IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

NO.

MARCIN SOSNIAK**,** Petitioner

v.

JACOB BEASLEY, WARDEN, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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Appendix

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11667

Non-Argument Calendar

MARCIN SOSNIAK,

Petitioner-Appellant,

versus

MACON SP WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 2:20-cv-00264-SCJ

APPENDIX A

Before JORDAN, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Marcin Sosniak, a Georgia prisoner serving four consecutive life sentences followed by an additional one-hundred years' imprisonment, appeals the denial of his petition for a writ of habeas corpus. We affirm.

FACTUAL BACKGROUND

Sosniak and two friends—Jason McGhee and Frank Ortegon—were drinking at Ortegon's house on the evening of March 19, 2006, when they decided to buy cocaine from a guy Ortegon knew. Sosniak was armed; two days earlier, he and McGhee bought a pistol from a local pawn shop. And Sosniak was carrying it in his backpack. After getting the cocaine, the three drove to a gas station so they could use the drugs. Then, McGhee told Sosniak and Ortegon that he "want[ed] to go out and have some fun." McGhee drove them to Chad Brown's house, where he knew they could find Chad's brother Matt. Matt and some others had stolen marijuana from Sosniak at knifepoint the previous summer. McGhee thought it was time for someone to either pay up or give the drugs back.

McGhee pulled into Chad's driveway, told the others to wait in the truck, and went inside. But Sosniak and Ortegon eventually followed McGhee in and found him arguing with Chad upstairs. Empty handed, the three left Chad to make their way back outside. Once outside Ortegon started a fight with Mark Bartlett and Billy

Osment—two boys, seventeen and fifteen, respectively—who were also at the house. McGhee pulled Ortegon away and the three left. But they'd be back.

Sosniak, McGhee, and Ortegon then went to Walmart and got some ammo for Sosniak's gun. With the ammo in hand, they made their way back to Chad's. Sosniak grabbed his gun, McGhee armed himself with a knife, and McGhee handed Ortegon a pocketknife. Then, the three went in the house. McGhee immediately started stabbing seventeen-year-old Mark Bartlett, who he ran into on the first floor. Sosniak saw Chad running out of the house, took aim, and fired. But Sosniak missed. Matt Brown then came downstairs wielding a shotgun, but it proved useless because there was no ammo in it. So Matt ran back upstairs to escape.

McGhee grabbed the gun from Sosniak and made his way upstairs, shooting anyone he saw. He first ran into seventeen-year-old Kyle Jones on the stairs and shot Jones once. In the head. Jones died shortly after. Once upstairs, McGhee shot Mark's mom Lynn Bartlett in the head. She died at the scene. McGhee continued into a room upstairs, where he found Matt, John Hatcher, Matt's girlfriend Mariel Hannah, and Osment. Matt was trying to escape out of a window, but McGhee stopped him with a shot in the leg. McGhee turned to Hatcher and shot him in the face while he was calling 911. Next, McGhee shot Hannah once in the head while she also called 911. She died of her injuries. At some point, McGhee aimed the gun at fifteen-year-old Osment and shot him twice. Once in the buttock. Once in the back of the head. He also died

of his injuries. McGhee turned back to Matt and unloaded another ten shots from the gun.

In the end, Matt Brown, Mark Bartlett, and John Hatcher escaped with their lives. Sosniak, McGhee, and Ortegon fled. Ortegon went home. Sosniak and McGhee drove to a nearby lake, where McGhee disassembled Sosniak's gun and Sosniak threw it in the lake. After they took care of the gun, the pair drove to a gas station and ditched some of their clothes in a dumpster. McGhee drove Sosniak home once the clothes were taken care of.

Officers came knocking on Sosniak's door the same night. They took Sosniak down to the Criminal Investigations Division of the Sheriff's Office, where Sosniak was interviewed by Detective Thomas Moore early in the morning on March 20th. At first, Sosniak denied everything. He said he didn't know anything about the crimes, had no part in them, and wasn't at Chad's house that night. But he eventually admitted to being at the house and hearing gunshots—though he maintained he wasn't involved in the attack on the house. Sosniak was taken into custody.

After his first interview, Sosniak retained John Stokes to represent him. Mr. Stokes was an attorney with nearly fifty years of experience who handled both criminal and civil cases. Earlier in his career Mr. Stokes served as a state and federal prosecutor. He was an Assistant United States Attorney from 1954 to 1961. Later, Mr. Stokes served as an Assistant District Attorney in the Fulton County District Attorney's Office for three years. Mr. Stokes was then the United States Attorney for the Northern District of

Georgia from 1969 to 1977. After a few years in private practice, Mr. Stokes returned to public service as an Assistant Fulton County Solicitor General. And he then served as the United States Marshal for the Middle District of Georgia for two or three years until starting his own private practice.

Detective Moore and Detective Josh Cox interviewed Sosniak at the CID on March 23rd with Mr. Stokes present. At this second interview, Sosniak admitted to being with McGhee and Ortegon the night of the crimes, but he lied about several details. For example, he claimed the trip to Walmart was so that McGhee and Ortegon could "buy a drink." Most importantly, Sosniak still denied he was involved with the attack on Chad's house. He said the gun was McGhee's and that Sosniak stayed in McGhee's truck while McGhee and Ortegon went into Chad's house. And Sosniak claimed that after the murders McGhee threatened to kill him and forced him to help get rid of the gun at the lake.

Since Sosniak insisted he was innocent, Sosniak and Mr. Stokes agreed that Sosniak would go to the lake and Chad's house with the detectives after the second interview, show the detectives where they could find the gun at the lake, and then go back to the CID for another interview. Mr. Stokes didn't think he needed go along with them or attend the later interview, so he left Sosniak with the detectives. Sosniak agreed with that plan. Like they discussed, Sosniak went to the lake and to Chad's house with the detectives.

The three then made their way back to the CID, and Sosniak's third interview began. At the third interview, Sosniak's story changed. Sosniak admitted that the gun was his—not McGhee's. He admitted that the trip to Walmart was for ammo—not a drink. He admitted he was in Chad's house at the time of the crimes—not in McGhee's truck. And he admitted he fired at Chad. Finally, he admitted that he went with McGhee willingly to get rid of the gun.

Following Sosniak's admissions, Detective Cox interviewed Sosniak again on March 29th. Mr. Stokes was present. Sosniak provided a more detailed version of what he said during the third interview, confirming again that the gun was his, that he fired at Chad, and that he voluntarily threw the gun in the lake.

Then Charles Haldi, a death-penalty certified lawyer who had tried five murder trials in front of juries, was appointed to take over representing Sosniak from Mr. Stokes.

PROCEDURAL HISTORY

A grand jury indicted Sosniak on September 10, 2007, for four counts each of malice murder and felony murder, eight counts of aggravated assault, three counts of aggravated burglary, and one count of burglary. The state notified that it intended to seek the death penalty.

Mr. Haldi moved to suppress the statements Sosniak gave to the detectives on March 23rd and March 29th while in custody, arguing they should be suppressed because Mr. Stokes provided ineffective assistance of counsel to Sosniak. Mr. Haldi argued that Mr. Stokes provided ineffective assistance by (1) not familiarizing

himself with the case before advising Sosniak to cooperate, (2) advising Sosniak to cooperate at all, and (3) not going on the trip to the lake and Chad's house or attending the third interview.

The state trial court held a hearing on the motion, and Mr. Stokes testified about his decision to advise Sosniak to cooperate. Mr. Stokes explained that he always understood the state might seek the death penalty in Sosniak's case, so he thought it could "be helpful to [Sosniak] to cooperate to try" to avoid a harsher punishment, including death. Even after Sosniak admitted to being more involved in the crimes than he first let on, Mr. Stokes thought Sosniak should cooperate because "[b]ased on [Mr. Stokes's] experience in criminal prosecutions," the first defendant to cooperate "generally g[ot] better treatment and a better deal," and McGhee and Ortegon hadn't cooperated with law enforcement yet.

The state trial court denied the motion to suppress, finding that Mr. Stokes did not offer ineffective assistance of counsel because his advice to cooperate was a reasonable tactical strategy. Mr. Haldi filed an interlocutory appeal to challenge the state court's denial of the motion, and the Supreme Court of Georgia directed the parties to brief the ineffective assistance issue. But Mr. Haldi didn't. Instead, his appellate brief focused on other arguments he made to the state trial court—for example, that Sosniak's statements were involuntarily given. And at oral argument, Mr. Haldi stated he considered it "premature to address the issue of ineffective assistance of counsel" because Sosniak's case was still

ongoing, so Mr. Haldi couldn't yet demonstrate that Mr. Stokes's alleged deficiencies affected the outcome of the case. Thus, the Supreme Court of Georgia considered the issue abandoned and affirmed.

Sosniak eventually pleaded guilty to all counts other than the malice murder counts, which the state did not pursue. As part of the plea agreement, the state withdrew its intent to seek the death penalty. The trial court sentenced Sosniak to four consecutive life sentences followed by an additional one hundred years' imprisonment.

Following his sentencing, Sosniak filed an application for a writ of habeas corpus in Georgia state court. Sosniak's state habeas petition claimed that Mr. Haldi provided ineffective assistance of counsel in Sosniak's interlocutory appeal by not briefing Mr. Stokes's alleged ineffectiveness. At an evidentiary hearing on the petition, Mr. Haldi testified that he couldn't recall why he chose to abandon the issue, but he explained that he did not "know that in good faith [he] could say that [he] believed [Mr. Stokes] was ineffective" and that, as a general matter, he "rarely" pursued ineffective assistance of counsel claims. Sosniak also testified at the hearing. He maintained that he did not know the Supreme Court of Georgia directed Mr. Haldi to address Mr. Stokes's alleged ineffectiveness or that Mr. Haldi didn't brief the issue. If Sosniak knew it was an issue that could be raised or the statements were suppressed, he claimed, he wouldn't have pleaded guilty.

The state habeas court denied Sosniak's petition for two reasons. First, it found that Mr. Haldi's performance did not fall below an objective standard of reasonableness because Mr. Haldi's decision to abandon the issue of Mr. Stokes's alleged ineffectiveness was "based upon his belief that it was premature to address" it and because he "thought that the actions [Mr.] Stokes took were in" Sosniak's best interest. Second, Sosniak suffered no prejudice. While Sosniak testified that he would not have pleaded guilty had the issue been pursued, the state habeas court "d[id] not credit [Sosniak]'s testimony." The Supreme Court of Georgia denied Sosniak's application for a certificate of probable cause to appeal without providing its reasoning.

Sosniak then filed his federal petition for a writ of habeas corpus and continued to argue that Mr. Haldi provided ineffective assistance of counsel by failing to pursue Mr. Stokes's alleged ineffectiveness. The district court denied Sosniak's petition, but it relied on different reasoning than the state habeas court. It found that, even if Mr. Stokes was ineffective when advising Sosniak to cooperate, that wasn't a reason to suppress Sosniak's statements. As the district court viewed it, "absent a finding that [the] investigators were coercive," a court couldn't suppress Sosniak's statements. And if Sosniak's statements couldn't be suppressed based on the argument Mr. Haldi abandoned, Sosniak suffered no prejudice from Mr. Haldi's failure to brief it. We granted a certificate of appealability on a single issue:

> Whether Sosniak's counsel for his interlocutory criminal appeal from the denial of a motion to suppress incriminating statements rendered ineffective assistance by failing to brief, after being directed to by the Supreme Court of Georgia, initial counsel's alleged ineffective assistance in allowing Sosniak to be interviewed outside his presence?

This is Sosniak's appeal.

STANDARD OF REVIEW

We review de novo a district court's denial of a federal habeas petition. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010).

DISCUSSION

Sosniak argues Mr. Haldi's performance fell below an objective standard of reasonableness when Mr. Haldi abandoned the issue of Mr. Stokes's ineffectiveness because he incorrectly believed raising the issue was premature in the interlocutory appeal. Sosniak was prejudiced, he argues, because Mr. Haldi's failure to get the statements suppressed led him to plead guilty. And Sosniak argues he is entitled to federal habeas relief because the state habeas court's decision rejecting those arguments was contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts.

When a state court has denied a habeas petition on the merits, our review is subject to the "highly deferential standards" of the Antiterrorism and Effective Death Penalty Act. *Davis v. Ayala*, 576

U.S. 257, 269 (2015). We can only grant relief if the state court's denial of the petition "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law"; or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d).

"To meet the 'unreasonable application' standard, 'a prisoner must show far more than that the state court's decision was merely wrong or even clear error.'" *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1034 (11th Cir. 2022) (quoting *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (quotation omitted)). He is only entitled to relief if he can show that the state court decision denying his habeas petition was "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Shinn*, 592 U.S. at 118 (quotation omitted). When determining whether a state court's decision was unreasonable, "we are not required . . . to strictly limit our review to the particular justifications that the state court provided." *Pye*, 50 F.4th at 1036 (emphasis omitted). Instead, we can look to the state court's "reason[]" for denying habeas relief—like a lack of prejudice—and "consider additional rationales that support the state court's" reason. *Id.*

As for allegedly unreasonable factual determinations, "[s]ection 2254(d)(2) works much like [section] 2254(d)(1) in that it requires us to give state courts 'substantial deference.'" *Sears v. Warden GDCP*, 73 F.4th 1269, 1280 (11th Cir. 2023) (quoting *Brumfield v. Cain*, 576 U.S. 305, 314 (2015)). It isn't enough that "'reasonable

minds reviewing the record might disagree' about the finding in question." *Wood v. Allen*, 558 U.S. 290, 301 (2010) (alteration accepted) (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)). Rather, we "presume that the state court's factual determinations are correct, absent clear and convincing evidence to the contrary." *Sears*, 73 F.4th at 1280 (citing 28 U.S.C. § 2254(e)). "Overall," under either section 2254(d)(1) or 2254(d)(2), "a state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Pye*, 50 F.4th at 1034 (alteration accepted) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)).

When, like Sosniak, a petitioner bases his petition for habeas relief on his counsel's alleged ineffectiveness, he must show both that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984). "As with any ineffective-assistance claim, the Supreme Court's decision in *Strickland* governs" claims that appellate counsel was ineffective. *Sealey v. Warden, Ga. Diagnostic Prison*, 954 F.3d 1338, 1366 (11th Cir. 2020). "[T]here can be no showing of . . . prejudice from an appellate attorney's failure to raise a meritless claim." *Brown v. United States*, 720 F.3d 1316, 1335 (11th Cir. 2013). In other words, there is no prejudice if "the claim would not have been successful if it were brought on appeal." *Heath v. Jones*, 941 F.2d 1126, 1136 (11th Cir. 1991). On top of succeeding on appeal, because Sosniak pleaded guilty he must show that "he would

have pleaded not guilty and insisted on going to trial" had his counsel not made any alleged error. *Hill v. Lockhart*, 474 U.S. 52, 60 (1985).

Since Sosniak's petition was denied on the merits by a state court, he is only entitled to federal habeas relief if the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law or was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). The Supreme Court of Georgia did not state its reasoning for denying Sosniak's application for a certificate of probable cause to appeal, so we must "'look through' the unexplained decision" to the state habeas court's decision and "presume that the [Supreme Court of Georgia's] unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 584 U.S. 122, 125 (2018).

Sosniak hasn't shown that no "fairminded jurist[] could disagree on the correctness" of the state habeas court's determination that Sosniak wasn't prejudiced by Mr. Haldi's choice to abandon the issue relating to Mr. Stokes's ineffectiveness. *Harrington*, 562 U.S. at 101 (quotation omitted). That's because there is no "reasonable probability," *Strickland*, 466 U.S. at 694, that the claim that Mr. Stokes was ineffective "would . . . have been successful if it were brought on appeal," *Heath*, 941 F.2d at 1136; *see also Pye*, 50 F.4th at 1036 (explaining that we may consider additional rationales not relied on by the state habeas court).

In his interlocutory appeal, Sosniak would have to establish that Mr. Stokes's "representation fell below an objective standard

of reasonableness" to prevail. *Strickland*, 466 U.S. at 687–88. That claim would run right into the fact that there's "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. We've said there is a "strong reluctance to second guess strategic decisions" made by counsel, and that reluctance "is even greater where those decisions were made by experienced criminal defense counsel." *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998). And when the death penalty is a possible punishment, the Supreme Court of Georgia has held that "the avoidance of a death sentence is a legitimate trial strategy." *See Chapman v. State*, 541 S.E.2d 634, 636 (Ga. 2001) ("Where, as here, the evidence of guilt in a death penalty case is overwhelming, the avoidance of a death sentence is a legitimate trial strategy.").

Simply put, Sosniak hasn't offered any indication he could have prevailed in his interlocutory appeal. Mr. Stokes, an attorney with years of experience as a both a federal and state prosecutor, advised Sosniak to cooperate with the detectives, including outside of Mr. Stokes's presence, to try to avoid a harsher sentence like the death penalty. That is exactly the kind of strategic decision courts are "reluctan[t] to second guess," *see Provenzano*, 148 F.3d at 1332, and that the Supreme Court of Georgia has described as "a legitimate . . . strategy," *cf. Chapman*, 541 S.E.2d at 636. And Sosniak offers nothing to show there is a reasonable probability he would have rebutted the "strong presumption" that Mr. Stokes's advice was a reasonable strategic choice. *See Strickland*, 466 U.S. at 689. If his appeal wouldn't have succeeded, the failure to pursue it didn't

prejudice him. *Brown*, 720 F.3d at 1335; *Heath*, 941 F.2d at 1136. Thus, the state court's decision that Sosniak was not prejudiced was not unreasonable.

There's a second rationale supporting the state court's prejudice determination: its reasonable factual determination that Sosniak would have pleaded guilty anyway. Sosniak testified that he would not have pleaded guilty in the absence of any error, but the state habeas court "d[id] not credit" that testimony. That factual determination is entitled to substantial deference and "presumed correct" unless Sosniak can rebut it with "clear and convincing evidence." 28 U.S.C. § 2254(e). Instead, he hasn't offered anything to rebut it. He therefore hasn't shown that the state court's decision was "based on an unreasonable determination of the facts," 28 U.S.C. § 2254(d), and if Sosniak would have pleaded guilty anyway, the state habeas court reasonably found that he was not prejudiced, *see Hill*, 474 U.S. at 60.

CONCLUSION

Sosniak has not established that the state court's decision that he was not prejudiced was contrary to, or involved an unreasonable application of, clearly established federal law or was based on an unreasonable determination of the facts. Thus, we don't need to reach the state habeas court's determination that Mr. Haldi's actions did not fall below an objective standard of reasonableness. *See Tuomi v. Sec'y, Fla. Dep't of Corr.*, 980 F.3d 787, 795 (11th Cir. 2020) ("Failure to establish either [*Strickland*] prong is fatal and makes it unnecessary to consider the other.").

AFFIRMED.

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11667

MARCIN SOSNIAK,

Petitioner-Appellant,

versus

MACON SP WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 2:20-cv-00264-SCJ

ORDER:

Marcin Sosniak's motion for a certificate of appealability is GRANTED on the following issue only:

> Whether Sosniak's counsel for his interlocutory criminal appeal from the denial of a motion to suppress incriminating statements rendered ineffective assistance by failing to brief, after being directed to by the Supreme Court of Georgia, initial counsel's alleged ineffective assistance in allowing Sosniak to be interviewed outside his presence?

/s/ Andrew L. Brasher

UNITED STATES CIRCUIT JUDGE

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

MARCIN SOSNIAK,

Petitioner,

v.

TARMARSHE SMITH,

Respondent.

CIVIL ACTION FILE

No. 2:20-CV-0264-SCJ

ORDER

This matter is before the Court for consideration of the Magistrate Judge's Final Report and Recommendation (R&R), Doc. No. [12], in which the Magistrate Judge recommends that the instant 28 U.S.C. § 2254 petition for a writ of habeas corpus be denied. Petitioner Marcin Sosniak has filed his objections, Doc. No. [14], to the R&R. For the reasons discussed, the Court **OVERRULES** Petitioner's objections, **ADOPTS** the R&R as the order of the Court, and **DENIES** the petition for habeas corpus relief.

I. BACKGROUND

The Magistrate Judge provided a lengthy recitation of the factual and procedural background of this matter. Doc. No. [12], 1-7. Summarizing that discussion, the Court notes the following: On March 18, 2013, Petitioner was convicted in Forsyth County Superior Court based on his guilty plea to four counts of felony murder, three counts of aggravated battery, and one count each of aggravated assault and burglary. The court imposed an aggregate sentence of four life sentences without the possibility of parole plus a consecutive one-hundred years. Petitioner's convictions were based on his participation in a home invasion in which four people were shot to death and others were seriously injured.

In the early morning hours after the crimes, the police picked Petitioner up from his home and interrogated him for approximately two hours. Petitioner's mother hired attorney John Stokes to represent Petitioner. Petitioner attempts to portray Stokes as having very little experience in criminal defense, but the record demonstrates that he had done substantial criminal work in a long legal career. Doc. No. [11-9], 10-13. After discussions with Petitioner, Stokes determined that it was in Petitioner's best interest to cooperate with the police and encouraged

him to do so. Stokes sat in on some of the following police interrogations but opted not to join the police when they took Petitioner to a lake—so that he could show them where a co-defendant had disposed of the murder weapon—and to the crime scene. Stokes also opted not to sit in on at least one police interrogation, and he indicated that he did not have a problem with police questioning Petitioner outside of his presence. In these interrogations, Petitioner provided police with inculpatory information.

After the district attorney filed a notice of intent to pursue the death penalty against Petitioner, Stokes withdrew, and a death penalty certified counsel, Charles Haldi, was appointed to represent Petitioner. Haldi filed a motion to have Petitioner's custodial statements to police suppressed under Jackson v. Denno, 378 U.S. 368 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966). In that motion, Haldi raised a claim that Stokes had been ineffective in (1) encouraging Petitioner to cooperate without either understanding the evidence that the police had against him or securing some sort of agreement from the prosecution, and (2) allowing Petitioner to be questioned outside his presence. The trial court denied the motion to suppress. Haldi then filed an interlocutory appeal which the Georgia Supreme Court accepted. However, in that appeal,

Haldi abandoned the ineffective assistance claims. The Georgia Supreme Court affirmed the trial court's denial of the motion to suppress. Sosniak v. State, 695 S.E.2d 604, 612 (Ga. 2010). Thereafter, Petitioner entered the negotiated plea mentioned above and then filed a petition for a writ of habeas corpus in Macon County Superior Court. That court denied relief, and the Georgia Supreme Court denied Petitioner's certificate of probable cause to appeal the denial of habeas corpus relief.

In the instant petition, Petitioner raises claims that Stokes was ineffective in the manner that he represented Petitioner and that Haldi was ineffective in abandoning the ineffective assistance of counsel claim against Stokes in the interlocutory appeal.[1] Petitioner contends that, if his statements to police had been suppressed, he would not have pled guilty. In concluding that Petitioner had not shown that he is entitled to relief on that claim, the Magistrate Judge determined that the claims that Stokes was ineffective are procedurally defaulted because they were abandoned in the interlocutory appeal. The Magistrate Judge

[1] As the Magistrate Judge noted, Doc. No. [12], 12-13, it is not clear that Petitioner intended to raise both claims. However, the Court agrees with the Magistrate Judge that, out of an abundance of caution, both claims should be addressed.

further determined that this Court must, under 28 U.S.C. § 2254(d), defer to the state habeas corpus court's determination that Haldi had not rendered ineffective assistance.

II. LEGAL STANDARD

A district judge has broad discretion to accept, reject, or modify a magistrate judge's proposed findings and recommendations. United States v. Raddatz, 447 U.S. 667, 680 (1980). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the Report and Recommendation that is the subject of a proper objection on a de novo basis and any non-objected portion under a "clearly erroneous" standard. "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." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988).

III. DISCUSSION

As stated above, the issues before the Court are (1) whether Attorney Stokes was ineffective for advising Petitioner to cooperate with police and allowing Petitioner to be interrogated by police outside of Stokes' presence, and, if so, (2) whether Attorney Haldi was ineffective for abandoning that claim of

ineffective assistance in the interlocutory appeal before the Georgia Supreme Court.[2] Having reviewed the matter, the Court concludes that, in the first instance, Petitioner has not shown that Stokes was ineffective.

Stokes died prior to the state habeas corpus hearing, and he obviously did not testify in that proceeding. However, he did testify at the "Jackson-Denno" hearing held before the trial court to determine whether Petitioner's statements to police were voluntary. In that testimony, Stokes clearly stated that, based on what Petitioner had told him, he believed that Petitioner "wasn't guilty of any of the charges that were being brought against him," Doc. No. [11-9], 20,[3] and it thus was in Petitioner's best interest to cooperate with the police, id. at 27, 29. Accordingly, there was a clear basis for the state court to reasonably determine that Stokes made a strategic decision to advise Petitioner to cooperate with police.

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[2] The Court adopts the Magistrate Judge legal standard for reviewing claims of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984). Doc. No. [12], 10-12.

[3] As counsel for the state argued at the Jackson/Denno hearing, Doc. No. [11-9], 72, a petitioner cannot lie to his lawyer and then claim ineffective assistance when the lawyer acts on those lies. See United States v. Monzon, 359 F.3d 110, 120 (2d Cir. 2004) ("We agree with the district court's conclusion that [counsel]'s belief in [defendant]'s lies did not constitute constitutionally ineffective assistance.").

Moreover, the Court rejects Petitioner's premise that his counsel's ineffectiveness could have served as a basis to suppress his statements to police. The suppression of a confession or statements made during police questioning is grounded in the due process rights of the criminal defendant. Jackson, 378 U.S. at 376.

> While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.

Colorado v. Connelly, 479 U.S. 157, 163-64 (1986).

Put simply, absent a finding that investigators were coercive—that they threatened Petitioner, made him promises, or employed harsh interrogation tactics to induce his cooperation—there was no basis for the trial court or the Georgia Supreme Court to conclude that his statements to police should be suppressed under Jackson. Accordingly, even if this Court were to find that Stokes' strategy was unreasonable, Petitioner cannot show prejudice because his trial counsel's error could not serve as the basis for the suppression of his statements to police. "Government coercion is a necessary predicate to a finding

of involuntariness." United States v. Thompson, 422 F.3d 1285, 1296 (11th Cir. 2005).

As a result, Petitioner's contentions in his objections that Attorney Haldi was ineffective in failing to pursue the ineffective assistance claim against Stokes in the interlocutory appeal are irrelevant. As indicated, Haldi could not succeed in obtaining suppression of Petitioner's statements with that argument.

IV. CONCLUSION

For the foregoing reasons, the Court **ADOPTS** the R&R, Doc. No. [12], as the order of the Court, and the instant petition for a writ of habeas corpus is **DENIED**. The Court further agrees with the Magistrate Judge that Petitioner has not demonstrated that reasonable jurists would debate the resolution of the issues presented, Slack v. McDaniel, 529 U.S. 473, 484 (2000), and a certificate of appealability is **DENIED** pursuant to 28 U.S.C. § 2253(c).

The Clerk is **DIRECTED** to close this action.

IT IS SO ORDERED this 11th day of April, 2023.

Steve C Jones

HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

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

MARCIN SOSNIAK, Petitioner, v. TARMARSHE SMITH, Warden, Respondent.	: : : : : : :	PRISONER HABEAS CORPUS 28 U.S.C. § 2254 CIVIL ACTION NO. 2:20-CV-0264-SCJ-JCF

FINAL REPORT AND RECOMMENDATION

Petitioner Marcin Sosniak, a state prisoner, has filed a counseled 28 U.S.C. § 2254 habeas corpus petition challenging his 2013 Forsyth County convictions and sentences for felony murder, aggravated assault, aggravated battery, and burglary. (Doc. 1 at 1.) The matter is before the Court on the § 2254 petition and the state's answer-response. For the reasons stated below, **IT IS RECOMMENDED** that the petition be **DENIED and that no certificate of appealability issue**.

I. PROCEDURAL HISTORY

This case arose out of the March 19, 2006, shooting deaths of four individuals and wounding of three other individuals at a residence in Forsyth County. (See Doc. 11-9 at 97-105.) In the early morning hours of March 20, 2006, the same night as the shooting, police went to the home where Petitioner lived with his parents.

(Doc. 11-10 at 5.) The police brought Petitioner to the Forsyth County Sheriff's Office, where they interrogated him for approximately two hours. (Id.) Petitioner's parents contacted attorney John Stokes, a family friend, and Attorney Stokes agreed to go to the Sheriff's Office and meet with Petitioner and represent him in the initial stages of the case. (Doc. 11-9 at 13.)

Attorney Stokes first met with Petitioner on March 20, 2006. (Doc. 11-9 at 33.) At that point, Petitioner had already been interviewed by police prior to obtaining counsel. (See doc. 11-4 at 20.) During custodial interviews on March 20 and 23, 2006, Petitioner made incriminating statements to the police both before and after Attorney Stokes became involved. (Id. at 20.) After a first interview at which Attorney Stokes was present on March 23, 2006, Attorney Stokes "left." (Doc. 11-4 at 20; see also Doc. 11-8 at 2, 13.) Prior to leaving, Attorney Stokes agreed that Petitioner would accompany police on a vehicular trip to areas related to the crime. (Doc. 11-4 at 20; see also Doc. 11-8 at 5, 16-17.) During that trip and in an immediately following second interview on March 23, 2006, at which Attorney Stokes was not present, Petitioner disclosed new substantially incriminating information. (Doc. 11-4 at 21.)

On September 10, 2007, Petitioner and two codefendants were indicted for four counts of malice murder, four counts of felony murder, eight counts of aggravated assault, three counts of aggravated battery, and one count of burglary. (See Doc. 11-9 at 95-105.) The state noticed that it was seeking the death penalty against Petitioner. (See id. at 111-13.)

Attorney Stokes withdrew from representation and new death penalty certified counsel, Charles Haldi, was appointed to represent Petitioner. (See doc. 11-4 at 45.) Attorney Haldi filed a pretrial Jackson-Denno[1] motion to suppress, arguing that Petitioner's custodial statements were involuntary under state law governing confessions, that Miranda[2] and right-to-counsel violations occurred, and that Attorney Stokes rendered ineffective assistance. (See doc. 11-10 at 33-51.)

At the Jackson-Denno hearing, Attorney Stokes testified that he believed that it was in Petitioner's best interest to cooperate fully and quickly with the police because there were multiple defendants, the other defendants were not cooperating at that time, and because, based on what he knew at the time, Petitioner's involvement

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[1] Jackson v. Denno, 378 U.S. 368 (1964).

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

was less culpable than the others. (See doc. 11-9 at 20, 27, 46-47.) Attorney Stokes testified that, in his prior experience as a prosecutor, "the first one that cooperates generally gets better treatment and a better deal," and he consistently advised Petitioner to cooperate. (Id. at 28-29, 38, 44, 48.) Relevant to the instant § 2254 proceedings, Attorney Haldi argued at the Jackson-Denno hearing that Attorney Stokes rendered ineffective assistance by (1) permitting Petitioner to make statements and be interviewed by police in a multiple homicide case after only being involved in the case for two or three days and meeting with Petitioner for a sum total of about two hours, (2) allowing Petitioner to be taken by police to areas related to the crime outside his presence, and (3) advising Petitioner to cooperate and freely provide incriminating information without having a deal in place with the district attorney. (Doc. 11-9 at 56-69.) The state court ultimately denied the motion to suppress and found Petitioner's statements admissible. (Doc. 11-10 at 33-51.)

Petitioner pursued an interlocutory appeal to the Supreme Court of Georgia from the state court's denial of his Jackson-Denno motion in a capital murder case. (See doc. 11-10 at 54.) Attorney Haldi did not brief or argue the ineffective assistance issue on appeal, and instead raised only the substantive issue of whether the lower court erred in admitting the statements. (See id. at 57.) The Supreme Court

of Georgia affirmed the denial of Petitioner's motions to suppress. Sosniak v. State, 695 S.E.2d 604, 612 (Ga. 2010). The Court did not reach the ineffective assistance issue and found that Attorney Haldi had abandoned it by failing to raise it in his brief. Id. at 611 & n.3. The opinion notes that Attorney Haldi expressed at oral argument his belief that an ineffective assistance claim was premature in an interlocutory appeal because a defendant could not yet establish prejudice at that stage in the proceedings. Id. n.3.

Petitioner ultimately pled guilty to the four counts of felony murder, three counts of aggravated battery, one count of aggravated assault, and one count of burglary. (Doc. 11-9 at 114-116.) Petitioner testified at his change-of-plea hearing that he was satisfied with Attorney Haldi's representation, that it was his desire to plead guilty, and that he was pleading guilty freely and voluntarily based on a knowing waiver of his rights. (Id. at 125-28, 130.) The state court sentenced Petitioner to an aggregate of four consecutive sentences of life imprisonment without parole plus 100 years. (Id. at 114.)

Petitioner filed a *pro se* state habeas corpus petition raising a claim that Attorney Haldi was ineffective for failing to raise on interlocutory appeal Attorney Stokes' ineffectiveness through the course of Petitioner's custodial interrogations.

(Doc. 11-1.) The state habeas court held two evidentiary hearings on the petition at which Petitioner was represented by counsel and at which Petitioner and Attorney Haldi testified.[3] (Doc. 11-4.)

Attorney Haldi testified at the state habeas corpus evidentiary hearing that he had been practicing criminal law since 1985 or 1986, that he was certified to try death penalty cases, and that he had tried five murder cases previously. (Id. at 14-15.) Attorney Haldi further testified that he engaged in discovery, discussed the discovery with Petitioner, and met several times with Attorney Stokes about the case. (Id. at 16.) Attorney Haldi testified that Attorney Stokes "honestly thought [his actions] were in the best interests of Mr. Sosniak," but that he did not believe Attorney Stokes had a "firm grasp" of the situation and that he "would [not] ever think [that allowing police to ask Petitioner questions outside his presence in a homicide case] was a good idea." (Id. at 20-21.) Attorney Haldi testified that he recalled pursuing an interlocutory appeal following the state superior court's denial of his motion to suppress the Jackson-Denno statements, but that he did not recall why he failed to

[3] Attorney Stokes was deceased at the time of the state habeas corpus evidentiary hearing. (See doc. 11-4 at 44.)

brief the ineffective assistance issue before the Supreme Court of Georgia. (Id. at 29-33.) Attorney Haldi later indicated that he generally preferred to raise a substantive challenge as lower court error rather than presenting a claim couched within ineffective assistance of counsel. (See id.) On cross-examination, Attorney Haldi testified that, although "[w]hat [Attorney Stokes] tried didn't work or [. . .] ended up not working out very well," he did not believe that Attorney Stokes's performance rose to the level of constitutional ineffectiveness in light of the rapidly evolving situation that was "thrust upon him." (Id. at 36.)

The state habeas court entered a final order denying the petition. (Doc. 11-2.) Petitioner sought a certificate of probable cause to appeal the denial of habeas relief, but his application was denied. (Doc. 11-3.) The instant § 2254 petition followed.

II. 28 U.S.C. § 2254 PETITION

In his § 2254 petition, Petitioner raises one claim for relief. (Doc. 1 at 6.) Specifically, Petitioner argues that his first counsel rendered ineffective assistance when he left Petitioner with the police to be interrogated without counsel present, where Petitioner disclosed "very incriminating" evidence. (Id.) Petitioner notes that his second counsel was instructed to raise the issue on interlocutory appeal by the

Supreme Court of Georgia, but failed to do so, causing the Supreme Court of Georgia to deem it abandoned and not address it on the merits. (Id.)

The state responds that the state habeas court's denial of this claim was reasonable and is entitled to deference. (Doc. 10-1 at 11.) Specifically, the state argues that Petitioner's second counsel rendered effective assistance in that he was an experienced death penalty qualified litigator who spoke with prior counsel, reviewed discovery, pursued a Jackson-Denno hearing to attempt to suppress Petitioner's incriminating statements to law enforcement, and filed an interlocutory appeal of the state superior court's adverse decision. (Id. at 11-12.) The state notes counsel's oral argument testimony that he believed it was premature to address ineffective assistance at the interlocutory appeal stage because prejudice could not be shown at that point in the case, and counsel's state habeas testimony that prior counsel's "cooperation" strategy was in Petitioner's "best interest" under the circumstances. (Id. at 12-13.) The state further argues that Petitioner cannot show prejudice in the guilty plea context and emphasizes that the state habeas court found his testimony that he would not have pled guilty incredible. (Id. at 14.)

Petitioner has not replied to the state's response.

Under 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus on behalf of a person being held in custody pursuant to the judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." Butts v. GDCP Warden, 850 F.3d 1201, 1212 (11th Cir. 2017) (quotation marks omitted). This is "a substantially higher threshold" than a determination that the state court's decision was incorrect, and, as such, relief is not warranted if the federal court concludes that the state court's application of federal law was merely erroneous. Schriro v. Landrigan, 550 U.S. 465, 473 (2007).

A state court's factual findings are presumed correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). "[A] decision

adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding." Miller-El v. Cockrell, 537 U.S. 322, 324 (2003) (quotation marks omitted). When the relevant state court decision is not accompanied by a reasoned opinion explaining why relief was denied, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "presume that the unexplained decision adopted the same reasoning." Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018).

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

different." Id. at 694. If the petitioner makes an insufficient showing on the prejudice prong, the court need not address the performance prong, and *vice versa*. Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000).

Strickland's two-part test applies in the context of guilty pleas. Lafler v. Cooper, 566 U.S. 156, 162-64 (2012). Because a voluntary, unconditional guilty plea generally waives all nonjurisdictional defects in the proceedings, a defendant who enters a guilty plea can attack only "the voluntary and knowing nature of the plea." Wilson v. United States, 962 F.2d 996, 997 (11th Cir. 1992). A defendant can overcome the otherwise voluntary and intelligent character of his guilty plea only if he can establish that the advice that he received from counsel in relation to the plea was not within the range of competence demanded of attorneys in criminal cases, in violation of Strickland. Premo v. Moore, 562 U.S. 115, 121, 126 (2011). To establish prejudice in the context of a guilty plea, a defendant must show that there is "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 129 (quotations omitted). This means that "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Diveroli v. United States, 803 F.3d 1258, 1263 (11th Cir. 2015).

"The standards created by Strickland and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." Harrington v. Richter, 562 U.S. 86, 105 (2011). The Supreme Court has emphasized that the Strickland standard is a general one with a substantial "range of reasonable applications" and that federal habeas courts "must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d)." See id. "Thus, under § 2254(d), "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id.

As an initial matter, it is unclear if the counseled § 2254 petition is attempting to raise a claim that (a) Petitioner's first counsel, Stokes, was ineffective for leaving Petitioner with police to be interrogated outside counsel's presence, or (b) that Petitioner's second counsel, Haldi, was ineffective for abandoning that same ineffective assistance claim on interlocutory appeal, or (c) both. (See generally Doc. 1 at 6.) The state's response interprets the petition as raising claim (b)—that Attorney Haldi was ineffective for abandoning the ineffective assistance claim against Attorney Stokes. (See Doc. 10-1 at 11-14.) However, it appears that the petition actually raises claim (a) against Attorney Stokes, because Petitioner

subsequently states that he exhausted Ground 1 on appeal to the Supreme Court of Georgia rather than in his state habeas corpus petition. (See doc. 1 at 7.) Although a counseled petition is not entitled to liberal construction, cf. Bingham v. Thomas, 654 F.3d 1171, 1175 (11th Cir. 2011), the Court is mindful of the seriousness of Petitioner's convictions and sentences, and, out of an abundance of caution, the Court will address both potential claims.

To the extent that Petitioner attempts to assert a claim that Attorney Stokes rendered ineffective assistance when he left Petitioner unsupervised with police for a third interrogation and instructed him to "cooperate," resulting in Petitioner making incriminating statements, "[f]ederal courts may not review a claim procedurally defaulted under state law if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, and the bar presents an independent and adequate state ground for denying relief." Hill v. Jones, 81 F.3d 1015, 1022 (11th Cir. 1996). Here, the Supreme Court of Georgia found this claim to be abandoned because Attorney Haldi failed to brief it on appeal. Sosniak, 695 S.E.2d at 611& n.3. This constitutes an independent and adequate state procedural bar to federal review. See Ga. Supreme Ct. R. 22; Felix v. State, 523 S.E.2d 1, 5 n.6 (Ga. 1999) ("[I]f the assertion that a particular trial court ruling was error is not

supported by argument or citation of authority, it is deemed abandoned[.]"). To the extent that Petitioner argues that Attorney Haldi's ineffectiveness constitutes cause to overcome the procedural default, "ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim." Edwards v. Carpenter, 529 U.S. 446, 451 (2000). Attorney Haldi's alleged ineffectiveness is addressed below.

To the extent that Petitioner asserts that Attorney Haldi rendered ineffective assistance by failing to preserve his challenge to Attorney Stokes' ineffectiveness on appeal, the state habeas court's denial of this claim was not contrary to, or an unreasonable application of, clearly established federal law. Appellate counsel in a criminal case does not have a duty to raise every nonfrivolous issue requested by the client. See Jones v. Barnes, 463 U.S. 745, 751-54 (1983). Rather, the hallmark of effective appellate advocacy is the ability to "winnow out weaker arguments on appeal and [focus] . . . on 'those more likely to prevail' . . . ." Smith v. Murray, 477 U.S. 527, 536 (1986). Here, the state habeas court emphasized that Attorney Haldi zealously litigated the suppression motion and interlocutory appeal but did not pursue the issue of ineffective assistance on appeal because it was premature. (See doc. 11-2 at 5, 7.) Indeed, the record supports that Attorney Haldi made a reasonable decision

to "winnow out" what he perceived as a weaker argument and preferred to focus on his claims of lower court error. (See doc. 11-4 at 29-33, 36.) On this record, Petitioner has not shown that Attorney Haldi's performance was objectively unreasonable, particularly under the "doubly" deferential standard applicable to ineffective assistance claims under § 2254(d). See Harrington, 562 U.S. at 105.

Finally, Petitioner has not shown prejudice in the context of his guilty plea. The state court found incredible Petitioner's testimony that he would not have pled guilty if Attorney Haldi had preserved the ineffective assistance claim. (See doc. 11-2 at 7.) State court credibility determinations are factual findings entitled to deference. See Consalvo v. Sec'y for Dep't of Corr., 664 F.3d 842, 845 (11th Cir. 2011) ("Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review.") (quotation marks omitted). Petitioner has not rebutted the state habeas court's credibility determination with clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

Moreover, Petitioner's testimony during his plea colloquy that he was fully satisfied with Attorney Haldi's representation and that he wished to plead guilty of his own free will belie his contention that his plea was not knowing and voluntary. See, e.g., Blackledge v. Allison, 431 U.S. 63, 74 (1977) (holding that, in evaluating

the knowingness and voluntariness of a plea, the representations of the defendant at the plea hearing, as well as any findings made by the judge accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings"); United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994) (explaining that there is a "strong presumption" that statements made by a defendant during the plea colloquy are true) United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988) ("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false."). Finally, Petitioner has not shown that it would have been rational under the circumstances to reject the plea agreement where he was facing the death penalty, and the state withdrew its intent to seek the death penalty in exchange for Petitioner's guilty plea. See Diveroli, 803 F.3d at 1263.

Accordingly, **IT IS RECOMMENDED** that the § 2254 petition be **DENIED**.

III. CERTIFICATE OF APPEALABILITY

Under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, a petitioner cannot appeal the final order in a habeas corpus proceeding "unless a circuit justice or a circuit or district judge issues a certificate of appealability ["COA"] under 28 U.S.C. § 2253(c)." Because reasonable jurists would not debate the resolution of the issues presented, **IT IS FURTHER RECOMMENDED** that a COA be **DENIED**.

See Slack v. McDaniel, 529 U.S. 473, 484 (2000). If the District Judge adopts this recommendation and denies a certificate of appealability, Petitioner is advised that he "**may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." 28 U.S.C. foll. § 2254, Rule 11(a).**

IV. CONCLUSION

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

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

SO RECOMMENDED, this 13th day of February, 2023.

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

SUPREME COURT OF GEORGIA
Case No. S20H1213

October 19, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

MARCIN SOSNIAK v. GREGORY MCLAUGHLIN, WARDEN.

Upon consideration of the application for certificate of probable cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied.

All the Justices concur, except Warren, J., not participating.

Trial Court Case No. 2014-CV-078

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk

EFILED IN OFFICE
CLERK OF SUPERIOR COURT
MACON COUNTY, GEORGIA
2014-CV-00078
Jimmie H. Brown
APR 09, 2020 11:05 AM
Juanita M. Laidler
Juanita M. Laidler, Clerk
Macon County, Georgia

IN THE SUPERIOR COURT OF MACON COUNTY
STATE OF GEORGIA

MARCIN SOSNIAK, GDC # 1001033159, Petitioner, v. GREGORY MCLAUGHLIN, Warden, Respondent.	* * * * * * * * * *	CIVIL ACTION NO. 2014-CV-078 HABEAS CORPUS

FINAL ORDER

Petitioner Marcin Sosniak filed a petition for a writ of habeas corpus, challenging his May 18, 2013, Forsyth County convictions for four counts of felony murder, three counts of aggravated battery, aggravated assault, and burglary, arising from a guilty plea. Upon consideration of the record established at the April 2, 2018, evidentiary hearing of this case, the Court DENIES relief based upon the following findings of fact and conclusions of law.[1]

I. PROCEDURAL HISTORY

Petitioner was indicted with Jason McGhee and Frank Ortegon, Jr. by a Forsyth County grand jury on September 10, 2007, for malice murder (counts 1-4), felony murder (counts 5-8), aggravated assault (counts 9-12, 14,

[1] Citations to the April 2, 2018, evidentiary hearing transcript will be referred to as "HT." followed by the page number(s).

16, 18-19), aggravated battery (count 13, 15, 17), and burglary (count 20), in connection with the deaths of Kyle Jones, Mariel Hannah, William Osment, and Lynn Bartlett. (HT. 648-658). The State filed a notice to seek the death penalty. (HT. 676).

Petitioner pursued two interlocutory appeals prior to the ultimate disposition of his case.

In the first interim appeal, the Supreme Court granted Sosniak's application for interim review and directed the parties to address whether the trial court erred in its order denying Sosniak's motion to exclude his statements to law enforcement officers and any evidence obtained as a result and in its order addressing the admissibility of certain victim impact evidence." *Sosniak v. State*, 287 Ga. 279, 695 S.E.2d 604 (2010). The Supreme Court affirmed the trial court's ruling and noted that Petitioner had "abandoned" any claim that his statements should have been suppressed because he received ineffective assistance of counsel. *Id.* 279, 287. The second interlocutory appeal was from the trial court's order denying his motion to dismiss the indictment due to an alleged violation of his constitutional right to a speedy trial, and it was dismissed due to Petitioner's failure to follow the statutory interlocutory appeal procedures. *Sosniak v. State*, 292 Ga. 35, 734 S.E.2d 362 (2012).

On March 18, 2013, pursuant to a negotiated plea bargain, Petitioner entered pleas of guilty to four counts of felony murder (counts 5-8), three counts of aggravated battery (counts 13, 15, and 17), one count of aggravated assault (count 19), and one count of burglary (count 20). (HT. 667-669). He received a total of four consecutive sentences of life without parole, with 100 years to serve consecutively. (HT. 667).

Petitioner filed this petition pro se on March 24, 2014, in this Court, challenging his Forsyth County convictions. Current counsel entered an appearance on his behalf at the April 2, 2018, evidentiary hearing where Petitioner confirmed he was only pursuing ground two of his amended petition, a claim of ineffective assistance of plea counsel. (HT. 11, 37). Petitioner's former plea counsel testified, and Petitioner had the opportunity to present testimony and evidence in support of his sole ground. (HT. 14-15).

II. THE SOLE GROUND FOR RELIEF

In ground 2 of the amended petition, Petitioner alleges he received ineffective assistance of counsel in that plea counsel failed to challenge the ineffective assistance of Petitioner's previous counsel throughout the course of several custodial interrogations.

Findings of Fact

Petitioner was initially represented by John Stokes (who was deceased at the time of the April 2, 2018, evidentiary hearing), during which time

Petitioner made several incriminating statements to the police. (HT. 7, 19-20). After these incriminating statements were made, and prior to any formal court proceedings, Charles Haldi was appointed to represent Petitioner in place of Stokes. (HT. 14). Throughout his roughly 35-year career as a licensed Georgia attorney, the primary nature of Haldi's practice has been criminal defense. *Id.* At the time of Petitioner's representation, Haldi was death penalty certified and had tried five murder trials in front of a jury. (HT. 15).

After speaking with Stokes and reviewing discovery, Haldi determined that the State's case was bolstered by Petitioner's incriminating statements, in addition to other evidence. (HT. 16-17). These statements formed the basis of a *Jackson-Denno* hearing held before trial, at which many of Petitioner's statements were deemed admissible. (HT. 720-740). At the hearing, Petitioner asserted that Stokes was ineffective in that he: (1) did not spend sufficient time familiarizing himself with the case, (2) failed to attend Petitioner's third interview with the police, and (3) counseled Petitioner to cooperate, despite not having a deal in place with the District Attorney. (HT. 729). The trial court denied Petitioner's claim that the incriminating statements were inadmissible on the three bases of Stokes' alleged ineffective assistance of counsel, mainly because Stokes believed it was in Petitioner's best interest to cooperate with law enforcement. (HT. 729, 730, 735).

Specifically, Stokes stated that, in his experience as a prosecutor, it was almost always the person who cooperated first to receive consideration; at the time Petitioner made his statements, Stokes believed the other two participants in the crime were not cooperating, thus giving Petitioner the advantage of cooperating first. (HT. 730).

In a secondary effort to exclude the significant, incriminating statements, Haldi filed an interlocutory appeal to the Georgia Supreme Court, challenging the trial court's ruling on their admissibility. *See Sosniak v. State*, 287 Ga. at 279. The Georgia Supreme Court affirmed the trial court's order denying Sosniak's motion to exclude his statements to law enforcement officers, along with any evidence obtained as a result. *Id.* As noted in the Procedural History, the Supreme Court ruled that Petitioner's claim that the entirety of his March 23 statements should be suppressed due to ineffective assistance of counsel was "abandoned" due to Petitioner's failure to raise the issue in both argument and his brief. *Id* at 287. Footnote 3 of the opinion states that Petitioner's counsel expressed at oral argument it was premature to address the issue of ineffective assistance of counsel in the interlocutory appeal stage of the proceedings since prejudice affecting the outcome of the case could not be shown. *Id.* In short, Haldi did not pursue the issue of ineffective assistance of counsel because he believed he could not establish the necessary prejudice prong of the two-part *Strickland* analysis.

Conclusions of Law

To prevail on a claim of ineffective assistance of counsel, Petitioner has the burden to show both attorney error and actual prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* standard applies in the guilty plea context. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). The first prong of attorney performance is the same standard of competence previously announced in *Tollett v. Henderson*, 411 U.S. 258 (1973), and *McMann v. Richardson*, 397 U.S. 759 (1970), which is that counsel's advice must be within the range of competency demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. at 56, 58. The actual prejudice prong in the plea context requires a showing that the attorney's allegedly ineffective performance affected the outcome of the plea process and that "there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." *Id.* at 59; *Zant v. Means*, 271 Ga. 711, 712, 522 S.E.2d 449 (1999); *Thompson v. Greene*, 265 Ga. 782, 785, 462 S.E.2d 747 (1995).

Petitioner has not shown that that counsel's performance was deficient and that he was prejudiced as a result in order to prevail on this ground.

Petitioner has not shown counsel's performance to be deficient, as counsel's decision to forgo Petitioner's claim that the incriminating statements should be suppressed because he received ineffective assistance of

counsel was based upon his belief that it was premature to address the issue during the interlocutory appeal. The trial court had denied the ineffectiveness claim, reasoning that counsel's representation throughout Petitioner's custodial interrogations was sound and motivated by Petitioner's best interest. Haldi thought that the actions Stokes took were in the "best interest" of Petitioner, especially given the short, compressed time frame in which Stokes had to make decisions as to Petitioner's representation. (HT. 20, 22).

Petitioner has also failed to establish the requisite prejudice, as he has not shown that, but for Haldi's reasoned decision not to pursue an ineffective assistance of counsel claim, Petitioner would not have pleaded guilty. The Court does not credit Petitioner's testimony that, but for counsel's decision not to raise an ineffective assistance of counsel claim, Petitioner would not have pleaded guilty. As such, ground 2 of the instant petition lacks merit and provides no basis for relief.

CONCLUSION

Wherefore, the petition for writ of habeas corpus is DENIED.

If Petitioner desires to appeal this order, he must file an application for certificate of probable cause to appeal with the Clerk of the Georgia Supreme Court within thirty (30) days after the date this order is filed. Petitioner must also file a notice of appeal with the Clerk of the Superior Court of Macon County within the same thirty (30) day period.

The Clerk of the Superior Court is hereby directed to provide a copy of this order to counsel for Petitioner, Respondent, and the office of the Attorney General of Georgia.

SO ORDERED, this 7th day of April, 2020.

JIMMIE H. BROWN, Judge
Superior Court of Macon County, Georgia

Prepared by:

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the within and foregoing Final Order has been served upon:

Marcin Sosniak
GDC#1001033159
Macon State Prison
Post Office Box 426
Oglethorpe, Georgia 31068

by placing the same in the United States Mail, with sufficient postage.

The undersigned certifies that a copy of the within and foregoing Final Order was electronically filed, along with this certificate, with the Clerk of Superior Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney's of record:

JRea@law.ga.gov
Jason M. Rea

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Rodney Zell, Esq.

This 9th day of April, 2020.

Stephanie F. Harper
Secretary to Judge Brown

287 Ga. 279
695 S.E.2d 604

SOSNIAK
v.
The STATE.

No. S10A0335.

Supreme Court of Georgia.

June 7, 2010.

[695 S.E.2d 605]

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[695 S.E.2d 606]

Charles G. Haldi, Jr., William A. Finch, Cumming, for appellant.

Penny A. Penn, District Attorney, James A. Dunn, Asst. Dist. Atty., Thurbert E. Baker, Attorney General, for appellee.

MELTON, Justice.

This is an interim appellate review of a case in which the State seeks the death penalty. Marcin "Martin" Sosniak and his co-defendants, Jason McGhee and Frank Ortegon, have been indicted for four counts each of malice murder and felony murder in connection with the deaths of Kyle Jones, Mariel Hannah, William Osment, and Lynn Bartlett, as well as for related crimes. The crimes occurred on March 19, 2006, at a residence in Forsyth County. This Court granted Sosniak's application for interim review and directed the parties to address whether the trial court erred in its order denying Sosniak's motion to exclude his statements to law enforcement officers and any evidence obtained as a result and in its order addressing the admissibility of certain victim impact evidence. For the reasons set forth below, we affirm.

1. Sosniak claims that the trial court erred in finding admissible statements that he made to Detectives Moore and Cox of the Forsyth County Sheriff's Office on March 20, March 23, and March 29, 2006. "The trial court determines the admissibility of a defendant's statement under the preponderance of the evidence standard considering the totality of the circumstances. [Cit.]" *Vergara v. State,* 283 Ga. 175, 176, 657 S.E.2d 863 (2008). "Unless clearly erroneous, a trial court's findings as to factual determinations and credibility relating to the admissibility of the defendant's statement at a *Jackson-Denno* hearing will be upheld on appeal. [Cit.]" *Grier v. State,* 273 Ga. 363, 365(2), 541 S.E.2d 369 (2001). See *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). However, " '(w)here controlling facts are not in dispute, ... such as those facts discernible from a videotape, our review is de novo.' [Cit.]" *Vergara,* 283 Ga. at 178(1), 657 S.E.2d 863.

A. Statements of March 20, 2006.

(1) Pre-Miranda statements. Sosniak claims that he was in custody and, thus, that the statements of his March 20 interview prior to his being apprised of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), are inadmissible.

> A person is considered to be in custody and *Miranda* warnings are required when a person is (1) formally arrested or (2) restrained to the degree associated with a formal arrest. Unless a reasonable person in the suspect's situation would perceive that he was in custody, *Miranda* warnings are not necessary. Thus, the relative inquiry is how a reasonable person in [Sosniak]' s position would perceive his situation.

(Citations and punctuation omitted.) *State v. Folsom,* 285 Ga. 11, 12-13(1), 673 S.E.2d 210 (2009). In other words, the inquiry properly focuses upon "the objective circumstances

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attending the particular interrogation at issue, and not upon the subjective views of either the person being interrogated or the interrogating officer." *Hardin v. State,* 269 Ga. 1, 3(2), 494 S.E.2d 647 (1998).

The testimony at the *Jackson-Denno* hearing showed the following. After receiving a page at 10:45 p.m. on the date of the murders and reporting to the crime scene, Detective Moore went to the Criminal Investigations Division of the Sheriff's Office (CID), where he interviewed witnesses. At that time, he received information that Sosniak was one of three males that had been at the crime scene about a half hour prior to the crimes. As a

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result, sometime in the early morning hours of March 20, four to five officers from the Forsyth County Sheriff's Office went to Sosniak's residence. When Sosniak's mother opened the door to the officers, they entered and told her that they were looking for Sosniak. Sosniak's mother went upstairs and awakened Sosniak, who came downstairs and conversed with the officers. Then Sosniak went outside, where he was handcuffed, placed in a patrol car, and taken to the CID. Sosniak waited in the foyer of the CID until he was approached by Detective Moore, who testified that Sosniak was not handcuffed at the time that they met. Detective Moore's testimony also established that Sosniak was handcuffed for transport to the CID pursuant to a departmental policy for officers' safety, that the handcuffs were removed upon Sosniak's arrival at the CID, that the CID did not have a holding cell or a booking area and was not locked for those wishing to exit, and that the interview room was not locked.

The two-hour interview was videotaped, and the videotape, played before the trial court, showed the following. Sosniak was not handcuffed or physically restrained in any way when he entered the interview room at 5:15 a.m. After obtaining basic information from him, Detective Moore told Sosniak that he was "not under arrest for anything" and that he just needed to talk to him "about some stuff tonight, that's all." Sosniak indicated that he was agreeable to that. Sosniak initially denied knowing that the crimes had taken place or being at the location of the crimes shortly before they occurred, and the first hour of the interview was spent addressing Sosniak's denial of that information. Detective Moore told Sosniak that he knew that Sosniak was not being completely truthful, and he encouraged Sosniak to tell the truth. However, Detective Moore was neither hostile nor accusatory toward him. At one point during the interview, Detective Moore asked Sosniak if he would be attending his college class "tomorrow," and Sosniak responded that he would be. Detective Moore's question would indicate to a reasonable person in Sosniak's position that he was not being "restrained to the degree associated with a formal arrest." *Folsom,* 285 Ga. at 12(1), 673 S.E.2d 210. Although Sosniak once stated, "I'm exhausted, I'm tired, all I want to do is just go home," he made no effort to get up and leave, and he immediately re-engaged Detective Moore by asking, "What is this all about, is what I would like to know?" While Detective Moore told Sosniak that he had "a lot riding on this," he did nothing that would indicate to Sosniak that he was not free to leave, and he testified that, had Sosniak pursued leaving, the Sheriff's Office would have provided a ride for him.

There is no merit to Sosniak's contention that, because Detective Moore did not inform him that he considered him to be a suspect and did not apprise him of the nature of the crimes that he was suspected of being involved in, his statements are inadmissible. "[A] police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*. [Cit.]" *Stansbury v. California,* 511 U.S. 318, 324(II), 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994). The relevant inquiry remains how a reasonable person in Sosniak's position would have perceived his situation. See *McAllister v. State,* 270 Ga. 224, 228(1), 507 S.E.2d 448 (1998).

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We conclude that the trial court was authorized to find that, under the totality of the circumstances, a reasonable person in Sosniak's position would not have believed that he was in custody prior to the time that he was read the *Miranda* rights. See *Bell v. State,* 280 Ga. 562, 563(2), 629 S.E.2d 213 (2006) (finding that a defendant was not in custody for purposes of *Miranda* where he was handcuffed pursuant to police protocol during the execution of a no-knock search warrant and was driven in a patrol car to police barracks where he was released from handcuffs, was free to move about so long as he remained in an officer's presence, and was advised that he was free to leave at any time). Compare *State v. Folsom,* 286 Ga. 105, 108(1), 686 S.E.2d 239 (2009) (affirming the trial court's determination that the defendant was in custody during pre- *Miranda* questioning where the defendant was required to come to the police station by officers who waited at his home and followed him to the station, was

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never told that he was free to leave, was kept either under surveillance or in a closed interrogation room for six hours, was explicitly told that evidence pointed toward him, and was repeatedly asked incriminating questions).

(2) *Post-Miranda statements*. Almost an hour and a half into the interview, Sosniak acknowledged that he had been at the residence where the shootings occurred on the previous evening. Shortly afterward, he admitted hearing gunshots while there. Detective Moore testified that, once Sosniak made that admission, he was no longer free to leave. Our review of the videotape shows that, at the point when Sosniak admitted hearing gunshots, Detective Moore stopped the interview and read Sosniak the *Miranda* rights. When Detective Moore asked Sosniak if he understood his rights and if he and Sosniak were "still good to talk," Sosniak nodded affirmatively, effectively waiving his rights. See *Spain v. State,* 243 Ga. 15, 16(1), 252 S.E.2d 436 (1979) ("There is no constitutional requirement that waiver of constitutional rights be in writing."). Upon our review of the transcript of the *Jackson-Denno* hearing and the videotape of the interview reviewed by the trial court, we find no error in the trial court's ruling that this statement was given knowingly, freely, and voluntarily after Sosniak had been properly advised of and had waived his *Miranda* rights. See *Bell,* 280 Ga. at 565(2)(b), 629 S.E.2d 213.

B. Statements of March 23, 2006.

On March 20, 2006, Sosniak signed a waiver of appointed counsel form and retained attorney John Stokes to represent him. On March 23, 2006, Detectives Moore and Cox met with Sosniak and Stokes for Sosniak's second interview. This interview began at 1:20 p.m., took place in the same interview room as the first interview, lasted approximately an hour, and was also videotaped. A review of the videotape shows that Detective Moore again read Sosniak his *Miranda* rights and that both Stokes and Sosniak indicated that Sosniak understood his rights.

At this interview, Sosniak provided a written statement that he had previously prepared in which he gave the same version of events that he relayed in this interview and in the March 20 interview. Sosniak has offered no grounds upon which to find this written statement inadmissible, and we conclude that the trial court did not err in ruling that it was admissible.

During this interview, Sosniak twice volunteered to show the detectives the location where the murder weapon was allegedly thrown into a lake. The detectives stepped out of the interview room, and Stokes and Sosniak discussed the case, apparently unaware that the video camera was still recording. The trial court properly found that Sosniak's statements here were protected by the attorney-client privilege and, thus, were inadmissible. See OCGA § 24-9-21(2) (excluding communications between attorney and client).

After the detectives returned, they were discussing riding arrangements to the lake when the following conversation transpired.

> Mr. Stokes: I don't think I need to go.
>
> Detective Cox: Okay. All right.
>
> Mr. Stokes: I supposed [sic] you're going to have to get divers or something.
>
> Detective Cox: We're working on that. We'll probably be out there in a little bit of time.
>
> Detective Moore: Martin, are you okay with going with just us without Mr. Stokes present?
>
> Mr. Sosniak: Yeah.
>
> Detective Cox: Once we get done, we're going to bring you back here and just kind of go over some of the details, like specifically the note [1] and stuff like that, would you have any problems with us talking to him outside your presence?
>
> Mr. Stokes: Do you have a contention?
>
> Mr. Sosniak: (No audible response)
>
> Mr. Stokes: I think we're on track as far as the (Inaudible)

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> Detective Moore: Martin has been cooperative. We appreciated it and it will be noted and passed on.
>
> Mr. Stokes: Okay. Very good. And I'll be talking to him and talking to y'all, I guess.
>
> Detective Cox: Okay. I'll tell you what I'll do is, as soon as we get done this afternoon I'll call you-
>
> Mr. Stokes: Okay.
>
> Detective Cox:-and just kind of let you know that we're done.
>
> Mr. Stokes: Okay.
>
> Detective Cox:-And some of the information that was passed on, that we have a good line of communication between the two of us.

Our review of the videotape shows that the trial court did not err in finding that, while Sosniak did not give an audible response to Stokes when Stokes asked him whether he had an objection to speaking with detectives outside of Stokes's presence, Sosniak shook his head negatively, indicating that he was agreeable to the detectives' questioning him without his attorney present upon their return to the CID.

Detective Cox testified at the *Jackson-Denno* hearing that he confirmed with Stokes outside the interview room that the detectives also intended to take Sosniak to the crime scene. However, Stokes testified that he did *not* know the detectives planned to go to the crime scene. "The trial court was entitled to weigh the credibility of witnesses testifying at the hearing, and to believe the more credible witness." *Hardin,* 269 Ga. at 4(2)(c), 494 S.E.2d 647. We are bound by the trial court's findings here, as they are not clearly erroneous. Id. Furthermore, our review of the record shows that Stokes's recollection of events during his testimony at the suppression hearing was inconsistent with the record on several points. For instance, he denied that any discussion regarding Sosniak's being further interviewed upon returning to the CID took place, but the videotape clearly contradicts that testimony.

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Sosniak accompanied the detectives to the lake, where he pointed out the location where the murder weapon was thrown, and to the crime scene, where he reviewed the incident with the detectives. The detectives testified that, during the visits to the lake and the crime scene, no promises or threats were made to Sosniak and that Sosniak never indicated to them that he wished to cease speaking to them or that he wanted his lawyer present.

Upon returning to the CID, the detectives took Sosniak back to the same interview room where the interview had taken place that morning and continued their interview with him. This interview, which began at 4:07 p.m., was also videotaped. A review of that tape and the transcript of the *Jackson-Denno* hearing shows that Detective Moore advised Sosniak at the beginning of this portion of the interview as follows:

> When we first came in here ... [w]e re-read you your *Miranda* rights. And at that time Mr. Stokes said that you understood your rights. You said you understood your rights. And you've been working with us ever since.
>
> This is the same day.... So, I just want to make sure that you still understand your rights. And that you don't have to talk to us if you don't want to.

After Sosniak responded that he just wanted to help himself, Detective Moore repeated that Sosniak did not have to talk to the detectives if he did not wish to do so, and then he asked: "And you still know that you have the right to an attorney and have [him] present if you wish and all that?" and "So, with that in mind [do] you still wish to continue to answer questions and talk [ ] with us about the situation?" Sosniak answered affirmatively to both questions. The trial court's finding that the March 23 interviews constituted a continuing interrogation is supported by the record, and the detectives had no duty to repeat the entire *Miranda* warnings before reinitiating the interview. See *Williams v. State,* 244 Ga. 485, 488(4)(b), 260 S.E.2d 879 (1979) (holding that there was "no duty to repeat the *Miranda* warnings given the day before where ... the interviews were part of a continuing interrogation").

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Sosniak maintains that he had invoked his right to counsel "as of March 23," that the detectives initiated further contact, and, therefore, that his statements to the detectives after his counsel's departure are inadmissible under the bright-line rule of *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Under *Edwards,* once an accused has invoked his Fifth Amendment right to have counsel present during custodial interrogation, any subsequent waivers are insufficient to justify police-initiated interrogation. Id. at 484-485(II), 101 S.Ct. 1880. " *Edwards* is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.' " *Minnick v. Mississippi,* 498 U.S. 146, 150, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) (quoting *Michigan v. Harvey,* 494 U.S. 344, 350, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990)).

Sosniak has not pointed to, nor has our review revealed, anything in the record showing that, prior to March 23, Sosniak invoked his Fifth Amendment right to counsel during custodial interrogation under *Miranda*.[2] Furthermore, even assuming that Sosniak made a clear assertion of the right to counsel prior to March 23, we find no violation of the *Edwards* rule here. While *Edwards* bars police-initiated interrogation in counsel's absence, it does not bar police-initiated interrogation in the presence of counsel. See *Minnick* at 152, 111 S.Ct. 486. Therefore, counsel's presence at the first March 23 interview rendered *Edwards* inapplicable. As discussed above, a review of the record, including the videotape, supports the trial court's finding that Sosniak was given access to his lawyer and that, in his lawyer's presence, Sosniak was read his *Miranda* rights, indicated that he understood them, and waived

the presence of counsel during the visit to the lake and the crime scene and during the interview afterward at the CID. Accordingly, the trial court did not err in denying Sosniak's challenge based on an alleged *Edwards* violation.

Sosniak also contends that the trial court erred in finding that his statements were voluntary and, thus, admissible under OCGA § 24-3-50.

> OCGA § 24-3-50 requires that an admissible confession "must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury." The promise of a benefit that will render a confession involuntary under OCGA § 24-3-50 must relate to the charge or sentence facing the suspect. Generally, the "hope of benefit" to which the statute refers has been construed as a hope of lighter punishment.

(Citations and punctuation omitted.) *Foster v. State,* 283 Ga. 484, 485-486(2), 660 S.E.2d 521 (2008).

At one point during this interview, Detective Cox stated that he was "trying to get an idea of how honest" Sosniak was going to be with them, because he knew that Sosniak's co-defendant was going to be honest. Then he asked Sosniak, "Who's going to be honest first?" Sosniak contends that Detective Cox indicated by his remarks that Sosniak would be rewarded for his cooperation. Our review of the record reveals that the detective's comments amounted to no more than exhortations to Sosniak to be truthful. "[A]dmonitions to tell the truth will not invalidate a confession." *State v. Roberts,* 273 Ga. 514, 516(3), 543 S.E.2d 725 (2001), overruled on other grounds by *Vergara,* supra, 283 Ga. at 178(1), 657 S.E.2d 863. Sosniak also contends that Detective Cox's remark that one of Sosniak's co-defendants wanted to cooperate and would throw his co-defendants "under the ... bus" was a threat about what would happen to Sosniak if he did not cooperate. This comment was also an exhortation to be truthful and could not reasonably be interpreted as a threat of the type that would render Sosniak's statement involuntary. See *Mangrum v. State,* 285 Ga. 676, 678(2), 681 S.E.2d 130 (2009) (stating that a threat of

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injury within the meaning of the statute refers to a threat of physical or mental harm).

Detective Moore's statement that there would be "no further charges" regarding "any drugs or any intent to distribute" was made in the context of encouraging Sosniak to be truthful regarding his activities leading up to the time of the crimes, even if those activities involved drugs. The detectives never promised or gave hope to Sosniak that he would receive a lighter punishment in exchange for a confession to the crimes with which he was charged.

Examining the totality of the circumstances, we conclude that the trial court did not err in ruling that Sosniak's March 23 statement made outside the presence of counsel was voluntary and admissible. Compare *Canty v. State,* 286 Ga. 608, 610-611, 690 S.E.2d 609 (2010) (reversing the trial court's finding that a defendant's confession was voluntary where the defendant was told that confessing to the crime could result in a "shorter term").

The trial court also denied Sosniak's claim that the entirety of his March 23 statements should be suppressed because he received ineffective assistance of counsel. Although we directed the parties to address that issue in this appeal, Sosniak omitted entirely both argument and any citation of authority regarding it in his brief.[3] Accordingly, we deem as abandoned under Supreme Court Rule 22 any assertion that this trial court ruling was error. See *Felix v. State,* 271 Ga. 534, 539, n. 6, 523 S.E.2d 1 (1999); *Hayes v. State,* 261 Ga. 439, 444(6)(d), 405 S.E.2d 660 (1991).

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C. Statements of March 29, 2006.

At approximately 10:15 a.m. on March 29, Detective Cox interviewed Sosniak in Stokes's presence in an interview room at the CID. The interview was recorded, and a review of the videotape shows that, at the beginning of the interview, Detective Cox read Sosniak his *Miranda* rights and that Sosniak and Stokes both confirmed that Sosniak understood his rights. As in the interview on March 23, the trial court properly found inadmissible the statements between Sosniak and his attorney while they were alone in the interview room. See OCGA § 24-9-21(2).

Sosniak contends that his statements during this interview were induced by a hope of benefit. Near the beginning of the interview, Detective Cox stated: "Right now, you need to be thinking about you and what's ... going to get you out of jail so you can see your kid out in California, not wearing a Georgia Department of Corrections outfit." Sosniak maintains that Detective Cox's remark was intended to imply that, if he cooperated with the detectives, he could go free. After reviewing the remark in context, we conclude that it was a small part of the detective's lengthy opening comments made to Sosniak before the actual interview to encourage him to tell the truth. Detective Cox stated to Sosniak that, because Sosniak had previously been "ripped off" by the "obvious[ ] target of the incident" and because he had purchased the gun used in the murders with one of the co-defendants shortly before the incident, he was "in just as deep" as that co-defendant. Therefore, Detective Cox emphasized, it was important that Sosniak be truthful in order to strengthen his credibility with the officers.

In addition to considering the context of Detective Cox's remark about seeing his child, we have considered the fact that Sosniak was represented by counsel throughout this interview. The trial court found credible Detective Cox's testimony that, prior to the interview, he told Stokes that only the district attorney could make a deal and that all he could do was provide information as to

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who had been cooperative. See *Arline v. State,* 264 Ga. 843, 844(2), 452 S.E.2d 115 (1995) (stating that "telling a defendant that his or her cooperation will be made known to the prosecution does not constitute the 'hope of benefit' sufficient to render a statement inadmissible"). Stokes testified that neither law enforcement nor the district attorney made any promises regarding specific charges or the disposition of the case in exchange for Sosniak's cooperation, that he never expected the charges against Sosniak to be dismissed, and that he told Sosniak that cooperation with law enforcement might be in his best interest in regard to punishment. After Detective Cox's introductory comments, which included the remark about seeing his child, Stokes asked Sosniak whether he understood what Detective Cox was telling him, and Sosniak indicated that he did and that it was essentially what Stokes had told him. The trial court did not err in holding that, under the totality of the circumstances, the remark to Sosniak did not constitute a hope of benefit under OCGA § 24-3-50.

We also find no merit to Sosniak's contention that his statement was induced by a threat of injury because Detective Cox told him and Stokes that the prosecution was "already looking at a death penalty case" and that Sosniak could "get a needle." Detective Cox's statements "amounted to no more than an explanation of the seriousness of [Sosniak]'s situation." *Preston v. State,* 282 Ga. 210, 212(2), 647 S.E.2d 260 (2007) (upholding the admissibility of a defendant's statement where the officer discussed the death penalty and asked the defendant to permit him to help him).

Considering the totality of the circumstances, we conclude that the trial court correctly found that Sosniak's March 29 statement was voluntary and admissible. See *Lee v. State,* 270 Ga. 798, 800(2), 514 S.E.2d 1 (1999).

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2. Although directed by this Court to address whether the trial court erred in its order addressing the admissibility of certain victim impact evidence, see OCGA § 17-10-1.2, Sosniak omitted entirely both argument and any citation of authority regarding this issue in his brief.[4] Accordingly, we deem as abandoned under Supreme Court Rule 22 any assertion that this trial court ruling was error. See *Felix,* 271 Ga. at 539, n. 6, 523 S.E.2d 1; *Hayes,* 261 Ga. at 444(6)(d), 405 S.E.2d 660. See also *Butts v. State,* 273 Ga. 760, 771(31), 546 S.E.2d 472 (2001) (stating that "counsel may not add enumerations of error by way of oral argument").

Judgment affirmed.

All the Justices concur.

Notes:

1. Detective Cox referred to Sosniak's written statement as "the note" several times during the interview.

2. Any claim by Sosniak that the detectives violated the rule of *Edwards* under his Sixth Amendment right to counsel would be unavailable. See *Montejo v. Louisiana,* --- U.S. ---, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (overruling *Michigan v. Jackson,* 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)) (holding that the *Edwards* rule also applied to a defendant's Sixth Amendment right to counsel).

3. In fact, Sosniak's counsel expressed at oral argument his belief that it is premature to address the issue of ineffective assistance of counsel at this point in the proceedings, as prejudice that could affect the outcome of the case cannot yet be shown. See, e.g., *Terry v. State,* 284 Ga. 119(2), 663 S.E.2d 704 (2008), citing *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance so prejudiced the defendant that there is a reasonable likelihood that, but for counsel's errors, the outcome of the trial would have been different.).

4. At oral argument, Sosniak's counsel expressed his belief that the current law in this area would favor the admission of this evidence, and that the law in this area was unlikely to change.

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