximum punishment for Petitioner's crimes, "Life without Parole, 20 years + 5 years"; (2) to the question asking what the plea agreement provided, "not seeking death penalty with judge deciding life without parole or life with parole"; and (3) to the question asking what unlawful acts Petitioner had committed, "murder." (*Id.* at 101).

went to trial. Bell went over Petitioner's *Boykin*² rights with him. On the day of the plea, she went over specific *Boykin* rights forms with him, and on the day of, along with various times beforehand, she discussed that he would be waiving his right to a trial by jury, his right against self-incrimination, and his right to confront witnesses against him. At his plea hearing, Petitioner acknowledged that he had gone over all of the plea questions and answers with his attorneys.

(Doc. 13-7 at 13-14 (citations omitted)). The state habeas court then reached the following conclusions of law:

A guilty plea that is a compromise by the defendant or entered to avoid a harsher sentence is not "compelled" within the meaning of the Fifth Amendment and does not amount to "coercion" in the legal sense. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Brady v. United States*, 397 U.S. 742, 755-757 (1970). The focus of the inquiry is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Alford*, 400 U.S. at 31.

Here, the record reflects that Petitioner knowingly, intelligently, and voluntarily entered his guilty plea after a valid waiver of his *Boykin* rights. Petitioner signed and initialed a waiver of rights form which included references to all three *Boykin* rights, and verified before the sentencing court that (1) . . . his initials and signature [were] on the form; and (2) he answered the form truthfully. Additionally, Ms. Bell testified that she discussed these rights with Petitioner. The record contradicts Petitioner's arguments in grounds 6 and 8.

Accordingly, the record reveals that Respondent has carried the burden in demonstrating the voluntariness of Petitioner's plea; grounds 6 and 8 provide no basis for relief.

²*Boykin v. Alabama*, 395 U.S. 238 (1969).

(*Id.* at 15-16).

To the extent that Petitioner challenges the specific findings and conclusions set forth above, those challenges fail, as described in more detail below. The Court finds no basis for ruling that the state habeas court's conclusion that Petitioner's plea was knowing and voluntary, as summarily affirmed by the Supreme Court of Georgia, was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 103; *see also Farley v. Sec'y, Dep't of Corr.*, 8:11-CV-2706-T-27EAJ, 2014 U.S. Dist. LEXIS 164061, at *35-36 (M.D. Fla. Nov. 24, 2014) ("A reviewing federal court may set aside a state court guilty plea only for failure to satisfy due process: If a defendant understands the charges against him, understands the consequences of a guilty plea, and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea . . . will be upheld on federal review.' " (internal quotations omitted) (quoting *Stano v. Dugger*, 921 F.2d 1125, 1141 (11th Cir. 1991))); *Beier v. Butler*, 8:99-CV-754-T-27TBM, 2009 U.S. Dist. LEXIS 8536, at *12 (M.D. Fla. Jan. 23, 2009) ("A knowing and voluntary plea satisfies due process. The standard for determining the validity of a plea is whether the plea represents a voluntary intelligent choice among the alternative courses open to the defendant. The voluntariness of a plea

is determined by considering all of the relevant circumstances surrounding it.” (citations omitted) (citing *Alford*, 400 U.S. at 31; *Brady*, 397 U.S. at 749; *Boykin*, 395 U.S. at 242-43)).

The state habeas court’s order and the transcript of Petitioner’s plea hearing (Doc. 13-4 at 174-201) show that Petitioner understood the charges against him, the trial rights he was waiving and the consequences of his guilty plea, and that after consultation with his attorneys, without coercion or duress, he chose *voluntarily* to plead guilty.

At the February 7, 2012 plea hearing, the trial court explained to Petitioner that it would impose a sentence of life imprisonment without parole for malice murder, and that later, at his sentencing hearing — held on April 26, 2012 — [he could seek a modification to allow for the possibility of parole.] (See *id.* at 177 (“Count one charges [Petitioner] with the offense of malice murder that the accused on the 11th day of July, 2010, unlawfully did then and there *with malice aforethought* cause the death of [the first victim] by shooting her with a firearm.” (emphasis added)); *id.* at 40 (indictment); *id.* at 178 (“It is the agreement that he be sentenced today on [the two malice murder] counts . . . to life without parole.”); *id.* at 182-90 (Petitioner’s sworn responses to the trial court regarding his understanding of the charges against him, the rights he was

waiving by pleading guilty, the maximum punishment he could receive for his crimes and the voluntary nature of his plea); *id.* at 184 (Court: “Have you received a copy of the indictment . . . [and do] you fully and completely understand the charges against you?” Petitioner: “Yes.”); *id.* at 188-89 (Court: “Has any person used any threats, force, pressure or intimidation to make you plead guilty?” Petitioner: “No.”; Court: “Has any promise been made to you by any one which causes you to plead guilty?” Petitioner: “No.”)); *see also Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (“[T]he representations of the defendant, his lawyer, and the prosecutor at [] a [plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. *Solemn declarations in open court carry a strong presumption of verity.* The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.” (emphasis added)).

Petitioner argues that he was unaware of certain legal implications of his plea, such as the waiver of all known and unknown defenses, but these implications do not concern a federal habeas court that is reviewing a guilty plea entered in state court. As long as Petitioner understood the charges against him, the trial rights he was waiving and the consequences of his plea, i.e., the potential scope of his punishment, and he

then voluntarily chose to plead guilty — and the record shows that these federal habeas due process requirements were satisfied in this case — federal habeas review is at an end. Petitioner’s ground 1 claim fails.³ And because Petitioner’s guilty plea was knowing and voluntary, he has waived the claims he has raised in grounds 2, 3 and 5,

³As discussed in the text below, a *guilty* plea constitutes a waiver of all of a defendant’s potential claims that he is *not guilty* of the crimes charged, so that the existence of potential defenses, known or unknown, is not relevant to the question of whether a plea is knowing and voluntary. The waiver of such defenses, although necessarily a consequence of a guilty plea, is not a consequence about which a defendant need be informed in order for his plea to be knowing and voluntary. See *United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003) (in accepting a guilty plea, a federal district court need “only . . . ensure that a defendant is aware of the direct consequences of his plea[,]” and “need not explain the possible collateral consequences,” such as the loss of appellate rights or ineligibility for parole (internal quotations omitted)); *Chamniiss v. Tucker*, 3:11cv566/RV/EMT, 2012 U.S. Dist. LEXIS 184225, at *60-62 (N.D. Fla. Dec. 11, 2012) (because the Florida Supreme Court has held that the “sexual offender registration requirement is a collateral consequence of a plea to a sexual offense because the registration requirement *has absolutely no effect on the range of the defendant’s punishment for the crime*” (emphasis added), petitioner’s failure to be informed of that consequence “did not render [his] plea unknowing or involuntary” — “Under federal and state law, a defendant need only be advised of the direct consequences of his guilty plea; advising [him] of the collateral consequences . . . is not constitutionally required.”), *adopted by* 2013 U.S. Dist. LEXIS 4526 (N.D. Fla. Jan. 11, 2013); *see also United States v. Doe*, 568 Fed. Appx. 30, 31 (2d Cir. 2014) (“At the [plea] colloquy, the District Court informed Doe of the 240-month mandatory minimum sentence, and discussed the appeal waiver [because that was part of the plea agreement]. Accordingly, Doe knew of the direct consequences of a guilty plea, i.e. anything that would have a definite, immediate and largely automatic effect on the range of . . . punishment.” (emphasis added) (internal quotations omitted)); *Appleby v. Warden, N. Reg’l Jail & Corr. Facility*, 595 F.3d 532, 542 (4th Cir. 2010) (citing *United States v. Salmon*, 944 F.2d 1106, 1130 (3d Cir. 1991) (“Due process requires that a guilty plea be voluntary, that is, that a defendant be advised of and understand the *direct consequences* of a plea. *The only consequences considered direct are the maximum prison term and fine for the offense charged.*” (emphasis added)))).

as discussed below.

B. Ground 2: Ineffective Assistance – Void Indictment

In ground 2 of his federal habeas petition, Petitioner asserts that the indictment against him was “deficient, vague and confusing, as it fail[ed] to inform [him] of the ‘mens rea’ element of the crime,” and his trial counsel provided ineffective assistance by coercing him into signing the indictment and by failing to challenge it on constitutional grounds. (Doc. 1-1 at 2). Petitioner argues that the indictment failed to put him on notice that he was being charged with the intent to commit murder and aggravated assault, and it also failed to “show ‘on its face’ that the crime(s) alleged were ‘premeditated’ as to show or prove malice.” (Doc. 1-2 at 11-12; *see id.* at 26-27; Doc. 15 at 17-18). Petitioner asserts that trial counsel should have filed pre-trial motions challenging the defective indictment and also should have presented evidence of self-defense. (Doc. 15 at 18).

Malice

The state habeas court rejected these ground 2 claims as follows:

In [state habeas] ground 9, Petitioner alleges that the indictment was deficient, as it did not inform him of the charge against him, showed no malice, and failed to define aggravated assault, and that counsel should have filed a demurrer or a motion to quash the indictment. At the evidentiary hearing, Bell explained that there were no issues with the indictment and that they could have filed a motion to quash if they had proceeded with the case. Petitioner chose to enter his plea instead.

Petitioner has failed to demonstrate that because Bell did not file[] a demurrer or a motion to quash, Bell fell below a standard of performance. Additionally, any issues raised regarding the indictment are defaulted, as the entry of the guilty plea waives all known and unknown defenses, any alleged constitutional violations occurring prior to its entry, and comprehends all the factual and legal elements necessary to sustain a final judgment. *United States v. Broce*, 488 U.S. 563 (1989); *Tollett v. Henderson*, 411 U.S. 258 (1973); *Tutt v. State*, 267 Ga. 49, 50, 472 S.E.2d 306 (1996); *Clark v. Caldwell*, 229 Ga. 612, 193 S.E.2d 816 (1972). Petitioner's claim regarding the indictment is defaulted, and this ground provides no basis for relief.

(Doc. 13-7 at 11).

"[A] knowing and voluntary guilty plea waives all constitutional challenges to a conviction." *Hutchins v. Sec'y for the Dep't of Corr.*, 273 Fed. Appx. 777, 777 (11th Cir. 2008) (rejecting petitioner's claim that "his trial counsel was ineffective for failing to explicitly define and advise him of a statute of limitations defense prior to advising him to waive that defense and plead guilty" — despite the prosecutor's announcement at his plea hearing that the charge against him was time-barred — because his "voluntary guilty plea . . . waived any ineffective assistance of counsel claim," and "a knowing and voluntary guilty plea waives all constitutional challenges to a conviction"); see *Ricci v. Sec'y, DOC*, 2:13-cv-634-FtM-29CM, 2016 U.S. Dist. LEXIS 64649, at *11 (M.D. Fla. May 17, 2016) ("A guilty plea precludes claims of constitutional deprivations occurring prior to entry of a plea." (citing *Tollett v.*

Henderson, 411 U.S. 258, 267 (1973) (“[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.”)); *see also Broce*, 488 U.S. at 569 (“A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, *when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary*. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack. There are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence.” (emphasis added)); *Stephens v. Laughlin*, CV 115-151, 2016 U.S. Dist. LEXIS 182158, at *28-29 (S.D. Ga. Dec. 21, 2016) (because “[p]etitioner entered a knowing and voluntary plea, . . . the state habeas court properly found that [he] waived any” claim challenging the validity of the indictment against him), *adopted by* 2017 U.S. Dist. LEXIS 6988 (S.D. Ga. Jan. 18, 2017).

Based on the controlling caselaw, as set forth above, Petitioner has not, with respect to his ground 2 claims, “show[n] that the state court’s ruling on . . . [these claims] was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *See Richter*, 562 U.S. at 103. Petitioner’s ground 2 claims fail.⁴

C. Ground 3: Ineffective Assistance – Funds For An Expert

In ground 3 of his federal habeas petition, Petitioner asserts that trial counsel was ineffective for failing to file a pre-trial motion to seek funds for an independent expert to support a possible temporary insanity defense. (Doc. 1-1 at 3). Petitioner argues that an independent psychiatrist could have developed the basis for such a defense, especially because the victims were his friends “and there is no clear motive for the crimes, no premeditation or malicious intent.” (Doc. 1-2 at 13; *see id.* at 28-29; Doc. 15 at 19-20; *but see* Doc. 13-5 at 151 (In the closing argument presented by Petitioner’s attorney at the sentencing hearing, he argued that in one of the statements Petitioner gave to the police after turning himself in, shortly after the murders, “[h]e acknowledged the acts that he committed and the only explanation he offered was . . .

⁴To the extent Petitioner claims that his guilty plea was involuntary because trial counsel coerced him into signing a defective indictment, the Court has addressed Petitioner’s ground 1 claim that his plea was unknowing and involuntary and has rejected that claim.

[that] he was angered by the fact that his [former] girlfriend [one of the murder victims] was seeing another man [Wayne Poole, the other murder victim]."); *id.* at 31

(GBI Special Agent Hamby, who interviewed Petitioner, testified at the sentencing hearing: "During this [second] interview, [Ppetitioner] admitted again that he had shot Wayne Poole. He described more in detail how that occurred. He said that he was not hit on the head, but he was just angered by the fact that Mr. Poole had been hanging around with Laura who was his ex-girlfriend [whom he also shot and killed], that he was very angered by the fact that that was going on."); *id.* at 54-55 (The aggravated assault victim, whom Petitioner shot in the face but did not kill, testified at the sentencing hearing that Petitioner had told him, three weeks prior to the murders, that "if [Laura] went horseback riding with us he was going to shoot me and Wayne"; that he and Laura and Wayne had indeed gone horseback riding together; and that Petitioner had slammed the door in Wayne's and his faces when they had returned)).

The state habeas court addressed Petitioner's federal ground 3 claim as follows:

In [state habeas] grounds 1, 3, and 10, [] Petitioner alleges that counsel (1) failed to preserve and present expert testimony regarding [his] competence to stand trial or his competence at the time the crime was committed; (3) failed to object to the court not requiring more information on the ordered mental exam of Petitioner's competence at the time of the act; and (10) failed to file a pre-trial motion for funds to employ an independent psychiatrist to evaluate him for his mental

competence at the time of the act. Bell explained that she did not have Petitioner evaluated for his mental competence because she did not see any reason to have him evaluated for competence in terms of taking the plea. Bell also explained in the record that she did not see any issues with Petitioner's competence. Bell would have had no reason to object to the court not requiring more information on an ordered exam of Petitioner, and Bell made no mention of needing funds to employ a psychiatrist. Bell had made the determination not to evaluate Petitioner at all. The record reflects that Bell had made these determinations after thoroughly researching Petitioner's case, speaking with experts, and communicating with Petitioner. Accordingly, Petitioner has not demonstrated that Bell's actions fell below an objectively reasonable standard in this regard. Further, Petitioner has not demonstrated prejudice, as the record reflects that Petitioner spoke numerous times with Bell about his decision to enter the plea in order to possibly receive a sentence of life with parole, despite not having a mental evaluation. Viewing this argument through the prism of *Strickland* reveals that these three grounds are without merit, and therefore provide no basis for relief.

(Doc. 13-7 at 9-10).

As noted above, Petitioner waived his ground 3 claim by pleading guilty. And Petitioner has not shown that there is no "reasonable argument," such as the one set forth in the state habeas court's opinion, "that counsel satisfied *Strickland*'s deferential standard." See *Richter*, 562 U.S. at 105. Ground 3 fails.

D. Ground 4: Illegal Sentence

In ground 4 of his federal habeas petition, Petitioner claims that his sentence of life without parole is illegal because there was no pre-plea notice of the state's intent

to seek the death penalty. (Doc. 1-1 at 4). Petitioner also argues that his sentence is unfair when compared to other defendants convicted of one of Georgia's "7 deadly sin(s)," who are not serving sentences of life imprisonment without parole and who "are able to work and enjoy their liberty, families and pursuit of happiness." (Doc. 1-2 at 17; *see id.* at 14-17, 29-32). Petitioner argues that Georgia law required the state to give notice of its intent to seek the death penalty, and absent that notice his sentence of life imprisonment without parole is illegal. (Doc. 15 at 20-22).

The state habeas court addressed this ground 4 claim as follows:

In [state habeas] ground 11 at the evidentiary hearing, Petitioner claims that his sentence is illegal and unconstitutional because there was no notice of intent to seek the death penalty. . . .

Petitioner received a sentence of life without parole, which precludes requiring a notice of intent to seek the death penalty.

Petitioner committed malice murder on July 11, 2010, [i.e.,] after April 29, 2009, the effective date of the 2009 amendment to O.C.G.A. § 16-5-1(d), which allows a sentence of life without parole to be imposed for murder in all cases, regardless of whether the death penalty was sought. *Mathis v. State*, No. S13A0068 (Ga. May 20, 2013); *Heywood v. State*, No. S12A1925 (Ga. March 28, 2013); *Williams v. State*, 291 Ga. 19, 20, 727 S.E.2d 95 (2012).

Accordingly, this ground is without merit.

(Doc. 13-7 at 16 (citation omitted)).

In *Kimbrough v. State*, 2017 Ga. LEXIS 48 (Ga. Feb. 6, 2017), the Supreme Court of Georgia stated the following:

In 2009, the General Assembly amended the murder statute, OCGA § 16-5-1, to authorize a sentence of life without parole for all murders committed on or after April 29, 2009. *See* Ga. L. 2009, p. 223, §§ 1, 11 (a). The 2009 Act explicitly said in § 10 that “[a] person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state.” In 2011, the General Assembly expressly required the codification of § 10 of the 2009 Act in the Official Code of Georgia Annotated as OCGA § 17-10-16.1 [(“A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state.”)].

Id. at *4 n.5; *see also Heywood v. State*, 743 S.E.2d 12, 18 (Ga. 2013) (because appellant committed murder on April 28, 2010, he was subject to the April 29, 2009 change in Georgia law that allows a murder defendant to receive a sentence of life imprisonment without parole “without the prosecutor seeking the death penalty”).

Petitioner, who committed two murders on July 11, 2010, is also subject to the April 2009 change in Georgia law. There was thus no violation of Georgia law with respect to his sentence. And even if there had been, such violations are not subject to federal habeas review. “[I]t is only noncompliance with *federal* law that renders a State’s criminal judgment susceptible to collateral attack in the federal courts.” *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010); *see also Clark v. AG*, 821 F.3d 1270, 1286-87 (11th

Cir. 2016) (rejecting petitioner's sentencing error claim because "a violation of state law is not sufficient to entitle a petitioner to federal habeas relief"). Petitioner's ground 4 claim fails.

E. Ground 5: Ineffective Assistance – Evidence Not Submitted

In ground 5 of his federal habeas petition, Petitioner claims that trial counsel provided ineffective assistance by "not admitting physical and/or medical evidence in regards to [his] being able to prepare a defense as relates to 'premeditation' as . . . he suffered a 'head contusion' as a direct result of an attack upon [him] by [the] alleged victim." (Doc. 1-1 at 5; *see* Doc. 1-2 at 18-19, 32-33; Doc. 15 at 22-23; *but see* Doc. 13-5 at 150 (In the closing argument of Petitioner's attorney at the sentencing hearing, he noted: "We brought you the one medical record because we believe there was truth in the fact that [Petitioner] . . . did have a contusion to the back of his head. No, it didn't cause a concussion. It did not cause sufficient damage to show up on an x-ray, but there clearly was a contusion on the back of his head. Now was that justification for murder? Absolutely not.")).

The state habeas court addressed Petitioner's ground 5 claim as follows:

In [state habeas] ground 12, Petitioner [] alleges that counsel failed to admit physical or medical evidence to prove lack of premeditation. Bell explained that there was no physical or medical evidence to disprove

malice murder and that she did admit evidence of Petitioner's intoxication at the time of the incident. The record contradicts Petitioner's argument, and ground 12 is therefore without merit, and provides no basis for relief.

(Doc. 13-7 at 12).

Once again, as noted above, Petitioner's claim of pre-plea ineffective assistance of counsel is precluded by his knowing and voluntary guilty plea. And Petitioner has not shown that there is no "reasonable argument," such as the one set forth in the state habeas court's opinion, "that counsel satisfied *Strickland*'s deferential standard." See *Richter*, 562 U.S. at 105. Petitioner's citation to *Smith v. Dretke*, 417 F.3d 438 (5th Cir. 2005), is unavailing, as the petitioner in that case did not plead guilty in state court, but rather was convicted at a jury trial. Ground 5 also fails.

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III. Certificate Of Appealability

A state prisoner must obtain a certificate of appealability (COA) before appealing the denial of his federal habeas petition. 28 U.S.C. § 2253(c)(1)(A). A COA may issue only when the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard is met when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S.

473, 484 (2000) (quotations omitted). A petitioner need not “show he will ultimately succeed on appeal” because “[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate.” *Lamarca v. Sec’y, Dep’t of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 337, 342 (2003)). Because there is no reasonable argument to support a finding that Petitioner has presented a claim of sufficient merit to warrant federal habeas relief, a certificate of appealability should not issue in this case.

IV. Conclusion

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

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

SO RECOMMENDED this 21st day of March, 2017.

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

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