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

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| SCOTT WINFIELD DAVIS, | : | |
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| Petitioner, | : | |
| | : | |
| v. | : | |
| | : | |
| ERIC SELLERS, | : | CIVIL ACTION NO. |
| | : | 1:13-CV-1434-AT |
| | : | |
| Respondent. | : | |

**ORDER**

This matter is before the Court on the Magistrate Judge's Final Report and Recommendation ("R&R") [Doc. 38] and Petitioner's objections thereto [Doc. 44]. In reviewing an R&R, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." *United States v. Schultz*, 565 F.3d 1353, 1361 (11th Cir. 2009) (per curiam) (quoting *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988) (internal quotation marks omitted)). Absent objection, the Court "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge," 28 U.S.C. § 636(b)(1), and "need only satisfy itself

that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72, advisory committee note, 1983 Addition, Subdivision (b). Further, the Court "has broad discretion in reviewing a magistrate judge's report and recommendation" – it "does not abuse its discretion by considering an argument that was not presented to the magistrate judge" and "has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge." *Williams v. McNeil*, 557 F.3d 1287, 1290-92 (11th Cir. 2009).

## I. Background[1]

A Fulton County jury convicted Petitioner of malice murder, and the trial court sentenced Petitioner to life imprisonment. *Davis v. State*, 676 S.E.2d 215, 215-16 (Ga. 2009). Petitioner filed a motion for a new trial, which he later amended, and the trial court ultimately denied the motion. *Id.* at 216. Attorneys Bruce Morris and Brian Steel represented Petitioner at trial and on appeal, and attorney Don Samuel was also retained to represent Petitioner on appeal. (Doc. 1 at 18.)[2]

The Georgia Supreme Court found that the following evidence, which it "[c]onstrued most strongly to support the verdict," was "sufficient to authorize a

[1] The Court briefly summarizes the procedural history here. The background of the case is more fully set forth in the R&R.

[2] The listed document and page numbers in citations to the record refer to the document and page numbers shown on the Adobe file reader linked to the Court's electronic filing database, CM/ECF.

rational trier of fact to find [Petitioner] guilty of murder beyond a reasonable doubt":

> . . . [A]fter two years of marriage, [Petitioner's] wife filed for divorce and moved out of the couple's home. [Petitioner], who did not want to get divorced, threatened to kill anyone who had a sexual relationship with his wife. [Petitioner's] wife subsequently began dating David Coffin, and [Petitioner] hired a private investigator to follow her. [Petitioner] asked the investigator to locate Coffin's home address and telephone number, and after the investigator provided the information to him, [Petitioner] said that he was going to drive by Coffin's residence during the next weekend. That Saturday night, Coffin's house was burglarized, and his car was stolen. During the burglary, a call was made from Coffin's home to [Petitioner's] house, and later that night [Petitioner] made repeated calls to his wife's apartment, asking if she was sleeping with Coffin.
>
> Two days after the burglary, [Petitioner] called in sick to work, and sometime that night, Coffin was fatally shot inside his house. The next morning, Coffin's car and other items stolen from his home were found burning near a MARTA station. A gas can and bag found inside the burning car were identified as being similar to items owned by [Petitioner]. That night, Coffin's house was destroyed by arson, and his body was found inside.
>
> That same night, [Petitioner] made false reports to the police about having twice been attacked by an unidentified assailant at his own house, claiming one attack before, and another attack after, the fire at Coffin's home. During his statement to police about the alleged attacks, [Petitioner] said that he knew Coffin had been shot. However, at that time, the police did not know Coffin had been shot due to the charred condition of his body. It was not until the autopsy was later performed that the cause of death was revealed to be a gunshot wound to the head. A few days later, [Petitioner] attempted to establish an alibi for himself by asking a neighbor to say that he had seen [Petitioner] at a gym on the night of the murder. . . .

*Davis*, 676 S.E.2d at 216-17. On April 28, 2009, the Georgia Supreme Court affirmed the trial court's judgment. *Id.* at 221. The United States Supreme Court denied Petitioner a writ of certiorari on October 5, 2009. *Davis v. Georgia*, 558 U.S. 879 (2009).

Represented by new counsel, Marsha G. Shein, E. Jay Abt, and Andy M. Cohen, Petitioner filed a habeas corpus petition in the Superior Court of Gwinnett County on August 25, 2010. (Docs. 1-3, 1-4, 1-5; Doc. 1-12 at 30-31.) After conducting evidentiary hearings on July 25 through 29, October 27, and December 2, 2011, (Docs. 1-15 through 1-21), the state habeas court entered a written order denying the petition. (Doc. 16-10.) On March 18, 2013, the Georgia Supreme Court denied Petitioner a certificate of probable cause to appeal the denial of habeas corpus relief. (Doc. 16-11.)

Still represented by Ms. Shein, and with the assistance of Howard Jarrett Weintraub and Benjamin Black Alper, Petitioner filed this 28 U.S.C. § 2254 petition on April 29, 2013. (Doc. 1.) Petitioner's arguments present a challenge for the Court to discern which of his exhausted federal claims he raises in the instant petition. However, the Court agrees with the Magistrate Judge's determination that Petitioner raises the following grounds for relief: (1) the state habeas court's factual findings were unreasonable in light of the evidence presented at the evidentiary hearing; (2) trial and appellate counsel were ineffective for failing to call an expert to show that the tape of Petitioner's police interview had been altered and that there was a second tape or additional recording device, and trial counsel was ineffective for failing to investigate the police department's taped interview of Petitioner; (3) Petitioner was deprived of his due process rights to a fair trial when the state's gun expert committed misconduct while working at the Georgia Bureau of Investigation ("GBI") crime

lab by failing to properly test firearms and by testifying falsely; (4) his attorneys were ineffective for failing to (a) fully investigate the exculpatory nature of the missing evidence individually to prove bad faith, (b) investigate the lost evidence to prove bad faith, (c) investigate or raise the violation of Petitioner's due process right to the preservation of evidence created under state law and administrative rules, (d) object to the loss of exculpatory evidence, (e) raise the unfair prejudice in the loss of certain evidence and the use of that evidence at trial, and (f) raise the violation of Petitioner's right to cross examine the witnesses against him recognized by *Crawford v. Washington*, 541 U.S. 36 (2004); and (5) the prosecution violated Petitioner's right to due process when Chris Harvey, an investigator with the Fulton County District Attorney's Office, had Linda Tolbert, a former Atlanta Fire Department employee, sign a false affidavit denying that her signature was on the receipt for a U.P.S. package that contained the Beretta handgun. (Doc. 1 at 12; Doc. 7 at 14-80.)

Whether Petitioner properly raised an independent due process claim in state habeas proceedings based on the Government's loss or destruction of the roughly 70 items of evidence is not completely clear. In his revised brief in support of his petition, Davis argues that "[t]he misconduct uncovered at the habeas hearing, the expert testimony and the massive amount of SOP violations establish a violation of Petitioner['s] due process rights without the need to prove ineffective assistance of counsel." (Doc. 7 at 40; *id*. at 42; 55; 61 ("Based on

*Guzman*, ineffective assistance of counsel is not the only means to reverse Petitioner's conviction, independently the misconduct would be enough.").)

Petitioner claims that the prosecution's loss or destruction of over 70 pieces of evidence, alongside the conduct of its witnesses, indicates bad faith which entitles him to a new trial. In the alternative, he claims the lost evidence was apparently exculpatory and that this too entitles him to a new trial. In particular, he argues that the State lost (1) the purported murder weapon, a 9mm Beretta, along with a clip, shell casings, and the bullet recovered from the victim's head; (2) fingerprints lifted from the victim's Porsche which were never properly tested but which did not match Petitioner's prints; and (3) a gas can found in the victim's burning car (a Porsche) that was never traced, but which was identified by the Petitioner's ex-wife as belonging to Petitioner. As a result, some of this evidence was never tested. Davis contends that some of the evidence against him was destroyed as late as 2005 – 8 to 9 years after criminal charges were originally filed against him (and then dismissed in 1997), 3 years after the case was reopened, and not too long before his eventual trial. (Doc. 44 at 25; *see also* Habeas Transcript, Doc. 1-18 at 114-16.)

He also claims that the police evidence room for the case looked like a garbage dump. (*See* Doc. 7 at 8.) Finally, he claims several witnesses against him were compromised or were liars, including Ms. Davy, the state GBI ballistics expert who was later fired for misconduct, and Ms. Tolbert, an Atlanta Fire Department employee who signed an affidavit claiming she'd never signed an

acknowledgment of receipt of some of the lost evidence but then later admitted she'd lied on that affidavit.

The Magistrate Judge rejected this last independent due process claim and found that Petitioner had not exhausted any such due process claims, other than those pertaining to the state's firearm expert. (Doc. 38 at 9-12.) Next, the Magistrate Judge concluded that the state habeas court's factual findings were supported by the record and that Petitioner had failed to rebut those findings by clear and convincing evidence. (*Id.* at 15-25.) The Magistrate Judge then determined that the state habeas court's rejection of Petitioner's grounds regarding the audio-taped police interview is entitled to deference and that Petitioner's claim concerning the state's firearms expert's testimony lacked merit. (*Id.* at 34-37, 40-42.) The Magistrate Judge also found that the state habeas court's conclusions that Petitioner's attorneys were effective in connection with the lost evidence issue and that Petitioner did not show prejudice were entitled to deference. (*Id.* at 53-59.) As previously noted, the Magistrate Judge determined that Petitioner had not exhausted a substantive due process claim regarding the lost evidence. However, the Magistrate Judge alternatively found that Petitioner had not met his burden to establish a due process violation. (*Id.* at 59-66.) Finally, the Magistrate Judge concluded that Petitioner's claim concerning Ms. Tolbert's allegedly false affidavit was new and procedurally defaulted and that, in any event, it was not supported by the record. (*Id.* at 66-68.)

## II. 28 U.S.C. § 2254 Standards

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 a judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). In general, a state prisoner who seeks federal habeas corpus relief may not obtain that relief unless he first exhausts his available remedies in state court or shows that a state remedial process is unavailable or ineffective. *Id.* § 2254(b)(1). A federal court may not grant habeas corpus relief for claims previously adjudicated on the merits by a state court unless the state court adjudication resulted in a decision that (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d); *Van Poyck v. Fla. Dep't of Corrs.*, 290 F.3d 1318, 1322 n.4 (11th Cir. 2002) (per curiam) ("[I]n the context of a habeas review of a state court's decision–only Supreme Court precedent can clearly establish the law.").

When applying § 2254(d), the federal court evaluating a habeas petition must first determine the applicable "clearly established Federal law, as determined by the Supreme Court of the United States." *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000) (quoting 28 U.S.C. § 2254(d)(1)). Next, the federal habeas court must ascertain whether the state court decision is "contrary to" that

clearly established federal law by determining if the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or whether the state court reached a result different from the Supreme Court on a set of materially indistinguishable facts. *Id.* at 412-13. In other words, a state court decision is "contrary to" clearly established federal law only when it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Id.* at 405; *see also Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (holding that a state court decision is not contrary to federal law simply because it does not cite Supreme Court authority; the relevant inquiry is whether the reasoning or the result of the state decision contradicts that authority).

If the federal habeas court determines that the state court decision is not contrary to clearly established federal law, it must then determine whether the state court decision was an "unreasonable application" of clearly established federal law. It evaluates this by determining whether the state court identified the correct governing legal principle from the Supreme Court's decisions but unreasonably applied it to the facts of the petitioner's case. *Williams*, 529 U.S. at 413. "For purposes of § 2254(d)(1), 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Williams*, 529 U.S. at 410) (emphasis in original). "Under § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly

established federal law erroneously or incorrectly [but r]ather, that application must also be unreasonable." *Williams*, 529 U.S. at 411. Thus,

> [a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

*Harrington*, 562 U.S. at 103; *see also Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam) ("Where [in a federal habeas corpus petition] the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but [also] objectively unreasonable."). Additionally, the state court's determinations of factual issues are presumed correct. 28 U.S.C. § 2254(e)(1). A petitioner can overcome this presumption only by presenting "clear and convincing evidence" that the state court's findings of fact were erroneous. *Id.*

## III. Discussion of Petitioner's Objections

### A. The State Habeas Court's Factual Findings

In his objections (Doc. 44), Petitioner first challenges the Magistrate Judge's conclusions regarding ground one – in which Petitioner disputes the state habeas court's factual findings – as if the Magistrate Judge had determined in that ground that Petitioner's attorneys provided him effective assistance. However, the Magistrate Judge repeatedly stated during his discussion of ground one that he was only addressing the state habeas court's factual findings and not any legal conclusion regarding counsel's effectiveness. The Court agrees with the

Magistrate Judge's conclusion that the state court's factual findings were entitled to a presumption of correctness because Petitioner has not rebutted those findings by clear and convincing evidence. "[S]ome evidence suggesting the possibility" that the Petitioner's version of the facts is correct is not sufficient to show that the state court made an unreasonable determination of fact. *Bottoson v. Moore*, 234 F.3d 526, 540 (11th Cir. 2000). Therefore, the Court overrules Petitioner's first objection.

### B. The Procedurally Defaulted Due Process Claims

Petitioner next objects that he did raise independent due process claims before the state habeas court. In response to the Court's order (Doc. 55), Petitioner has provided pinpoint record citations for the pleadings in which he contends he presented an independent due process claim to the state habeas court (Doc. 56). They include the following: (1) a pleading titled "Supplement to Habeas Petition Issue of Bad Faith," filed in the state proceeding prior to the habeas hearing (Doc. 1-12) and outlining the panoply of lost evidence problems and other bad faith-related issues identified by Petitioner; (2) portions of the state habeas transcript; (3) the Certificate of Probable Cause to Appeal filed with the Supreme Court of Georgia in the state habeas proceeding (again setting forth what Petitioner contends were constitutional deficiencies in his trial); and (4) a proposed order filed by Petitioner in the state habeas proceeding ("Proposed

Habeas Order"), which was not adopted by the state habeas court.[3] In addition, Petitioner argues that his state habeas pleadings were amended to conform to the new evidence presented at oral argument, and that such amendment was accomplished, *inter alia*, via his oral argument at the state habeas level. (Objections at 8.)

The Court has reviewed those documents and finds that the arguments that Petitioner presented concerning lost evidence and bad faith in those pleadings appear generally, though not consistently, to have been made in the context of his ineffective assistance of counsel claims and not as independent due process claims.

"[T]he exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record." *McNair v. Campbell*, 416 F.3d 1291, 1303 (11th Cir. 2005) (internal quotation marks, alteration, and citation omitted). It is clear from the record that the state

[3] The Court notes that Petitioner's counsel submitted pin cites for some of these materials only in his reply in support of his response to the Court's order; the specific documents were identified in his initial brief. (Doc. 58.) Petitioner's reply does not change the Court's conclusion on this issue. Many of the pin cites refer to due process issues that are plainly intertwined with ineffective assistance of counsel issues. (*E.g.*, Proposed Habeas Order, Doc. 56-1 at 3 (Counsel made a "general due process violation objection" but did "not present any witnesses or information regarding the evidence chain of custody handling or law enforcement policy violations. . ."); *id*. at 5 ("At the motion for new trial hearing and on appeal, counsel again raised the missing evidence issue, focusing on this issue as a due process violation, lumping the due process issue with a general complaint regarding all of the missing evidence . . . and [failed to] call witnesses to discuss the evidence of chain of custody by the persons responsible for the missing evidence."); *id*. at 32 ("Counsel[] were ineffective in failing to properly present this [due process destruction of evidence] issue to the trial or Supreme Court.").) On the other hand, some parts of the Proposed Habeas Order can be read as supporting Petitioner's contention that he has preserved his independent due process claim. (*Id*. at 33 ("If material exculpatory evidence is lost or destroyed, it is a violation of a defendant's right to due process, regardless of the good or bad faith [of the] government . . .").)

and the state habeas court did not discern that Petitioner was asserting any independent substantive due process claims other than those pertaining to the state firearms expert and the private investigator, and addressed only the grounds clearly asserted in the petition. Accordingly, Petitioner's independent due process claims, with the exception of those pertaining to the state firearms expert and the private investigator, are procedurally defaulted. *See* O.C.G.A. § 9-14-51 (prohibiting a Georgia court from considering claims in a second state habeas corpus petition that could have been raised in the first habeas petition); *Ogle v. Johnson*, 488 F.3d 1364, 1370-71 (11th Cir. 2007) (A claim that "could not be raised in a successive state habeas petition . . . is procedurally defaulted.").

The Court, however, recognizes that the record is not crystal clear on these issues. There are instances where it seems that habeas counsel did raise independent due process claims. It is for this and other reasons described herein that the Court grants a certificate of appealability. For example, habeas counsel argued at the state habeas hearing that it was ineffective assistance of counsel to fail to investigate and seek the disciplinary records of Ms. Davy, the state's ballistics expert. But counsel also later argued there is a "new issue, the key issue, . . . [one] they couldn't have known about" – "they" referring to Petitioner's trial and appellate counsel. (Doc. 1-20 at 98.) This issue was that Ms. Davy is "a big, fat liar." (*Id.*) Habeas counsel argues, "[h]e gets a new trial just on that ground. It violates his due process that she was allowed to testify about the cause of death,

testify about the firearms, testify about key pieces of evidence, when she very well may have been lying through her teeth." (Doc. 1-20 at 100.)

And in Petitioner's "Supplement to Habeas Petition Issue of Bad Faith" in his state habeas case, he outlines the numerous problems posed by lost evidence in his case, arguing that "an atmosphere of bad faith on securing vital evidence permeated this case to such a degree as to deprive the Petitioner of his . . . rights to due process." He then asserts that "[a]ny defendant in these circumstances is deprived of due process and of the right to confront his or her accusers." (Doc. 1-12 at 1; 25.)[4] This could be construed as an independent due process argument. On the other hand, Petitioner later returns his focus to his ineffective assistance of counsel argument in the Supplement when he argues, "[r]egardless of the manifest injustice of losing the evidence and still being allowed to enter it in evidence . . . the trial attorneys and appellate counsel failed to address the issue as bad faith and that the evidence was apparently exculpatory." (*Id*. at 28.) In Petitioner's conclusion to this filing, he again conflates his arguments, stating in one paragraph that "[o]ne of the most significant elements of the ineffective assistance of counsel claim [raised] deals head on with the number of items lost," then turning and immediately arguing that the *Mussman* case[5] "works to reaffirm and strengthen the Petitioner's claim of due process violations." (*Id*. at 30.) *See also* Petitioner's Application for Certificate of Probable cause to Appeal (Doc. 43

[4] Petitioner made this comment in a section of the filing regarding swabbings taken at the scene, but the comment can be construed as applying to more than just that evidence.
[5] *Mussman v. State*, 697 S.E.2d 902 (Ga. Ct. App. 2010), *rev'd*, 713 S.E.2d 822 (Ga. 2011), and *vacated*, 717 S.E.2d 654 (Ga. Ct. App. 2011).

at 11 ("During the habeas hearing, new evidence was revealed that reinforced Applicant's claim of bad faith and due process violations that counsel failed to pursue, investigate, or was not aware of.").)

Because of this frequent conflation of the ineffective assistance of counsel claims and what are arguably independent due process arguments, the Court will address the merits of Petitioner's due process claims regarding the state's alleged mishandling of the evidence and bad faith in Section II.H, and grant a certificate of appealability.

### C. Counsel's Handling of the Lost Evidence Issue

Petitioner objects that counsel ineffectively dealt with the lost evidence and misconduct issues by failing to show bad faith prior to trial with evidence that was available to counsel, by failing to consult experts to show bad faith, by not showing violations of Standard Operating Procedures ("SOP") or calling any custodians of the evidence at a pretrial hearing, and by erroneously arguing that gross negligence equated to bad faith. The Magistrate Judge accurately addressed each of these issues on pages fifty-four through fifty-nine of the R&R, applied the right legal standard, and correctly set forth the facts based on the record before this Court. Accordingly, the Court agrees with the Magistrate Judge's conclusion that the state habeas court's rejection of Petitioner's ineffective assistance claims is entitled to deference pursuant to § 2254(d).

### D. The Fingerprint Evidence

Petitioner further objects that his due process rights were violated because the lost fingerprint cards (containing prints lifted from the victim's Porsche) had apparent exculpatory value. The fingerprint evidence falls within the body of lost evidence that Petitioner contends is subject to both his ineffective assistance of counsel and due process claims. Despite the Court's rulings above as to defaulted claims, the Court reviews the substance of the finger print evidence due process claim in the interest of providing a complete and fair review. The Court agrees with the Magistrate Judge that Petitioner failed to present clear and convincing evidence sufficient to rebut the state habeas court's finding that the missing fingerprint cards were not of the quality required for Automated Fingerprint Identification System ("AFIS") or otherwise were required to be submitted to AFIS. The Court finds unconvincing Petitioner's argument that, because GBI policy required that fingerprints which were not of AFIS quality be identified as such in the GBI reports and because the reports in this case said nothing about the AFIS quality of the prints, the lost fingerprint cards *must* have been of AFIS quality. The Magistrate Judge accurately addressed Petitioner's claim concerning the lost fingerprint cards on pages fifty-one, fifty-six, and sixty-two at footnote twelve. The Court agrees that Petitioner has not shown that the fingerprint cards had apparent exculpatory value *other than* the fact that they did not match Petitioner's fingerprints, which was brought out at trial. Petitioner does not present an alternative and convincing theory of the exculpatory nature of this

evidence. (Objections at 81 ("The crime scene fingerprints found on the stolen Porsche were not the Petitioner's. Therefore by definition, they were exculpatory.").) The state court already addressed this issue, finding that "the exculpatory nature of such fingerprint evidence was brought out at trial through the testimony of various witnesses. Fingerprints were not found on many pieces of evidence tested by the state, and fingerprints lifted from the victim's vehicle did not match Petitioner's fingerprints." (State Habeas Order, Doc. 1-42 at 21.) The Court does note that the jury did not receive a jury charge instructing it that it could draw an adverse inference from the lost evidence, unlike in some of the case authority cited by the Magistrate Judge. (Objections, Doc. 44 at 102.) But this does not change the fact that the "apparently exculpatory" qualities of the lost fingerprint evidence – that they did not match Petitioner's prints – were presented at trial. Suggesting that these prints would do anything else – like lead the prosecution to another suspect – would be speculative at best.

Accordingly, the Court overrules this objection.

### E. Petitioner's Audio-Taped Police Interview

Petitioner alleges that the state altered the audiotape of his police interview and failed to disclose a second recording. Petitioner contends that he presented this allegation to the state habeas court as an independent due process claim. However, the record does not support this contention, and this claim is procedurally defaulted.

Moreover, the Magistrate Judge addressed this issue on pages thirty-four through thirty-seven and footnotes seven through nine of the R&R, applied the right legal standard, and correctly set forth the facts based on the record before this Court. Petitioner disputes the Magistrate Judge's finding that the detective's testimony was in accord with what Petitioner told his attorneys. However, the record shows that Petitioner only told his attorneys that the detectives threatened him with the death penalty when the recorder was stopped, (Doc. 1-19 at 50; Doc. 1-21 at 9-10), and that, although Petitioner initially asked his attorneys to have an expert analyze the tape, Petitioner ultimately changed his mind, (Doc. 1-21 at 9-10). Although Petitioner disputes the state habeas court's factual findings regarding the audiotape, "some evidence suggesting the possibility" that the Petitioner's version of the facts is correct is not sufficient to show that the state court made an unreasonable determination of fact. *Bottoson*, 234 F.3d at 540. The Court agrees with the Magistrate Judge that the record does not support a finding of bad faith on the part of the state with regard to the audiotape. Accordingly, the Court also overrules Petitioner's objections as to this ground.

### F. Firearm Expert's Testimony

Petitioner next argues that his due process rights to a fair trial were violated because the state's firearms expert, Bernadette Davy, falsified reports. The Magistrate Judge thoroughly and accurately addressed this issue on pages thirty-seven though forty-two of the R&R. The Court agrees that Petitioner has not shown that Davy testified falsely in his case and that Petitioner has not

presented any evidence to show that the prosecutor had any knowledge of Davy's misconduct. The Court rejects Petitioner's unsupported assertion in his objections that the prosecutor should be deemed aware of Davy's violations because the police were allegedly aware of her disciplinary history prior to trial. The Court further agrees with the Magistrate Judge that Petitioner has not shown that Davy's testimony had any impact on the jury's verdict.

### G. Tolbert's False Affidavit

Petitioner objects to the Magistrate Judge's finding that his claim concerning Tolbert's allegedly false affidavit was new and procedurally defaulted. The Court need not reach this issue, because it concludes that the Magistrate Judge's alternative finding that this ground lacks merit is correct. Petitioner contends that in 2006, prior to trial, Tolbert knowingly and falsely executed an affidavit claiming that she did not sign for a package from the GBI containing, among other evidence, the alleged murder weapon and a gas can.

Petitioner claims that Chris Harvey, an investigator with the District Attorney's office, is the individual that procured this false affidavit. And Petitioner contends that as a result of this deceit, his attorneys were misled and lost an opportunity to retrieve and locate critical evidence. (Objections at 74.) Tolbert later recanted this affidavit in her testimony at the state habeas hearing in 2011. Petitioner claims that this incident is more evidence of bad faith on the part of the prosecution.

Tolbert testified that she was a dispatcher and switchboard operator at the Atlanta Fire Department. (Doc. 1-17 ("Habeas Transcript") at 142.)[6] Sometimes she manned the front desk where she worked, and so would acknowledge receipt for items delivered to the department. (*Id*. at 143.) In May of 1999, Ms. Tolbert signed an acknowledgment of receipt for items of evidence arriving from GBI. Ms. Tolbert typically placed items she signed for on a credenza, and did not maintain a chain of custody. (*Id*. at 144-45.) She did not open the packages and so had no cause to know if they contained evidence or not. (*Id*. at 146.) All she did was "sign for things and pass them along." (*See id*. at 149.)

On May 17, 2006, Ms. Tolbert signed an affidavit denying she'd signed anything acknowledging the fire department's receipt of evidence in this case, stating "I was shown the document in which my forged signature was obtained and I cannot identify who signed it. Even though this was my position for the past several years, like in any receptionist position, I was relieved for lunch by other Fire Department personnel. I took vacations and I did take time off from work. I would highly suggest that a more thorough investigation is done to see who was at the front desk on that day in question to determine which person may have signed my name." (Doc. 1-25 at 1.) Her explanation for this statement is that when she spoke to a "police officer" about this matter, she stated that the 1999 signature acknowledging receipt of the evidence "looks like my signature

[6] The Court cites to the docket page numbers, not the numbers as they appear on the original state habeas transcript.

but it might not be my signature because other people sat at my desk. So that's where that came from." (Habeas Transcript, Doc. 1-17 at 155.)

She then recanted her statement in her 2006 affidavit that "I cannot identify who signed [the U.P.S. acknowledgment of receipt]," and she "made that statement" because "it [the 1999 signature on the acknowledgment of receipt] was just so unclear." (*Id*.) When asked if she misrepresented herself in signing the 2006 affidavit, she said "yes." (*Id*.) On re-direct, she testified that she may have signed an electronic acknowledgment which may have "slightly distorted" her signature, which caused her alleged confusion. On re-cross, she said "That is the only reason I said that, because of the scanner. That's the only reason I said that." (*Id*. at 159.) She then reaffirmed, "That's my signature, yes," when referring to the original 1999 acknowledgment of receipt. She finally testified that Chris Harvey directed her to prepare her affidavit. (*Id*. at 164.) This last part is troublesome, because it suggests an intentional change in position, directed by the prosecution.

Nevertheless, the Court concludes that the Magistrate Judge accurately addressed this issue on pages sixty-seven through sixty-eight of the R&R, applied the right legal standard, correctly set forth the facts based on the record before this Court, and rightly concluded that Petitioner failed to make a showing of bad faith or misconduct. Tolbert testified that she (a) had no knowledge of the contents of any particular package she received or signed for and (b) made a "simple mistake" when she claimed that her signature acknowledging receipt of

the package was not her own. And, as the Magistrate Judge noted, although Harvey procured the affidavit, Petitioner presented no other evidence that suggests bad faith. The Court finds that Harvey's involvement alone is not enough to suggest bad faith and that Petitioner is entitled to relief, even if once again, the Court understands the reasons for Petitioner's suspicions and argument that a smokescreen was created to thwart Petitioner's defense. Still, Petitioner's bad faith evidence remains ultimately speculative.

Accordingly, the Court agrees with the Magistrate Judge's finding that Petitioner has not shown misconduct or "bad faith" based on Tolbert's mistaken affidavit.

### H. The State's Alleged Mishandling of Evidence and Bad Faith

Finally, Petitioner objects to the Magistrate Judge's alternative conclusion that his independent due process claims concerning the lost and/or destroyed evidence lack merit. Petitioner maintains that over 70 pieces of evidence were lost and that the loss and/or destruction of much of that evidence was contrary to law enforcement and state policy as set forth in hundreds of SOPs and many preservation statues. Petitioner also points to the deplorable condition of the police evidence room and the aggregated official animus, deception and bad faith detailed in Petitioner's claims alleging, among other things, that the audiotape of his police interview was altered, that Davy committed misconduct, and that Tolbert signed a false affidavit. Petitioner asks the Court to consider the

cumulative effect of these errors in addressing his due process claims and submits that reasonable jurists could disagree about whether he had established bad faith.

Once again, the Magistrate Judge accurately addressed these issues in the R&R on pages fifty-nine through sixty-six and footnotes twelve through sixteen, applied the right legal standards, and correctly set forth the facts based on the record before this Court. The Court agrees with the Magistrate Judge's findings that the lost evidence was not apparently exculpatory and that, even accepting Petitioner's contention that the evidence was potentially useful, he has not demonstrated the bad faith necessary to establish a due process violation under the governing legal standards. However, the state's handling of the evidence in this case is certainly troubling.

The homicide at issue in this case occurred in December of 1996, and the criminal charges against Petitioner were initially dismissed in 1997. However, the State reopened the case approximately eight years later in November of 2005, and Petitioner was tried in late 2006. By that time, a significant amount of the evidence had been lost, including, among numerous other items, the only fingerprints collected, the items found in the victim's burnt vehicle that Petitioner's ex-wife testified belonged to Petitioner, and a Beretta handgun alleged to be the murder weapon. Even though Petitioner was not able to test or refute this lost evidence, the trial court allowed the state to rely on it at trial. Additionally, Petitioner presented evidence at the state habeas hearing to show

that the state had failed to follow various SOPs and statutes for preserving evidence, that the evidence room was disorderly, and that large bags of evidence were not inventoried. After Petitioner's trial had concluded, the state's firearms expert resigned following a customary peer review, which revealed that she had intentionally fabricated data in other cases.

While each of the state's actions and/or omissions, including non-compliance with SOPs and preservation statutes, do not independently constitute evidence of bad faith, a reasonable jurist might conclude that the cumulative pattern presented here indicates that Petitioner was denied a fair trial. *See United States v. Lopez*, 590 F.3d 1238, 1258 (11th Cir. 2009) ("Even where individual judicial errors or prosecutorial misconduct may not be sufficient to warrant reversal alone, we may consider the cumulative effects of errors to determine if the defendant has been denied a fair trial.") (citation omitted); *United States v. Thomas*, 62 F.3d 1332, 1343 (11th Cir. 1995) ("[T]he 'cumulative effect' of multiple errors may so prejudice a defendant's right to a fair trial that a new trial is required, even if the errors considered individually are non-reversible.") (citation omitted).[7] The Court also recognizes the many problems

[7] Since the number of cases finding evidence of bad faith is small, it should be no surprise that there are few if any reported opinions addressing the issue of whether a court should view each error leading to the destruction or loss of potentially useful or exculpatory evidence in isolation or if a court can look at a pattern of potential misconduct when assessing the kinds of improper motive necessary to show bad faith. At least one court has intimated that it is proper to view repeated instances of lost evidence as a whole when assessing bad faith. *United States v. Osbourn*, No. 05-M-9303-M-1, 2006 WL 707731, at *2 (D. Kan. Mar. 17, 2006) (rejecting suppression challenge when four missing videotapes over nineteen-year period not sufficient to show pattern and practice of bad faith destruction of evidence under *Youngblood* or *Trombetta*); *see also* Martina Kitzmueller, ARE YOU RECORDING THIS?: ENFORCEMENT OF POLICE

with *Youngblood*'s doctrinal focus on bad faith as opposed to the potential value of the lost evidence - something commentators have been discussing for decades. *E.g.*, Matthew H. Lembke, THE ROLE OF POLICE CULPABILITY IN LEON AND YOUNGBLOOD, 76 Va. L. Rev. 1213, 1215 (1990) ("Police bad faith should not be dispositive in destruction of evidence cases because focusing on police motivation gives inadequate protection to the rights of the defendant to fundamental fairness. Ignoring the materiality of evidence is illogical when fairness to the defendant is the concern."); Norman C. Bay, OLD BLOOD, BAD BLOOD, AND YOUNGBLOOD: DUE PROCESS, LOST EVIDENCE, AND THE LIMITS OF BAD FAITH, 86 Wash. U.L. Rev. 241, 293 (2008) ("in the two decades since *Youngblood* was decided, there are few reported cases in which a court has found bad faith.") The number of errors in the prosecution of this case is troubling. Potentially useful evidence was lost, in baffling ways that sometimes sound as if they were lifted from a Hollywood thriller (or a podcast). But given the significant legal hurdles imposed upon habeas petitioners advancing claims like those pressed herein, the Magistrate Judge reached the correct result.

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VIDEOTAPING, 47 Conn. L. Rev. 167, 192 (2014) (arguing that isolated instances of police failing to videotape or preserve recordings of police-citizen interactions do not show bad faith but that "[a] court may . . . take a different view when there is a pervasive pattern of not producing videos" under *Youngblood*.)

### III. Petitioner's Motion to Obtain and Listen to the Audiotape

Petitioner did not present this motion to the Magistrate Judge. Thus, the Court rejected it in its September 25, 2015 Order. *See Williams*, 557 F.3d at 1292. Moreover, the motion is moot, as Respondent indicates that the audiotape is not in his possession. (Doc. 48 ¶ 8.)

### IV. "Notices" of New Evidence

The Court also rejects Petitioner's efforts (made via "Notices" rather than motions) to obtain a hearing regarding purportedly new evidence about the alleged existence of two tapes of Petitioner's police interview. (Docs. 62, 65.) The Court has listened to digital recordings of the conversations via electronic links provided by Petitioner. Significant portions of the first conversation are unintelligible (as reflected by a transcript of the recording, also provided by Petitioner). (Doc. 62 at 4 (providing electronic link for first phone call); Doc. 65 at 3 (providing electronic link for second phone call).)

The presentation of this issue is a bit strange. Petitioner seeks to have the Court listen to recorded conversations between Jennifer Bland, a criminal justice student and Arkansas resident, and former Atlanta Police homicide detective Marchel Walker. Petitioner characterizes Ms. Bland as "an amateur sleuth." (Doc. 67 at 2.) Petitioner contends that the conversations show there were "in fact two tape recorders in the room the night Petitioner was interviewed by the police in 1996." (Doc. 64-3.) Petitioner contends this evidence shows that two

tapes of Petitioner's police interview do exist and that this raises significant *Brady* and *Giglio* issues.

The Court is not persuaded due to the substance of the conversation and the significant hurdles to granting an evidentiary hearing under the relevant statutes.

First, the substance. Ms. Bland appears to assume the existence of a second tape, and poses some of her questions in both a leading and compound manner, so that Walker's answers are not clear. (*See* Doc. 64-2 at 6; 8 (Bland starts her question with the assumption that "Now on these interviews, this second tape that was a cassette tape . . .".) Walker appears to testify repeatedly that he is not clear on whether or not two tapes actually existed, even as he does appear to confirm that two recording devices may have been in the interview room. (*Compare* Doc. 64-2 at 9 ("I can't remember exactly what happened.") with *id*. at 13).)

One reading of the first interview is that Walker acknowledges the existence of two recording devices, but not necessarily that a second tape exists. For example, Ms. Bland poses a (leading) question that "in 1996 with this Scott Davis case you just had two tapes, one microcassette recorder and then one of the larger style cassette tapes; right?" Walker answers "That is correct." But this comes on the heels of a conversation about whether the police department videotaped interviews at the time of the original investigation in 1996 and 1997. Walker's answer, in context, can easily be seen only as confirmation that the

department had the capability to record two tapes at once for an interview at that time, but lacked video capabilities – not that two tapes of the Davis interview actually existed. Even if such a tape did exist, there is *no* discussion of its contents, or any suggestion that the purported second tape would be any different than the initial tape. Walker offers no opinion whatsoever on the contents of the tape, and so the Court is left to speculate as to what it might mean for the case.

The second recording is more problematic for Respondent. In it, Ms. Bland asks "When you told me that you gave both of the Scott Winfield Davis interview tapes and transcripts to the prosecutors, were you sure that you gave it to the assistant district attorney, Joe Burford?" Walker responds, "Yes . . . we turned it all [in to] them." (Doc. 65 at 3.) This second recording was filed several months after the first. The second tape genuinely raises the troubling constitutional prospect that the prosecution failed to turn over a second audio tape to Petitioner's counsel that might potentially have been exculpatory and in any event, clearly had been requested by Defense counsel. But Petitioner still does not escape two central problems: the Court has no way of ascertaining the content of any second tape, and the presentation of this issue by an unaffiliated third-party who presumes the existence of a second tape and asks questions in a leading matter poses real problems for Petitioner in meeting § 2254(e)(2)'s clear and convincing standard.

The Court ultimately agrees with Respondent that Petitioner has not shown that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty." 28 U.S.C. § 2254(e)(2). Moreover, as Respondent points out, Petitioner "has given no reason why [the substance of] said recording, or the contents thereof, could not have been presented to the state courts years ago." (Doc. 63 at 3-4.) Petitioner's counsel interviewed Walker prior to the state habeas hearing, but declined to question him at the state habeas hearing about the second tape. Yet Petitioner claims to have elicited admissions of perjury or destruction of evidence from other state employees once they were under oath and testifying in the habeas hearing. Petitioner offers little insight as to why Walker's testimony was not developed in a similar way.

Nor does Petitioner establish other grounds for an evidentiary hearing. As Petitioner acknowledges, "review under 2254(d)(1) is limited to the record that was before the state court that adjudicated the claims on the merits" – which would not include the new evidence. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011).

Finally, the Court notes that instead of relying on unclear and distorted telephone recordings procured by a third party unaffiliated with this case, Petitioner's counsel could have contacted Walker, sought to elicit the same information as supposedly contained within the phone recordings, and presented

it in a more convincing and complete manner. Counsel did not do this, leaving the Court with suggestive but inadequate legal and factual grounds on which to order an evidentiary hearing. It declines to do so.

## V. Conclusion

The Court has wrestled with this case for 18 months since the substantive briefing regarding objections to the R&R and other issues was completed. The Petitioner's invocation of Marcellus's commentary in *Hamlet* that "something is rotten in the state of Denmark"[8] expresses a core element of the Petitioner's case – that the prosecution and police in bad faith manipulated evidence, withheld evidence, and recklessly lost evidence in zealous pursuit of a guilty verdict. The record of pervasive Government "loss" of evidence is the most disturbing and concrete factor here that has caused the Court to pause repeatedly in its review of a legal challenge subject to the dauntingly high habeas review standard. The Court does not minimize the potential prejudicial impact of the evidentiary gaps fostered by the actions or omissions of law enforcement personnel or the alleged false statements made by law enforcement or prosecution related personnel. But binding precedent and AEDPA standards preclude the Court from conducting the vigorous form of critical, substantive *fresh* review of the case evidence – unrestrained from the findings rendered at the state level -- that the Petitioner seeks, even if this results in a judicial determination that may rest on a faulty or flawed foundation.

[8] William Shakespeare, Hamlet, Act I, Scene 4, as quoted in Petitioner's Supplemental Notice to Consider New Evidence of Material Facts. (Doc. 65 at 9.)

In the end, having conducted a careful review of the Magistrate Judge's very thorough R&R and Petitioner's objections thereto, the Court finds that the Magistrate Judge's factual and legal conclusions were correct and that Petitioner's objections should be overruled.

For the reasons set forth above, the Court **DENIES** Petitioner's motion to obtain and listen to tape [Doc. 46], **ADOPTS AS MODIFIED HEREIN** the Magistrate Judge's Final Report and Recommendation as the opinion of this Court, and **DENIES** the instant petition, but grants a certificate of appealability to address whether Petitioner's independent due process claims are procedurally defaulted, and, if not, whether Petitioner's due process claims fail on the merits.

The Clerk is **DIRECTED** to close the case.

**IT IS SO ORDERED** 30th day of March, 2017

Amy Totenberg
United States District Judge