**No. S22A0530**

IN THE SUPREME COURT OF GEORGIA

JAQUAVIOUS REED
*Appellant*,

v.

STATE OF GEORGIA
*Appellee.*

# BRIEF OF APPELLEE THE DISTRICT ATTORNEY

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# BRIEF OF APPELLEE

**COMES NOW** the State of Georgia, through Fulton County District Attorney Fani Willis, and submits this Brief of Appellee.

## PART ONE: GENERAL INFORMATION

### INTRODUCTION

On March 15, 2010, Appellant shot at an injured man who was on his knees on the ground. The man was shot in his chest and in his shoulder. The bullet traveled through his lung, heart and liver and killed him on the scene. Appellant was subsequently indicted and was tried in front of a Fulton County jury. The jury convicted Appellant on all charges. Appellant timely filed a motion for new trial which was denied by the trial court. Appellant brings the present appeal, raising nine enumerations of error. For the reasons stated below, this Court should AFFIRM Appellant's convictions and the denial of his motion for new trial.

### SUMMARY OF ARGUMENT

Appellant raises nine enumerations of error relating to following issues: 1) sufficiency of evidence; 2) speedy appeal violation; 3) Appellant's presence at the bench conferences; 4) Appellant's first trial attorney's conflict of interest; 5) incomplete transcript; 6) *Brady* violation; 7) trial court's denial of continuance request; 8) ineffective assistance of counsel claim; and 9) sentencing. The State provides the following summary of its argument in response to Appellant's enumerations of error.

1) **Sufficiency of Evidence:** There was ample evidence, including abundant testimony from witnesses, as well as Appellant's Co-Defendant's admission, which authorized the jury to conclude that Appellant was guilty of each and every charge in the indictment.
2) **Speedy Appeal Violation:** The failure to make a showing of prejudice in an appellate delay claim [is] fatal to the claim. *Hyden v. State*, 308 Ga. 218, 226, 839 S.E.2d 506, 512 (2020). "[A]ppellate delay is prejudicial when there is a reasonable probability that, but for the delay, the result of the appeal would have been different." *Chatman v. Mancill*, 280 Ga. 253, 260-261, 626 S.E.2d 102, 110 (2006). No such prejudice has been shown here. Therefore, Appellant's speedy appeal claim fails.
3) **Appellant's Presence at the Bench:** Appellant contends that his right to be present at all critical stages of trial was violated because he was not physically present at the bench during the 26 bench conferences. This enumeration of error is without merit because Appellant fails to make the necessary arguments for his claim required under Georgia law. Additionally, Appellant acquiesced in the error he now asserts. Thus, not only is this claim without merit, but it is also waived.
4) **Appellant's first trial attorney's alleged conflict of interest:** Appellant claims that the entire Fulton County District Attorney's Office should have been disqualified from

prosecuting Appellant because his first trial counsel, attorney Edward Chase, was employed by the Fulton County District Attorney's Office subsequent to attorney Chase's representation of Appellant. Appellant does not dispute that attorney Chase did not participate directly or indirectly in the prosecution of Appellant and did not consult with any person in the District Attorney's office regarding this case. Hence, under Georgia law, the facts of this case did not warrant disqualification of the Fulton County District Attorney's Office.

5) **Incomplete Transcript:** Appellant alleges that the lack of record for the bench conferences entitles him a new trial. "The failure to record a bench conference does not constitute reversible error absent a showing of prejudice to the defendant." *Bradford* v. *State*, 299 Ga. 880, 882, 792 S.E.2d 684, 687-88 (2016). Thus, Appellant must allege specific harms he suffered from a particular error that may have occurred at trial. Here, Appellant failed to show any specific harm or prejudice as a result of incomplete transcript. Therefore, this claim is also without merit.

6) ***Brady* violation:** Appellant claims that the State violated *Brady* by not disclosing that its witnesses received reward money from Crime Stoppers. Appellant presented no evidence that any of the witnesses received any kind of reward from any organization. Therefore, this claim is wholly without merit.

7) **Trial Court's Denial of Continuance Request:** Appellant contends that the trial court should have granted continuance so that Appellant could investigate State's witness, Harriet Feggins. To support this contention, Appellant alleges that the State introduced Feggins as its surprise witness in violation of discovery statute. This allegation is factually and legally unsupported.

8) **Ineffective Assistance of Counsel Claim:** Appellant raises three ineffective assistance of counsel claims. For each of these claims, the trial counsel did not perform deficiently. Even if there were any alleged deficiencies, the claims are without legal merit. Moreover, Appellant failed to show prejudice on each claim.

9) **Sentencing:** The State agrees with Appellant that the felony murder count should have been vacated by operation of law

## STATEMENT OF THE CASE[1]

Following the March 15, 2010 deadly shooting of the victim, Antwan Curry, the State obtained an indictment charging Appellant with one count of Murder, one count of Felony Murder, one count of Aggravated Assault With Deadly Weapon, and Possession of Firearm

[1] Citations to the Record are marked "R: [appropriate page number(s)]." Citations to the Trial Transcript are marked "T.T." followed by the appropriate volume number(s) and page number(s) based on the lower court's pagination. Motion for New Trial Hearing Transcripts are marked "H.T." followed by the hearing date(s), and appropriate page number(s) based on the lower court's pagination.

During Commission of Felony. (R:4-7). On May 2, 2011, the case proceeded to a jury trial. On May 10, 2011, a jury convicted Appellant of each charge. (R: 547-549). The trial court sentenced Appellant to imprisonment for life plus five years. (R: 539-542).

On May 13, 2011, Appellant filed a timely Motion for New Trial. (R: 556-557). On January 28, 2015, the State filed a motion for a status conference. (R: 589-592). On May 16, 2019, Appellant filed Amended Motion for New Trial. (R: 632-637). On April 6, 2021, Appellant filed an additional Amended Motion for New Trial. (R: 743-744). Between July 21, 2021 and July 23, 2021, the trial court held an evidentiary hearing on Appellant's Motion. On October 21, 2021, the trial court denied Appellant's Motion for New Trial. (R: 816-841). On October 28, 2021, Appellant timely filed his Notice of Appeal. (R: 1-3). This appeal was docketed in this Court on December 30, 2021. On January 19, 2022, Appellant timely filed the Brief of Appellant. On January 20, 2022, Appellee requested a 20-day extension, which was granted by this Court. *See* Exhibit "A." Appellee timely files this brief.

**STATEMENT OF FACTS**

On March 15, 2010, victim Antwan Curry left his home in his truck to move his household items to the new home he was soon moving to with his wife and his three daughters. (T.T. Vol 3: 509-510; 512; Vol 5: 1074). On the way to his new home, he stopped by Four Seasons Apartment located at 960 New Town Circle, Atlanta,

Georgia (Fulton County). (T.T. Vol 3: 533; 626; 705). Curry regularly stopped at Four Seasons Apartment because he was the pest control contractor for the apartment. (T.T. Vol 3: 510; 705). He also stopped by Four Seasons Apartment to purchase marijuana from people who lived at the apartment. (T.T. Vol 3: 510; Vol 5: 1074).

On March 15, 2010, around 1:00 P.M., Curry made the stop at Four Seasons Apartment and purchased marijuana. (T.T. Vol 3: 510-512). While Curry was still at Four Seasons Apartment, he ran into Santron Prickett[2] (also known by his nickname "Ton"). (T.T. Vol 3: 705-706). Prickett was upset that Curry had not purchased the marijuana from him. (T.T. Vol 3: 1000-1001). A verbal argument ensued and soon turned into a physical tussle. (T.T. Vol 3: 630; 705-706; 861). During this physical altercation Prickett took out his gun and shot Curry's leg. (T.T. Vol 3: 705-706; 1000-1001). Curry, despite being injured, continued to defend himself, at which point, Prickett accidentally shot his own hand. (T.T. Vol 3: 542; 570; 706; 999-1001). After shooting himself, Prickett started to run away from Curry. (T.T. Vol 3: 633; 1001).

Appellant, Jaquavious Reed (also known by his nickname "Quay"), was near this chaotic scene. (T.T. Vol 3: 635; 720). As Prickett was running away from the scene, Prickett ordered Appellant to kill Curry. (T.T. Vol 4: 1000-1001). Appellant,

[2] Prickett is Appellant's Co-Defendant in this case.

following those orders, went over to where the injured Curry was on his knees on the ground. (T.T. Vol 3: 635-636; 639; Vol 5: 1271-1272). Appellant yelled, "Let the f*cking n*gger die," and fatally shot Curry in his chest and in his shoulder. (T.T. Vol 3: 652-654; Vol 5: 1212; 1219; 1273-1276). The bullet that hit Curry's shoulder traveled through Curry's lung, heart, and liver. (T.T. Vol 5: 1219; 1223).

About a month after the incident, Appellant was arrested. (T.T. Vol 4: 943-945). After the arrest, Appellant lied to the police that he was not at the incident location when Curry was shot, falsely stating he was at his cousin's house during the incident. (Trial Exhibit 124; T.T. Vol 6: 1349-1350; Vol 7: 1556). Appellant's statement to police was proved false when his cousin, Monique Reed, testified at trial that Appellant was not at her house at the time of the incident. (T.T. Vol 4: 839; 843).

## PART TWO: ARGUMENT & CITATION TO AUTHORITY

### I. ENUMERATION OF ERROR 1: GENERAL GROUNDS

In his first enumeration of error, Appellant contends that the evidence was insufficient to support his conviction, and that the trial court should have ordered a new trial using its discretion as the "thirteenth juror" pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21. For the reasons stated below, Appellant' claims are without merit.

#### A. THE EVIDENCE WAS SUFFICIENT TO PROVE THE GUILT OF APPELLANT BEYOND A REASONABLE DOUBT.

The standard for reviewing the sufficiency of evidence is whether the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of the charged offense. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781) (1979); *Taylor v. State*, 303 Ga. 624, 626, 814 S.E.2d 353 (2018); *Cunningham v. State*, 304 Ga. 789, 791, 822 S.E.2d 281 (2018). The resolution of conflicts or inconsistencies in the evidence, credibility of witnesses, and reasonable inferences to be made from the facts are matters for the jury to resolve. *Carter v. State*, 305 Ga. 863, 866, 828 S.E.2d 317 (2019); *Chavers v. State*, 304 Ga. 887, 891, 823 S.E.2d 283 (2019). "As long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the State's case, the jury's verdict will be upheld." *Boyd v. State*, 306 Ga. 204, 207, 830 S.E.2d 160 (2019); *Jones v. State*, 304 Ga. 594, 598, 820 S.E.2d 696 (2018). The reviewing court's role is limited:

> "In assessing whether the evidence was sufficient to support [the defendant's] convictions, we neither weigh the evidence nor judge the credibility of witnesses, but determine only whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

*Dorsey v. State*, 327 Ga. App. 226, 227—228, 757 S.E.2d 880 (2014) (citations omitted).

Here, the evidence is legally sufficient to sustain the convictions, and it is sufficient to authorize a rational jury to find beyond a reasonable doubt that Appellant is guilty of the crimes of which he was convicted. Many individuals witnessed the incident and testified at trial. (T.T. Vol 3: 538-544; 630-635; 705-707; Vol 4: 858-862). There were at least four witnesses (Willie Wilson, Laketa Smith, Keon Burns, and Bianca Haney) who saw Co-Defendant Prickett fight and shoot the victim. (T.T. Vol 3: 538-544; 630-635; 705-707; Vol 4: 858-862). Additionally, two witnesses, Willie Wilson and Harriet Feggins, saw Appellant shoot and kill the victim. (T.T. Vol 3: 652-654; Vol 5: 1212; 1219; 1273-1276).

Moreover, Prickett's girlfriend testified that Prickett admitted to her that he shot the victim for the missed drug deal opportunity and that he ordered Appellant to murder the victim. (T.T. Vol. 4: 1000-1001). Accordingly, there was ample evidence authorizing the jury to conclude that Appellant was guilty of each and every charge in the indictment. Therefore, the trial court properly found that "the evidence was sufficient to authorize a rational trier of fact to find Appellant guilty beyond a reasonable doubt as to all counts." (R: 816-841).

**B. THE TRIAL COURT PROPERLY DECLINED TO EXERCISE ITS THIRTEENTH JUROR DISCRETION.**

"Even when the evidence is legally sufficient to sustain a conviction, a trial judge may grant a new trial if the verdict of

the jury is contrary to the principles of justice and equity, or if the verdict is decidedly and strongly against the weight of the evidence." *White v. State*, 293 Ga. 523, 524, 753 S.E.2d 115, 116 (2013) (citation omitted). In exercising this discretion, "the trial judge must consider some of the things that she cannot when assessing the legal sufficiency of the evidence, including any conflicts in the evidence, the credibility of witnesses, and the weight of the evidence." *Id.* at 115, 116-17. Moreover, this discretion "should be exercised with caution [and] invoked only in exceptional cases in which the evidence preponderates heavily against the verdict," *Alvelo v. State*, 288 Ga. 437, 438 (1) (704 SE2d 787) (2011). "This Court presumes, in the absence of affirmative evidence to the contrary, that the trial court properly exercised its discretion [as the 'thirteenth juror'] pursuant to OCGA §§ 5-5-20 and 5-5-21." *Hodges v. State*, 309 Ga. 590, 592, 847 S.E.2d 538, 540 (2020) (cit omit).

Here, the verdict is not: 1) "decidedly [or] strongly against the weight 0f the evidence"; 2) "contrary to...the principles of justice and equity"[3]; nor 3) "sufficiently close so as to warrant the court to exercise its discretion to grant a new trial." This is not a case where the "evidence preponderates heavily against the verdict[4];" rather, this is a case in which Appellant's guilt

[3] OCGA § 5-5-20
[4] OCGA §5-5-21

was proven with overwhelming evidence leaving no doubt as to Appellant's identity and the crimes he committed. Accordingly, the trial court properly declined use of its thirteenth juror discretion to grant Appellant a new trial. (R: 816-841).

**II. ENUMERATION OF ERROR 2: THERE WAS NO SPEEDY APPEAL VIOLATION.**

In his second enumeration of error, Appellant contends that he was denied due process in his ability to appeal because there was an inordinate delay in the appellate process. (Brief of Appellant, pp. 5; 13; 17). Although State agrees with Appellant in that the length of the delay may have been excessive, this alone cannot prove that Appellant was denied due process. *Chatman v. Mancill*, 280 Ga. 253, 257, 626 S.E.2d 102, 108 (2006) ("not every delay in the appeal of a case, even an inordinate one,' implicates an appellant's due process rights"). Instead, this Court must review the four factors (which includes length of the delay) as held in *Chatman v. Mancill*, 280 Ga. 253, (2006).

In *Chatman v. Mancill*, 280 Ga. 253, 256-260, 626 SE2d 102, 102-105, (2006), the Georgia Supreme Court determined that constitutional speedy appeal claims in criminal cases in which a death sentence was not imposed should be evaluated by application of the following "modified Barker factors."

> length of the delay, reason for the delay, defendant's assertion of his right, and prejudice, i.e., whether the delay prejudiced the defendant's ability to assert his arguments on appeal and, if so, whether the

> delay prejudiced the defendant's defenses in the event of a retrial or resentencing.

Citing to *Lord v. State*, 304 Ga. 532, 542, 820 S.E.2d 16, 26 (2018); *see also Barker v. Wingo*, 407 U. S. 514 (92 SCt 2182, 33 LE2d 101) (1972). The State therefore follows the analytical framework formulated in *Chatman* and presents its argument as follows:

**(1) Length of Delay:**

There was a 10-year delay between Appellant's conviction and the trial court's ruling on motion for new trial. The State concedes that this was a lengthy delay and weighs in Appellant's favor. *See Loadholt v. State*, 286 Ga. 402, 406, 687 SE2d 824, 828,(2010) (nine-year delay was excessive). However, "[m]ere passage of time, standing alone, does not compel a finding of denial of due process." *Obiozor v. State*, 213 Ga. App. 523, 524 (445 SE2d 553) (1994).

**(2) Reason for the Delay:**

> Although strategic delays by the State are weighted heavily against the State, '[a] … neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.'

*Hyden v. State*, 308 Ga. 218, 224, 839 S.E.2d 506, 511 (2020) (cit omit). The trial court found that delay in this case was due to State's negligence, and not from an intentional or strategic delay

caused by the State. (R: 816-841). This finding is supported by the record. *See infra.*

Appellant was sentenced to life in prison on May 11, 2011. (R:541-542). On January 28, 2015, the State filed a motion for a status conference and scheduling concerning the Appellant's Motion for New Trial. (R: 589-592). On May 27, 2015, the court reporter filed the eight volume trial transcripts. (T.T. Vol 1:1). Appellant filed his Amended Motion for New Trial on May 16, 2019. (R:632-637). On April 5, 2021, Appellant filed an additional Amended Motion for New Trial on behalf of Appellant. (R:743-774). The trial court held a hearing on Appellant's Motion for New Trial between July 21, 2021, and July 23, 2021. (R:816-841).

Nothing in the record suggests that the State intentionally delayed the process. Instead, the record is unclear as to what caused the delay. It is well established that "where no reason appears for a delay, [the court] must treat the delay as caused by the negligence of the State." *Spradlin v. State*, 262 Ga. App. 897, 901, 587 S.E.2d 155, 160 (2003). A delay caused by the negligence by the State is "weighted less heavily" than a strategic delay. *Hyden,* at 224. Therefore, this factor should weigh against the State, but "less heavily". *Id.*

**(3)Defendant's Assertion of His Right:**

The State acknowledges that Appellant did attempt to move the process along from time to time by writing *pro se* letters to the trial court.

**(4) Prejudice:**

In a speedy appeal claim, "prejudice, unlike in the speedy trial context, is not presumed but must be shown." *Hyden*, at 225. "Appellate delay is prejudicial when there is a reasonable probability that, but for the delay, the result of the appeal would have been different." *Lord v. State*, 304 Ga. 532, 542, 820 S.E.2d 16, 26 (2018)." Here, Appellant failed to show that there was a reasonable probability that the result of the appeal would have been different if not for the delay.

Appellant asserts that the delay: (1) prevented his trial counsel from providing meaningful testimony for his ineffective assistance claims due to lack of memory; and (2) prevented the 26 missing bench conferences from being recreated. (Brief of Appellant, p. 22-23). These are bare assertions, not proof of prejudice. See *Loadholt v. State*, 286 Ga. 402, 406, 687 S.E.2d 824, 828 (2010) (holding that a bare assertion that the passage of time results in prejudice is insufficient to demonstrate that the delay has prejudiced a defendant's appeal or that the result of the appeal would have been different but for the delay).

Appellant fails to show that his trial counsel would have been able to provide additional testimony helpful to his

ineffective claims or would have been able to recreate the 26 missing bench conferences if she had been given opportunity to testify earlier. Likewise, Appellant fails to explain to this Court how his ineffective claims would have succeeded if his trial counsel had better memory of his trial. Moreover, Appellant completely fails to offer argument as to how recreating the 26 missing bench conferences would have granted him a motion for new trial.

In order for Appellant to prevail in his speedy appeal claim, he must "offer [a] **specific evidence** to show that the delay has prejudiced his appeal." *Loadholt*, at 406, (emphasis added). Likewise, this Court has previously held that "generalized speculation about the delay's effect on witness memories and evidence is not the kind of 'specific evidence' required to show prejudice in the appellate-delay context." *Veal v. State*, 301 Ga. 161, 168, 800 S.E.2d 325, 332 (2017) (citing to *Payne v. State*, 289 Ga. 691, 695, 715 S.E.2d 104, 108 (2011)).

Even when the delay resulted in death of certain witnesses, this Court held that the death of the witnesses alone could not establish prejudice. *Id.* Therefore, even when a witness has died or disappeared – ergo, there is not even a testimony available – "[that] alone, is not sufficient to show prejudice at the retrial." *Threatt v. State*, 282 Ga. App. 884, 889-90, 640 S.E.2d 316, 321 (2006). Instead for Appellant to succeed in this claim, "there

must be some *correlation between the witnesses' death or unavailability and the delay*, ***and*** *[defendant] must show that the missing witness would have supplied material evidence for the defense." Id.*

Here, Appellant not only fails to prove that there is correlation between trial counsel's lack of memory and the delay, but also fails to identify what material evidence the trial counsel could have supplied in his favor. Moreover, Appellant utterly fails to establish what the substance of his trial counsel's testimony would have been (had the hearing been held earlier), let alone its admissibility. *Id.*

Furthermore, "[w]hile the unavailability of material witnesses would create almost certain prejudice in a speedy trial analysis regarding a first trial on the merits, the same is not necessarily true when retrials are concerned." *Id.*, at 891. Therefore, again, even if Appellant were to establish that his trial counsel was a material witness for his appeal, that alone would not show prejudice. For instance, in *Veal v. State,* the defendant contended that he had been prejudiced because his trial counsel had passed away and could not testify at the motion for new trial hearing. *Veal,* at 168. However, because the defendant could not point to any instances in which his trial counsel was ineffective, this Court held that the delay and the unavailability of his trial counsel did not prejudice the defendant. *Id.*

Here too, the fact that the trial counsel lacked memory of certain events during the trial alone did not prejudice Appellant and Appellant failed to show that his ineffective claims would have been successful had the trial counsel retained better memory of the events at the trial. Hence, Appellant fails to show prejudice.

This Court has repeatedly held that "there can be no prejudice in delaying a meritless appeal." *Davis v. State,* 307 Ga. 625, 633, 837 S.E.2d 817, 824 (2020); *Loadhold*, at 406; *Simmons v. State*, 291 Ga. 664, 668, 732 S.E.2d 65, 69 (2012); *Whitaker v. State*, 291 Ga. 139, 145, 728 S.E.2d 209, 214 (2012). As argued by the State, *infra,* Appellant's ineffective claims and trial court error claims are meritless. Because Appellant's enumerations of error are meritless, he has failed to establish a "reasonable probability that, but for the delay, the result of [his] appeal would have been different." *Hyden*, at 227. This well-established law also applies to Appellant's prejudice claim regarding the 26 bench conferences allegedly missing from the trial transcript. As the State argues below, Appellant has not demonstrated any prejudice resulting from lack of the transcription of the 26 bench conferences. Therefore, again, Appellant has not made the requisite showing of prejudice.

In its recent opinion, this Court ruled "that the failure to make this showing [of prejudice] in an appellate delay claim [is]

fatal to the claim, **even when the other three factors weigh in the appellant's favor.**" *Hyden*, at 226 (emphasis added). Accordingly, Appellant's speedy appeal claim is without merit and the trial court did not abuse its discretion by denying this claim. *See Hyden*, at 224 ("In evaluating a trial court's decision to deny a speedy appeal claim, we must accept the factual findings of the trial court unless they are clearly erroneous, and we must accept the ultimate conclusion of the trial court unless it amounts to an abuse of discretion.") (Citation and punctuation omitted.)

## III. ENUMERATION OF ERROR 3: THE TRIAL COURT PROPERLY DENIED APPELLANT'S CONSTITUTIONAL PRESENCE CLAIM.

In his third enumeration of error, Appellant contends that his right to be present at all critical stages of trial was violated because he was not physically present at the bench during the 26 bench conferences. This enumeration of error is without merit because Appellant fails to make necessary arguments for his claim. As the State's recitation of the law below will show, the law regarding this issue requires Appellant to provide specific argument as to which bench conferences were critical and how he could have meaningfully participated during those critical stages. Appellant fails to make those arguments. Additionally, Appellant acquiesced in the error he asserts. Thus, not only is this claim without merit, but also it is waived.

### A. APPELLANT'S RIGHT TO BE PRESENT WAS NOT VIOLATED.

"This Court has long held that the Georgia Constitution guarantees criminal defendants the right to be present, and see and hear, all the proceedings which are had against him on [his] trial before the [c]ourt." *Champ v. State*, 310 Ga. 832, 839, 854 S.E.2d 706, 713 (2021) (citation and punctation omitted). However, this Court has also repeatedly held that this right does not extend to situations "where the defendant's presence bears no relation, reasonably substantial, to the fullness of his opportunity to defend against the charge, and thus would be useless, or the benefit but a shadow." *Id.*, at 840, (citation and punctuation omitted). "Such situations include bench conferences that deal with questions of law involving essentially legal argument about which the defendant presumably has no knowledge, or with procedural or logistical matters." *Id.*

As noted by this Court in *Heywood v. State*,

> "[m]ost bench conferences involve questions of law and consist of essentially legal argument about which the defendant presumably has no knowledge, and many other bench conferences involve logistical and procedural matters."

*Heywood v. State*, 292 Ga. 771, 774, 743 S.E.2d 12, 16 (2013). This trial was no exception. The 26 bench conferences all dealt with either a question of law or a logistical/procedural matter. (T.T. Vol 1: 90-97; 115-125; 125-127; Vol 2: 197-208; 402-412; 425-433; Vol 3: 512-522; 525-535; 592-602; 660-671; 671-681; 685-695; Vol 4; 830-838; 891-900; 900-910; 961-970; Vol 5: 1101-1116; 1151-

1161; 1177-1187; 1195-1206; 1230-1241; 1253-1263; Vol 6: 1347-1355; 1356-1365; 1381-1390; 1440-1451; 1458-1465; Vol 7: 1587-1598; 1633-1643; 1641-1661). Appellant does not refute this fact. (Brief of Appellant, pp. 24-33). Appellant has failed to present evidence that any of the bench conferences about which he complains were the sort that implicated his right to be present. *See Nesby v. State*, 310 Ga. 757, 759, 853 S.E.2d 631, 633 (2021) ("mere speculation as to what may have been discussed at the conferences cannot serve as the basis for the grant of a new trial.") (Citation and punctuation omitted).

Although bench conferences from this trial were not recorded, the portions of the trial transcript immediately prior to and immediately after the unrecorded bench conferences show that each of those conferences dealt with either a question of law or a logistical/procedural matter. (T.T. Vol 1: 90-97; 115-125; 125-127; Vol 2: 197-208; 402-412; 425-433; Vol 3: 512-522; 525-535; 592-602; 660-671; 671-681; 685-695; Vol 4; 830-838; 891-900; 900-910; 961-970; Vol 5: 1101-1116; 1151-1161; 1177-1187; 1195-1206; 1230-1241; 1253-1263; Vol 6: 1347-1355; 1356-1365; 1381-1390; 1440-1451; 1458-1465; Vol 7: 1587-1598; 1633-1643; 1641-1661). Moreover, Co-Defendant Prickett's trial counsel testified that he does not remember anything other than legal or logistical matters being discussed during the 26 bench conferences. (H.T. 135-137). Therefore, Appellant's right to be present was not violated.

Even if, *in arguendo*, this Court were to assume that some of the bench conferences – i.e. the bench conferences that occurred during *voir dire* – did not exclusively deal with legal or procedural matters, Appellant's right was still not violated. A defendant's right to be present is violated when his presence "bears relation to the fullness of his opportunity to defend against the charge." *Champ* at, 840. Here, at the motion for new trial hearing, Appellant testified that he had active discussions with his trial counsel during the jury selection, and he was able to voice his opinion as to who he wanted to strike as potential jurors. (H.T. July 21, 2021, pp. 99-102).

Appellant further testified that there was only one thing he could contribute to his trial that he believed would make difference: telling his trial counsel that he was not involved in the murder. (H.T. July 21, 2021, pp. 99-102). Appellant testified he was able to convey this information to his trial counsel. (H.T. July 21, 2021, pp. 99-102). Appellant unequivocally testified that he did not possess any other knowledge that would have made a difference in the trial. (H.T. July 21, 2021, pp. 99-102). Finally, Appellant's trial counsel testified that she would have sought out information from Appellant if she thought Appellant possessed information that would be helpful for her argument at the bench conferences. (H.T. July 21, 2021, pp. 61; 65-66). Therefore, his presence at bench conferences bore "no relation, reasonably

substantial, to the fullness of his opportunity to defend against the charge." *Heywood v. State*, 292 Ga. 771, 774, 743 S.E.2d 12, 16 (2013).

In this Court's recent decision, it reaffirmed its long standing holding that "the constitutional right to be present does not extend to situations where the defendant's presence would be useless, or the benefit but a shadow." *Nesby v. State*, 310 Ga. 757, 759, 853 S.E.2d 631, 633 (2021). Here, Appellant's presence would have been useless; hence, his constitutional right to be present was not violated. Accordingly, the trial court properly denied this claim.

**B. APPELLANT ACQUIESCED HIS RIGHT TO BE PRESENT DURING THE BENCH CONFERENCES.**

The following argument applies, only if, this Court finds that Appellant successfully proved that there were bench conferences in which Appellant's right to be present was implicated. In his Brief, Appellant does not identify a single bench conference which may have implicated his right. However, Appellant cites to a single case, *Ward v. State*, 288 Ga. 641, 706 S.E.2d 430,(2011), which dealt with a defendant's right to be present during jury selection, and Appellant attempts to apply *Ward* to the case at bar. Therefore, the State will address the bench conferences that were held in this case during jury selection of this trial.

In the case at bar, there were total of six bench conferences which may have dealt with jury selection – such as hardships and strikes for causes. (T.T. Vol 1: 90-97; 115-125; 125-127 Vol 2: 197-208; 402-412; 425-433). "[P]roceedings at which the jury composition is selected or changed are critical stages at which the defendant is entitled to be present." *Gobert v. State,* 311 Ga. 305, 310, 857 S.E.2d 647, 652 (2021) (cit omit). "However, 'the right to be present belongs to the defendant, and he is free to relinquish it if he so chooses.'" *Id.,* (cit omit). Here, Appellant relinquished his right to be present during those bench conferences.

Assuming, *in arguendo,* that the six bench conferences implicated Appellant's right to be present, the evidence shows that Appellant acquiesced his right when his trial counsel made no objection and Appellant thereafter remained silent. *See Brewner v. State,* 302 Ga. 6, 11-12, 804 S.E.2d 94, 100 (2017) (defendant acquiesced in trial court's dismissal of a prospective juror in his absence where he was made aware of what had occurred, his trial counsel indicated no objection, and the defendant never voiced disagreement during trial with either the trial court's decision or his counsel's conduct).

The record shows that Appellant sat at the defense table and observed all of the trial proceedings throughout the entirety of the trial. (H.T. July 21, 2021, p. 60-61). The trial court's

decision and counsel's argument relating to jury selection were discussed and announced in open court; thus, Appellant was in a position to hear the trial court go through entire jury selection. (T.T. Vol 1: 90-97; 115-125; 125-127; Vol 2: 235-242; 417-433). Moreover, at the Motion for New Trial hearing, Appellant testified that his counsel asked for his input on who he wanted to pick for jurors and who he wanted to strike. (H.T. July 21, 2021, pp. 99-102). Likewise, he testified that he had active role in jury selection. (H.T. July 21, 2021, pp. 99-100). Additionally, Appellant's trial counsel unequivocally testified that if Appellant had inputs during jury selection, she would have listened and would have tried to reflect his input. (H.T. July 21, 2021, p. 61). However, neither Appellant nor his trial counsel ever objected to his absence from the bench. (H.T. July 21, 2021, pp. 51-52). Therefore, even assuming Appellant's right to be present could have been implicated, he acquiesced in his own absence from the bench conferences. *See Nesby v. State,* 310 Ga. 757, 853 S.E.2d 631, (2021) (defendant acquiesced in his own absence from the conference, as he was in the courtroom at the defense table during voir dire and neither voiced disagreement with the trial court's decision or his counsel's conduct, nor did he ask for any explanation); *Murphy v. State,* 299 Ga. 238, 241, 787 S.E.2d 721, 725 (2016) ("[a]cquiescence may occur when counsel makes no objection and a defendant remains silent after he or she is made

aware of the proceedings occurring in his or her absence."); *Young v. State*, 312 Ga. 71, 79, 860 S.E.2d 746, 763 (2021) (holding that defendant acquiesced in the waiver of his presence that was made by his counsel because neither defendant nor his counsel ever objected to defendant's absence from the bench, and because defendant was present throughout all of the *voir dire*, and he was present in the courtroom during each of the bench conferences at issue, and the purpose of each was obvious from its inception or announced afterward by the trial court). Accordingly, the trial court properly found that Appellant acquiesced his right to be present. (R:816-841).

## IV. ENUMERATION OF ERROR 4: DISQUALIFICATION OF DISTRICT ATTORNEY'S OFFICE WAS NOT NECESSARY.

In his fourth enumeration of error, Appellant claims that the entire Fulton County District Attorney's Office should have been disqualified from prosecuting Appellant because his first trial counsel, attorney Edward Chase, was employed by the Fulton County District Attorney's Office after attorney Chase had represented him during the initial phase of his case. This claim is without merit and not supported by law.

Under Georgia law,

> There are two generally recognized grounds for disqualification of a prosecuting attorney. The first such ground is based on a conflict of interest, and the second ground has been described as 'forensic misconduct' … A conflict of interest has been held to arise where the prosecutor previously has represented the defendant with

> respect to the offense charged, or has consulted with the defendant in a professional capacity with regard thereto[.]

*Williams v. State*, 258 Ga. 305, 314-15, 369 S.E.2d 232, 238-39 (1988); *Serdula v. State,* 344 Ga. App. 587, 594, 812 S.E.2d 6, 12 (2018). "In applying these standards, the reversal of a conviction due to such a conflict of interest requires more than a theoretical or speculative conflict." *Ventura v. State*, 346 Ga. App. 309, 311, 816 S.E.2d 151, 154 (2018)." "An actual conflict of interest must be involved." *Id.*

The State does not dispute that attorney Chase left his employment with the Fulton County Public Defender's Office while he was representing Appellant and took a position with the Fulton County District Attorney's Office. However, unlike the private sector,

> where no partner or associate of a firm may represent a client with whom any of the other attorneys have a conflict of interest, **an entire government office is not necessarily disqualified from a case due to the conflict of an individual attorney.** Vicarious disqualification of a government department is neither necessary nor wise, and we **instead look to the individual attorney to screen for any direct or indirect participation in the case.**

*Arnold v. State*, 253 Ga. App. 387, 389, 559 S.E.2d 131, 133 (2002) (emphasis added); Burns v. State, 274 Ga. App. 687, 690, 618 S.E.2d 600, 603 (2005).

In *Arnold v. State*, the defendant contended that the entire Houston County District Attorney's office should have been

disqualified from prosecuting his case because his former counsel, Gerald Henderson, left the Houston Public Defender's Office to work for the Houston County District Attorney's Office. *Arnold*, at 387-88. Because the evidence revealed that attorney Henderson did not participate in prosecuting the defendant in any way following his departure from the public defender's office, the Georgia Court of Appeals ruled that it was not necessary for the entire Houston County District Attorney's Office be disqualified from prosecuting the defendant. Id., at 389; *See also*, *Fennell v. State*, 271 Ga. App. 797, 802, 611 S.E.2d 96, 101-02 (2005) (defendant failed to show a reasonable possibility that the outcome of his trial would have been different had his counsel discovered that the prosecutor had previously represented defendant.)

In the case at bar, attorney Chase did not participate directly or indirectly in the prosecution of Appellant, and he did not consult with any person in the district attorney's office regarding this case. (H.T. July 21, 2021, pp. 12-37). The evidence showed that once he was employed with the Fulton County District Attorney's Office, he was assigned to a different division than the division that handled the prosecution of Appellant. (H.T. July 21, 2021, pp. 12-37). At the motion for new trial hearing, Attorney Chase unequivocally testified that he did not discuss or disclose any information regarding Appellant or any of his prior clients to any of the members of the Fulton County District Attorney's Office.

(H.T. July 21, 2021, pp. 12-37). Likewise, he testified that his involvement in Appellant's case before he was employed by Fulton County District Attorney's Office was minimal. (H.T. July 21, 2021, pp. 12-37). Hence, the facts of this case did not warrant the recusal or disqualification of Fulton County District Attorney's Office.

## V. ENUMERATION OF ERROR 5: APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED DUE TO LACK OF A RECORD OF THE BENCH CONFERENCES

Appellant alleges that the lack of record for the bench conferences entitles him a new trial. It is undisputed that the trial transcript for the case at bar does not contain the conversations held during the bench conferences. The court reporter simply denoted those conversations as "Bench Conference," and the reporter did not keep a record of the content of the conversations. It is also true that the parties in the present case have stipulated that the missing record cannot be recreated. (R: 815). For these reasons ***alone***, Appellant contends that he is irreparably harmed. (Brief of Appellant, pp. 37-40). Without specifying how he was harmed, he merely states that he was prejudiced because he *could have* missed an opportunity to raise additional *potential* claims that *may* exist in the conversations that happened at the bench but were not recorded. (Brief of Appellant, pp. 37-40). Once again, Appellant attempts to use pure speculation as the basis for requesting a new trial.

It is well established that "[w]here all or an important portion of the original verbatim transcript of a trial is lost and the transcript reconstructed pursuant to OCGA § 5-6-41 (f) and (g) is manifestly inadequate, an appellant is not required to specify how he has been harmed by a particular error that may have occurred at trial but is now buried in unrecorded history." *Gadson v. State*, 303 Ga. 871, 878, 815 S.E.2d 828, 835 (2018). But such is not the case for the trial transcript in the case at bar: the only portion missing in this trial is the bench conferences. "The failure to record a bench conference does not constitute reversible error absent a showing of prejudice to the defendant." *Bradford* v. *State*, 299 Ga. 880, 882, 792 S.E.2d 684, 687-88 (2016). Thus, Appellant must allege specific harms he suffered from a particular error that may have occurred at trial. As shown below, this rule is well established in Georgia.

In *Ruffin v. State*, 283 Ga. 87, this Court held that the appellant was not entitled to a new trial because he failed to allege specific harm from the absence of a transcript of *voir dire*, opening statements, bench conferences, and the polling of the jury. *Ruffin v. State*, 283 Ga. 87, 88 (656 SE2d 140) (2008). Similarly, in *Smith v. State*, this Court held that the appellant's general assertion of harm due to omission of general *voir dire* from a transcript was insufficient because he failed "to show how he was harmed or to raise any issue which this Court is unable to

adequately review because of skips in the record." *Smith v. State,* 251 Ga. 229, 230 (304 SE2d 716) (1983). Because Smith did not object "to the conduct of voir dire, but only to its omission of record," such was not sufficient allegation of harm for the court to grant a new trial. *Id.* Furthermore, in *Marshall v.* State, the complete *voir dire* questioning was not transcribed for the record, but the objections made by counsel during the *voir dire*, as well as the court's rulings on those objections, were transcribed. *Marshall* v. State, 239 Ga. 101, 103, 236 S.E.2d 58, 60 (1977). Marshall argued, without citing to specific instance of prejudice or harm, that the absence of the record prejudiced him and such was a reversible error. *Id.* In such instance, this Court held that the record as it stands was sufficient to protect any challenge that defendant might have, and because defendant has failed to show any harm or prejudice, the omission of record was not a reversible error. *Id.*

Here too, Appellant makes mostly a general assertion that he may have been harmed by the missing record and fails to identify which missing bench conference transcript prejudiced his appeal — with the exception of one passing reference in his brief to a bench conference which occurred after his Co-Defendant's trial counsel asked to approach the bench during the State's closing. (Brief of Appellant, pp. 35-40). However, this one portion he identified is not followed by any argument or explanation as to how or why he

was prejudiced. Because Appellant has completely failed to specify any harm he suffered, the omission of the bench conference record is not a reversible error.

Additionally, similar to the transcript in *Marshall*, even though the trial transcript in this case does not contain conversations that occurred during the bench conferences, it does contain the objections made by counsel before the conferences, the court's ruling on those objections, testimony offered just before the bench conferences that led to the conferences, and the corrections made to those testimony after the conferences. Therefore, the current trial transcript is sufficient to protect any challenge Appellant may have in this case. Accordingly, the trial court properly denied this claim. (R:816-841).

**VI. ENUMERATION OF ERROR 6: THERE WAS NO BRADY VIOLATION.**

Appellant claims that the State violated *Brady*[5] by not disclosing "that any of [the witnesses] were given reward money [from Crime Stoppers]." (Brief of Appellant, p. 44). Appellant identifies three witnesses at issue- Willie Wilson, Keon Burns and Lakeyta Smith. (Brief of Appellant, p. 44). Appellant alleges that omission of this evidence was a suppression of impeachment evidence which they could have used to impeach the witnesses, and such "evidentiary suppression undermined confidence in the outcome of the trial." (Brief of Appellant, p. 43).

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

To prevail on a Brady claim, a defendant is required to prove the following four factors:

> (1) the State, including any part of the prosecution team, possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) a reasonable probability exists that the outcome of the trial would have been different"

*State v. James*, 292 Ga. 440, 441, 738 S.E.2d 601, 603 (2013). Appellant fails to meet any of the factors required: (1) there is no evidence that the witnesses received any reward money; (2) there is no evidence that the prosecution knew of a reward payment and failed to reveal it to the defense; (3) Appellant was made aware of the reward offer; and (4) Appellant failed to show that this evidence was material. Therefore, Appellant's claim *Brady* claim is wholly without merit. *See State v. James*, 292 Ga. 440, 441, 738 S.E.2d 601, 603 (2013).

**A. THE STATE DID NOT POSSESS EVIDENCE FAVORABLE TO APPELLANT.**

Although Appellant claims in its Brief that the witnesses received reward money, Appellant has no proof to support that claim. Likewise, the State is not aware of any reward money received by the witnesses. Appellant's contention is purely based on speculation and conjecture. These speculations alone are insufficient to establish that there was a reward given to witnesses and that the State had knowledge of and failed to disclose it prior to trial.

To the extent that such alleged evidence exists, Appellant has failed to show that the State possessed the evidence. Appellant's allegation that the State must have known about the alleged evidence rests upon his faulty legal conclusion that Crime Stoppers is part of the prosecution team. "*Brady* and its progeny apply to evidence possessed by a district's '**prosecution team** which includes both investigative and prosecutorial personnel." *Brown v. State*, 261 Ga. 66, 69, 401 S.E.2d 492, 495 (1991) (cit omit) (emphasis added). The prosecution team includes "the prosecutor **or anyone over whom the prosecutor has authority.**" *Black v. State,* 261 Ga. App. 263, 267, 582 S.E.2d 213, 217 (2003) (emphasis added); *see also, Brown v. State*, 261 Ga. 66, 69, 401 S.E.2d 492, 495 (1991). Appellant failed to provide any evidence that this District Attorney's Office had any authority or control over Crime Stoppers. Therefore, Crime Stoppers is not part of the prosecution team. Accordingly, if Crime Stoppers possessed possible alleged evidence claimed by Appellant, such does not equate to the State's possessing the evidence.

**B. APPELLANT COULD HAVE OBTAINED THIS ALLEGED EVIDENCE (IF IT EXISTS) WITH REASONABLE DUE DILLIGENCE.**

Just as the State, Appellant, through his trial counsel, possessed subpoena power. If the alleged evidence existed, Appellant could have obtained the evidence by issuing subpoena *Duces Tecum* to Crime Stoppers – which is the same method the State would have employed to obtain information from a non-profit

organization. Accordingly, the Defendant could have employed due diligence to obtain this alleged evidence.

**C. THE STATE DID NOT SUPPRESS EVIDENCE.**

To the extent that such alleged evidence exists, Appellant failed to show that the evidence was suppressed by the State. The record, rather, shows that the State provided all information that it knew regarding the reward, and that Appellant was aware of the reward offered by Crime Stoppers. (T.T. Vol 3: 636; 638; 726; 742; Vol 4: 1012). During the cross-examination of Wille Wilson and Keon Burns, Appellant's trial counsel attempted to use the fact that a Crime Stopper reward had been offered to impeach the witnesses. (T.T. Vol 3: 636; 638; 726; 742; Vol 4: 1012). Although her effort did not get favorable answers for Appellant, the failed attempt at impeachment does not prove that the State suppressed evidence. Nothing in the evidence suggests that the State withheld information regarding the reward payment.

**D. THERE IS NO REASONABLE PROBABILTIY THAT THE TRIAL OUTCOME WOULD HAVE BEEN DIFFERENT.**

"[I]mpeachment evidence must be material before its suppression justifies a new trial." *McClendon v. State*, 347 Ga. App. 542, 552, 820 S.E.2d 167, 175 (2018). "The suppression of impeachment evidence is material when a reasonable probability exists that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." *Strickler v. Greene*, 527 U.S. 263, at 289 (1999) (cit omit). "A

'reasonable probability' exists if the State's suppression undermines confidence in the verdict." *McClendon v. State*, 347 Ga. App. 542, 552, 820 S.E.2d 167, 175 (2018) (cit omit). In this case, any supposed suppression does not undermine the confidence in the outcome and overall fairness of the trial.

Eyewitness **Willie Wilson's** version of events has been consistent since the first day he notified the police of the incident. (T.T. Vol 3: 635-636). His initial phone call to the police was before Crime Stoppers offered any reward to the public, and the information he provided in this initial call is consistent with his trial testimony (T.T. Vol 5: 1120). Therefore, whether or not he ultimately received the Crime Stoppers reward, it clearly had no effect on his testimony. As for **Keon Burns**, he made clear during his trial testimony that his statements to the police were motivated by the reward (T.T. Vol 3: 704). As such, his motivation whether he actually received the reward or not, was expressed without any disguise. Finally, **Lakeyta Smith's** testimony, even if it she was paid by Crime Stoppers, would have not changed the outcome of the trial because even discounting her testimony completely, there were other independent eyewitnesses to the murder who testified to Appellant's involvement in the victim's murder. (T.T. Vol 3: 652-654; Vol 4: 1000-1001; Vol 5: 1212; 1219; 1273-1276). Accordingly, Appellant's *Brady* claim fails to satisfy

the four prong *Brady* test, and the trial court properly denied this claim.

## VII. ENUMERATION OF ERROR 7: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST FOR A CONTINUANCE.

Appellant contends that the trial court erred by not granting Appellant's request for continuance so that Appellant could investigate State's witness, Harriet Feggins. To support this contention, Appellant alleges that the State introduced Harriet Feggins as a surprise witness against the discovery rule, and the trial court failed to follow the discovery rule and exclude the State's witness, or, in the alternative, provide a continuance for Appellant's trial counsel to investigate this witness. This allegation is factually and legally unsupported.

### A. Factual Background

Harriet Feggins was a witness first identified by Co-Defendant Prickett in his witness list. (T.T. Vol 5: 1050-1051; Vol 6: 1331; R:477-484). On April 27, 2011, five days prior to trial, Prickett served his witness list and witness statements to the State which included the name of Harriet Feggins, her phone number that was no longer in working order, and her handwritten statement. (T.T. Vol 5: 1050-1051; Vol 6: 1331; R:477-484). The very next day, on April 28, 2011, the State provided this witness list and the witness statements to Appellant. (R:492). Within two business days of this disclosure, on May 2, 2011, the State located

the witness Harriet Feggins and filed a certificate of service of subpoena for witness Harriet Feggins. (R:492). This filing included Harriet Feggins' home address at the time. (R:492). This was on the first day of the trial and before the jurors were selected. (T.T. Vol 2: 137-144). On May 4, 2011, the State also provided Appellant with a new phone number for Harriet Feggins. (T.T. Vol 5: 1054). On May 6, 2011, the day of witness Feggins' testimony, witness Feggins was made available so that Appellant's trial counsel could interview her prior to her testimony. (T.T. Vol 5: 1049-1054). Trial counsel was also provided with a copy of Feggins' GCIC prior to the interview. (T.T. Vol 5: 1055; 1237-1238). The trial court delayed the trial proceedings so that the trial counsel could adequately investigate the witness. (T.T. Vol 5: 1053-1054). Trial counsel was able to interview the witness at length and cross-examine the witness thoroughly with the information she had obtained during her interview of the witness. (T.T. Vol 5: 1293-1303).

**B. Legal Analysis**

Although Harriet Feggins was not on the State's initial witness list, she was not a "surprise" witness because Appellant knew of her existence and of her potential statement prior to trial, and his counsel was given an opportunity to interview Feggins prior to her testimony. *See Luker v. State*, 291 Ga. App. 434, 435, 662 S.E.2d 240, 242 (2008) (holding that even when the

State did not include a witness in its witness list, if the witness was known to defendant prior to trial and defendant was provided an opportunity to interview the witness, said witness is not considered a "surprise witness"); *see also Carter v. State*, 253 Ga. App. 795, 797, 560 S.E.2d 697, 700 (2002) ("The witness list rule is designed to prevent a defendant from being surprised at trial by a witness that the defendant has not had an opportunity to interview.") Likewise, Feggins was added to the witness list as soon as the State discovered her existence through Co-Defendant Prickett's filing of his witness list. Prior this disclosure by Prickett, State had no knowledge of this witness. (T.T. Vol 5: 1264-1265). Thus, Harriet Feggins was not a "surprise witness" by the State; rather, she was a newly discovered witness.

Appellant also complains that he had no way of contacting the witness because he was not provided with the date of birth of the witness. (Brief of Appellant, p. 45). This complaint is without merit because Appellant was provided with the address of the witness as soon as the State was able to contact the witness and serve her with the subpoena. Moreover, the State provided her updated phone number as soon as it was requested by Appellant's trial counsel. (T.T. Vol 5: 1054).

Regardless of these facts, Appellant still contends that the alleged discovery violation required this Court to either exclude the witness or grant a continuance. As an initial matter, under

Georgia law, when a prosecutor and an Appellant's trial counsel discover evidence at the same time, there is no discovery violation. *Crawley v. State*, 240 Ga. App. 891, 892, 525 S.E.2d 739, 740-41 (1999); *Shelton v. State*, 257 Ga. App. 890, 892-93, 572 S.E.2d 401, 405 (2002). Here, the State became aware of the witness when Co-Defendant Prickett disclosed her to the State. Although there is a dispute as to whether Prickett provided his witness list to Appellant at the same time as he produced it to the State, such disputed fact is not material because the State provided Appellant with Prickett's witness list (which contained Harriet Feggins' name and statement) as soon as it received the list from Co-Defendant Prickett.

In *Crawley*, one day before the trial, Crawley's trial counsel and the prosecutor inspected evidence, including co-defendant's pants, and they found $143 in cash in one of the pockets of co-defendant's pants. Crawley, at 892. Because the prosecuting attorney and defense counsel discovered the evidence at the same time, Georgia Court of Appeals opined that the evidence was properly admitted. Id.

Similarly, in *Shelton*, the State obtained a copy of a map on the day of the trial from the police officer who was scheduled to testify. *Shelton*, at 892. The prosecutor disclosed the map to the defendant's trial counsel within minutes of receiving it. *Id*. The Georgia Court of Appeals ruled that in such circumstance where

"the prosecution and defense both view the evidence for the first time simultaneously," there is no discovery violation and is not an error to admit such evidence. *Id.*, at 893.

Here too, the prosecutor immediately notified Appellant's trial counsel of Harriet Feggins' identity and her statement – the knowledge was shared almost simultaneously. (R:477-484). Therefore, there was no discovery violation, and it was not an error to admit Harriet Feggins' testimony into evidence.

As for excluding this witness' testimony, "the sanction of evidence exclusion applies only where there has been a showing of prejudice to the defense and bad faith by the state." *Rosas v. State*, 276 Ga. App. 513, 518, 624 S.E.2d 142, 148 (2005) (emphasis added). Here, Appellant does not contend that the State acted in bad faith. Likewise, there is no evidence to demonstrate that the State acted in bad faith. Therefore, excluding Feggins' testimony would have been an inappropriate and undeserved sanction against the State under O.C.G.A. § 17-16-6.

Finally, Appellant was not entitled to a continuance. Appellant was provided with Feggins' expected testimony prior to trial, and the trial court stopped the trial proceeding and provided ample time and opportunity for Appellant's trial counsel to interview Feggins. *See Jackson v. State*, 270 Ga. App. 166, 605 S.E.2d 876 (2004) (where it was undisputed that prior to trial defendant's attorney and the prosecutor viewed tapes of statements

from both defendant and his ex-girlfriend, in which they discussed their prior difficulty, and prosecutor offered defendant's attorney the opportunity to look at the State's files regarding it, the trial court did not abuse its discretion by denying defendant's motion for continuance). Therefore, there was no reason to grant the continuance.

Feggins provided the entirety of her expected testimony in her written statement, and she had answered all questions necessary for proper cross examination by Appellant's trial counsel; therefore, a continuance would have not resulted in any additional information, especially information that would have been favorable to Appellant. (R: 477-484; T.T. Vol 5: 1262-1302). Accordingly, it was not an abuse of discretion for the trial court to deny the request for continuance. *See Gay v. State*, 258 Ga. App. 634, 574 S.E.2d 861 (2002) (trial court did not abuse the court's discretion when the court allowed a state's witness to testify even though the name of the witness did not appear on the state's witness list as the trial court granted the defendant an opportunity to interview the witness before the witness testified and the defendant did not demonstrate prejudice from the state's failure to list the name.)

Even if, *in arguendo*, the trial court erred in allowing Feggins to testify, it is highly unlikely that such would have affected the verdict. Feggins' statements were cumulative to

Willie Wilson's statements in that they both testified that Appellant shot victim to death. *See Blankenship v. State*, 229 Ga. App. 793, 494 S.E.2d 758 (1998) (failure of the trial court to turn over a handwritten statement of the victim in an assault case did not require a mistrial since the statement was merely cumulative of an audio tape of the victim's remarks and the court granted a continuance to allow the defendant to review the statement); *Brown v. State*, 236 Ga. App. 478, 481-82, 512 S.E.2d 369, 372 (1999) ("Brown was not prejudiced by the admission of the photographs because they were merely cumulative of the Parisian store employees' testimony regarding their contents.")

Feggins' statement did not add any additional information to what Willie Wilson testified about the incident. Because "[h]armless error does not require reversal", and Appellant failed to show any harm or prejudice from Feggins' testimony, Appellant cannot not succeed in his claim. *Leverett v. State*, 204 Ga. App. 736, 738, 420 S.E.2d 629, 631 (1992); see also *Easley v. State*, 352 Ga. App. 1, 833 S.E.2d 591 (2019)(trial court did not abuse the court's discretion in denying the appellant's motion for a continuance based on the state untimely serving a portion of a witness's custodial interview three days prior to trial because the appellant's contention that proper cross-examination questioning was prevented was unsupported by the evidence and the appellant did not present the testimony of any potential witnesses

or offer any other evidence to show that any prejudice resulted from the denial of the motion). Accordingly, the trial court properly denied the present claim.

## VIII. ENUMERATION OF ERROR 8: APPELLANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE.

In his eighth enumeration of error, Appellant alleges that his trial counsel was ineffective for: (1) failing to object Appellant's absence at the bench during the twenty-six bench conferences; (2) failing to ensure a complete recordation of Appellant's trial; and (3) failing to object to the "presumption of truthfulness" pattern jury charge. The burden is on Appellant to show that his "trial counsel's performance fell below a reasonable standard of conduct and that a reasonable probability exists that the outcome of the case would have been different but for the deficient performance of counsel." *Allen v. State*, 277 Ga. 502, 503, 591 S.E.2d 784, 787 (2004). Appellant has failed to make the requisite showings.

### A. GENERAL LAW ON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

In order to prevail on an ineffective assistance of counsel claim, Appellant must make two difficult showings: "trial counsel's performance was so deficient that it fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense such that a reasonable probability exists that the trial results would have been different but for counsel's performance." *Bragg v. State*, 295 Ga. 676 (4),

678, 763 S.E.2d 476 (2014), (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

Appellant's trial counsel "is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland, supra*, 466 U.S. at 690. Appellant has the burden of overcoming this presumption and showing affirmatively that the purported deficiencies in counsel's performance were indicative of ineffectiveness and not examples of a conscious, deliberate trial strategy. *Morgan v. State*, 275 Ga. 222 (10), 227, 564 S.E.2d 192(2002).

"[T]he standard for effectiveness of counsel does not require a lawyer to anticipate changes in the law or pursue novel theories of defense." *Propst v. State*, 299 Ga. 557 (3a), 788 S.E.2d 484 (2016), quoting positively *Washington v. State*, 271 Ga. App. 764 (1), 765, 610 S.E.2d 692 (2005). Further, as our Supreme Court said in *Shaw v. State*, in reviewing ineffective assistance claims, this Court:

> "[is] not limited in [its] assessment of the objective reasonableness of lawyer performance to the subjective reasons offered by trial counsel for his [or her] conduct. If a reasonable lawyer might have done what the actual lawyer did—whether for the same reasons given by the actual lawyer or different reasons entirely—the actual lawyer cannot be said to have performed in an objectively unreasonable way."

*Shaw v. State,* 292 Ga. 871, 875, 742 S.E.2d 707, 712 (2013) (citation omitted).

In the context of an ineffective assistance claim, prejudice means "counsel's errors were so serious so as to deprive the defendant of a fair trial[.]" S*trickland*, supra, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see also Miller v. State,* 285 Ga. 285, 287, 676 S.E.2d 173 (2009).

Ineffectiveness jurisprudence protects tactical decisions made by trial attorneys under the pressures of trial, and a matter of trial tactics must be "patently unreasonable" in order to be deficient. *Westbrook v. State*, 291 Ga. 60, 64, 727 S.E.2d 473 (2012). "The test for ineffectiveness is not whether counsel could have done more, as perfection is not required." *Archibald v. United States,* No. CV208-089, 2009 U.S. Dist. LEXIS 84808 (S. D. Ga., Aug. 24, 2009).

**B. APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING HIS COUNSEL'S LACK OF OBJECTION TO APPELLANT'S ABSENCE DURING THE BENCH CONFERENCES IS WAIVED.**

In his Brief, Appellant argues for the first time that his trial counsel was ineffective for failing to object to Appellant's absence at the bench during the bench conferences. (Brief of Appellant, pp. 47-48). "In cases where a defendant raises a claim of ineffective assistance of trial counsel for the first time on appeal — rather than through a motion for new trial before the

trial court – the issue is procedurally barred." *Morris v. State*, 330 Ga. App. 750, 751, 769 S.E.2d 163, 164 (2015); *see also State v. Butler,* 301 Ga. 814, 817, 804 S.E.2d 414, 417 (2017) ("[i]n order to avoid a waiver of a claim of ineffective assistance against trial counsel, the claim must be raised at the earliest practicable moment, and that moment is before appeal if the opportunity to do so is available.") Appellant "was required to assert his claim of ineffective assistance of counsel at the earliest opportunity, and was further required to present his claim to the trial court before arguing it on appeal." *Id.,* at 752. "Where, as here, appellate counsel's representation commences before the notice of appeal is filed, the defendant's first opportunity to raise a claim of ineffective assistance of trial counsel is in a motion for new trial." *Id.* Because, Appellant failed to raise this issue below, his claim is "now barred and may only be addressed in a habeas corpus proceeding." *Id.*

Even if this Court were to review this claim on its merits, the record does not support Appellant's claim. At the Motion for New Trial hearing, Appellant's trial counsel testified that she did not have conversation with Appellant regarding his right to be present during bench conferences. (H.T. July 21, 2021, p. 52). However, she also explained that it was standard practice at the time for defendants to stay at the counsel's table while attorneys handled the matter up on the bench during the bench conferences.

(H.T. July 21, 2021, p. 52). She further stated that she did not have conversation regarding rights to be present during bench conferences with any of her clients during the time period when this trial had been held. (H.T. July 21, 2021, p. 52). Also, Appellant's Co-Defendant's trial counsel also testified that it was standard practice at the time for the clients to remain at the counsel's table and for the attorneys to handle the matter up on the bench. (H.T. July 21, 2021, p. 121).

This Court has long held that:

> "Trial tactics and strategy, no matter how mistaken in hindsight, are almost never adequate grounds for finding trial counsel ineffective unless they are so patently unreasonable that no competent attorney would have chosen them."

*Sanchious v. State*, 359 Ga. App. 649, 659, 859 S.E.2d 814, 822 (2021)(cit omit). Likewise, "when addressing a claim of ineffectiveness of counsel, the reasonableness of counsel's conduct is examined from counsel's perspective at the time of trial." *Lyman v. State*, 301 Ga. 312, 321, 800 S.E.2d 333, 340 (2017). Both counsels testified that at the time of the trial, it was the norm for defendants to remain at the counsel's table during bench conferences while their attorneys handled the matter up on the bench with the judge. *See supra.* Therefore, Appellant's trial counsel was not deficient for failing to object to what was the standard at the time of his trial.

Furthermore, assuming, *arguendo*, that the trial counsel was deficient in failing to object to Appellant's absence at the bench, Appellant "has not shown that his absence from the conference caused him any prejudice at all." *Mohamed v. State*, 307 Ga. 89, 95, 834 S.E.2d 762, 768 (2019). First, all evidence suggests that these bench conferences exclusively dealt with procedural or legal matters. Further, Appellant stated that the only contribution he could have provided during the trial was to tell his trial counsel that he was not involved in the murder. (H.T. July 21, 2021, pp. 99-102). Appellant testified that he was able to convey this information to his trial counsel. (H.T. July 21, 2021, pp. 99-102). Moreover, Appellant unequivocally testified that he did not possess any other knowledge that would have made a difference in the trial. (H.T. July 21, 2021, pp. 99-102). Therefore, Appellant was not prejudiced by his absence from these conferences. Accordingly, this claim is without merit and should be denied.

**C. APPELLANT FAILS TO PROVE HE SUFFERED ANY PREJUDICE DUE TO UNRECOREDED BENCH CONFERENCES.**

Appellant contends that his trial counsel was deficient for not ensuring complete recordation of the trial, in particular, the 26 unrecorded bench conferences. Pretermitting whether this was a deficient performance, Appellant cannot succeed in his claim because he failed to prove that he suffered prejudice due to unrecorded bench conferences. Therefore, the trial court properly denied this claim. (R:816-841).

**D. APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL FAILED TO OBJECT TO CERTAIN JURY CHARGE IS WITHOUT MERIT AND SHOULD BE DENIED.**

Appellant claims that his trial counsel should have objected to the "Presumption of Truthfulness" jury charge given by the trial court, since it is misleading to the jury per *Noggle v. State,* 256 Ga. 383 (1986). As an initial matter, there is no record showing that the trial court gave this jury charge. Appellant argues that the following jury charge provided by the trial court was a Presumption of Truthfulness jury charge: "When you consider the evidence in this case, if you find a conflict, you should settle this conflict, if you can, **without believing that any witness made a false statement**." (Brief of Appellant, p. 49). However, the Court of Appeals had clearly held in its precedent that this exact language "was not a 'presumption of truthfulness' charge." *Hopkins v. State*, 309 Ga. App. 298, 301, 709 S.E.2d 873, 876 (2011) (citing to *Mallory v. State*, 271 Ga. 150, 151, 517 S.E.2d 780, 782 (1999)); *see also Smith v. State,* 292 Ga. 588, 590, 740 S.E.2d 129, 132 (2013) (holding that similar language did not require that the jury presume truthfulness of any witness). Moreover, this Court squarely held in its recent decision, *Smith v. State*, that a trial counsel's failure to object to use of this language in a jury charge does not amount to a deficient performance, even if the most recent editions of the Suggested Pattern Jury Instructions now states "[t]here is no support for this former charge in current

law." *Smith v. State*, 308 Ga. 81, 89, 839 S.E.2d 630, 638 (2020). Therefore, the trial court properly denied this claim.

## IX. ENUMERATION OF ERROR 9: FELONY MURDER SHOULD BE VACATED BY OPERATION OF LAW.

In his final enumeration of error, Appellant argues that the trial court improperly sentenced him to both malice murder (count 1) and felony murder (count 2) when the felony murder count should have been vacated by operation of law. (Brief of Appellant, p. 50). Because the felony murder count involved the same victim as the malice murder count, the State agrees. *See Graves v. State*, 298 Ga. 551, 556, 783 S.E.2d 891 (2016); *Manner v. State*, 302 Ga. 877, 890, 808 S.E.2d 681 (2017).

## X. APPELLANT WAS NOT HARMED OR PREJUDICED BY THE CUMULATIVE EFFECT OF HIS ASSERTED ENUMERATIONS OF ERRORS.

Appellant was not harmed by the cumulative harmful effect of the trial court error and the trial counsel's ineffective assistance under *State v. Lane*, 308 Ga. 10, 14 (2020). As explained *supra*, Appellant's allegations of trial court error and trial counsel's ineffective assistance are all without merit. Accordingly, Appellant was not prejudiced or harmed by such matters, either individually or collectively.

## CONCLUSION

WHEREFORE, for all of the above-stated reasons, the State respectfully prays that Appellant's conviction be AFFIRMED.

Respectfully submitted this 28th day of February, 2022.

s/ Juliana Y. Sleeper
Juliana Sleeper
Assistant District Attorney
Atlanta Judicial Circuit
State Bar No.376099

EXHIBIT “A”

SUPREME COURT OF GEORGIA
Case No. S22A0530

January 20, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JAQUAVIOUS REED v. THE STATE

Upon consideration of Appellee's motion filed January 20, 2022, for an extension of time to file Appellee's brief in the above case, it is hereby ordered that the motion be granted. An extension is given until February 28, 2022, to file.

A copy of this order MUST be attached as an exhibit to the document for which an extension is received.

**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

**CERTIFICATE OF SERVICE**

I certify, on this day, that I have served a true copy of this *Brief of Appellee* upon counsel of record for Appellant by electronic mail and mailing a copy of same, postage prepaid, to:

RANDALL SHARP, ESQ.
SHARP GEORGIA LAW FIRM
4480 South Cobb Drive, Ste. H, #164
Smyrna, Georgia 30080

Respectfully submitted this 28th day of February, 2022.

*s/ Juliana Y. Sleeper*
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