IN THE SUPREME COURT OF THE STATE OF GEORGIA

JAQUAVIOUS REED,	)	
	)	
APPELLANT,	)	SUPREME COURT OF GEORGIA
	)	CASE NUMBER: **S22A0530**
	)	
VERSUS	)	
	)	ON APPEAL FROM THE SUPERIOR COURT OF
	)	FULTON COUNTY CASE: 10SC92080
	)	
STATE,	)	
	)	CHARGE: MALICE MURDER
APPELLEE.	)	

BRIEF OF APPELLANT

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References to the JURY TRIAL TRANSCRIPT, which was held on May 02, 2011 (Transcript Volume 5) to May 10, 2011 (Transcript Volume 11), are denoted by transcript page number; and are further marked by "ln." if the line number is necessary. For example, "(TVol. 5: pg. 75, ln. 1) refers to the first line of the first page of the trial transcript. The trial transcripts are contained in the record index as Transcript Volumes 5 through 12. The transcripts are bate stamped and run through page 75 to page 2033.

References to the MOTION FOR NEW TRIAL, which was held on July 21, 2021 (Transcript Volume 16) to July 23, 2021 (Transcript Volume 18) are contained in the Transcript Volume 16 – 18. The motion for new trial transcripts are bate stamped and run through page 2104 through 2435.

PART 1:

Statement of the Proceedings

On March 15, 2010, Mr. Antwan Curry ("Mr. Curry") was shot near the parking area of New Town Apartments, which is located in Fulton County. Mr. Curry later died from his injuries. Both codefendants, Jaquavious Reed ("Def. Reed" or informally "Appellant") and Scantron Prickett ("Def. Prickett") were eventually arrested and charged with causing the death of Mr. Curry.

On June 15, 2010, a grand jury indicted the Appellant on the charges of: malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. (R: 4 – 7) On May 11, 2011, a petit jury convicted Appellant of all counts in the Indictment 10SC92080 for which he was charged. (R: 547-49) Immediately after the guilty verdict, the trial court sentenced Appellant to a term of life in prison for count one – malice murder and count two – felony murder. (R: 539-42) The trial court then merged count 4 – aggravated assault into counts one and two. Id. On May 13, 2011, Appellant timely filed a motion for new trial. (R: 556-57)

Between July 21-23, 2021, the trial court heard testimony and argument concerning Appellant's "*Motion for New Trial*". (Trial transcripts, volumes 16-18, pgs. 2104 through 2435) On October 21, 2021, the trial court denied Appellant's motion for new trial. (R: 816-41) Appellant now timely appeals the Trial Court's Order. (R: 1-3)

Preservation of the Issues for Appellate Review

(1) In Appellant's first enumeration of error – whether the State presented sufficient evidence at Appellant's trial to convict him – is preserved because "[n]o person shall be convicted of a crime unless each element of such crime is proven beyond a reasonable doubt." O.C.G.A. §16-1-5, *see also* Jackson v. Virginia, 443 U.S. 307 (1979).

(2) In Appellant's second enumeration of error – whether Appellant was denied due process in his ability to appeal his conviction because there was an inordinate delay in the appellate process, which has denied Appellant the right to a speedy appeal – is preserved because Appellant brought forward this issue at the Motion for New Trial Hearing, which was the earliest available opportunity.

(3) In Appellant's third enumeration of error – whether the trial court improperly denied Appellant the right to be present at every critical stage of his trial, when the trial court conferred with Appellant's counsel and codefendant's counsel outside Appellant's presence – is preserved because Appellant brought forward this issue at the Motion for New Trial Hearing, which was the earliest available opportunity.

(4) In Appellant's fourth enumeration of error – whether the Fulton County District Attorney's Office should have been disqualified, due to Appellant's attorney of record was currently working for the Fulton County

District Attorney's Office, which is the same entity that was prosecuting Appellant – is preserved because Appellant brought forward this issue at the Motion for New Trial Hearing, which was the earliest available opportunity.

(5) In Appellant's fifth enumeration of error – whether Appellant was denied due process, when the State failed to preserve a true and correct copy of the trial transcript, which has denied Appellant the ability to properly appeal his convictions – is preserved because Appellant brought forward this issue at the Motion for New Trial Hearing, which was the earliest available opportunity.

(6) In Appellant's sixth enumeration of error – whether Appellant was denied his right to effectively confront his accusers, when the State failed in their duty to turn over exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963) – is preserved because Appellant brought forward this issue at the Motion for New Trial Hearing, which was the earliest available opportunity.

(7) In Appellant's seventh enumeration of error – whether the trial court committed reversible error by refusing Appellant's request for a continuance to allow Appellant time to investigate a State's surprise witness – is preserved because Appellant brought forward this request at trial and the Court denied the request.

(8) In Appellant's eigth enumeration of error – whether Appellant was

denied effective assistance of counsel in various enumerations of errors – is preserved because Appellant brought forward this issue at the Motion for New Trial Hearing, which was the earliest available opportunity.

(9) In Appellant's ninth enumeration of error – whether Appellant was improperly sentenced to counts one and two (malice murder and felony murder respectively), when count two should have been vacated by operation of law.

Statement of Relevant Facts

On March 15, 2010, Mr. Antwan Curry ("Mr. Curry") went to New Town Apartments, located in Fulton County, in order to purchase some marijuana. (TVol. 7, pg. 824) While there, Mr. Curry and Def. Prickett got into a physical altercation. (TVol. 7, pg. 629) Detective David Quinn ("Det. Quinn") responded to the scene, but was unable to locate any witnesses who was willing to speak to him at that time. (TVol. 9, pg. 1148) Later that evening at a press conference Det. Quinn asked anyone for information to contact the police or to call CrimeStoppers.

After the reward was offered, multiple witness came forward, who all told a different story about the incident when Mr. Curry was killed.

Ms. Lakeyta Smith, AKA "Smurf" (hereinafter referred to as Ms. Smith) testified that she was a barber shop across the street from New Town Apartments on March 15, 2010. (TVol. 7, pg. 611) She observed Mr. Curry and

Def. Prickett fighting. (TVol. 7, pg. 615) During this initial fight, Ms. Smith heard two-gun shots go off. (TVol. 7, pg. 615) Def. Prickett then ran off. (TVol. 7, 616) After, Def. Prickett ran off, Ms. Smith saw two other guys run up to Mr. Curry and shoot him. (TVol. 7, 616) Ms. Smith was shown two photographic lineups. Ms. Smith was able to pick out Def. Prickett, but she was unable to identify Def. Reed as being a person on the scene. (TVol. 7, pg. 640)

Mr. Willie Wilson ("Mr. Wilson") testified he lived at the Four Seasons Apartments, AKA New Town Apartments. (TVol. 7, pg. 699) Mr. Wilson knows Def. Reed, because Def. Reed was dating his daughter. (TVol. 7, pg. 700) Mr. Wilson saw Mr. Curry and Def. Prickett fighting and it looked like they were fighting over a gun. (TVol. 7, pg. 706) Mr. Wilson could not determine who had the gun. (TVol. 7, pg. 708) During the fight, Mr. Curry was shot in the leg and Def. Prickett was shot in the hand. (TVol. 7, pg. 709) After Def. Prickett ran off, Mr. Wilson alleges he saw Def. Reed run up and shoot Mr. Curry a couple additional times. (TVol. 7, pg. 712)

Mr. Wilson stated when the altercation first started, he was standing around 240 feet away. (TVol. 7, pg. 741) On cross examination, Mr. Wilson stated he wanted to get the reward money for him coming forward. (TVol. 7, pg. 749) Mr. Wilson acknowledged he had issues with Def. Reed, because he was dating his daughter. When asked if he remembers telling an investigator

that Def. Reed would end up missing, Mr. Wilson responded, "Yeah, he will". (TVol. 7, pg. 754)

Mr. Keon Burns ("Mr. Burns") was another witness who came forward after the reward was offered. He stated he was at New Town Apartments when this incident occurred. He stated Mr. Curry came to the apartments to purchase some marijuana. (TVol. 7, pg. 781) He observed Mr. Curry and Def. Prickett start arguing. (TVol. 7, pg. 781) Mr. Curry and Def. Prickett started wrestling over a gun, when Def. Prickett shot himself in the hand. (TVol. 7, pg. 782) It was at this point, a guy named "Quinn" took the gun and finished Mr. Curry off. Id. Mr. Burns stated he really did not see anything, because once the shooting started, he "got out of there". (TVol. 7, pg. 782) Mr. Burns could not see the parking lot where it occurred and did not see Def. Reed at that time. (TVol. 7, pg. 782)

Mr. Burns acknowledged that at one point, he told the district attorney's office that he did not see anything. (TVol. 7, pg. 786) On cross-examination, Mr. Burns stated he heard one shot and then closed his door and did not see anything else. (TVol. 7, pg. 800) Mr. Burns also acknowledged he wanted some money for giving the names of the people he thought had committed this crime. (TVol. 7, pg. 802) He believed he could get $2,500 as a reward. (TVol. 7, pg. 819)

Ms. Bianca Haney ("Ms. Haney") testified she knows both codefendants from hanging around the New Town Apartments. (TVol. 8, pg. 927) She was walking to the store on the day of the incident when she heard an altercation down the street. (TVol. 8, pg. 935) Ms. Haney observed Mr. Curry retrieve something from his car and then charge towards Def. Prickett. (TVol. 8, pg. 936) Mr. Curry was on top of Def. Prickett, when the gun shots went off and everyone ran off. (TVol. 8, pg. 939) Ms. Haney testified she never saw Def. Reed on the day of the incident. (TVol. 8, pg. 954)

Ms. Harriet Feggins ("Ms. Feggins") was a witness who became known to the State and Def. Reed just days prior to trial. She had never spoken to police or gave any prior statements until codefendant, Def. Prickett, turned over her information just prior to trial. (TVol. 9, pg. 1342) Ms. Figgins stated she was sitting in her car, when she saw what happened. (TVol. 9, pg. 1347) Ms. Feggins saw Mr. Curry go to his truck to get a handgun and then started fighting with Def. Prickett. (TVol. 9, pg. 1348) After co-Def Prickett got shot and ran off, she saw a "little dude" approach and "just unloads" on Mr. Curry. (TVol. 9, pg. 1350) She identified the little dude as Def. Reed. Id.

On cross-examination, Ms. Feggins testified she has never spoke or met Def. Reed ever. (TVol. 9, pg. 1363) She had never made any statements about this incident until May 04, 2011. (TVol. 9, pg. 1365) She believed the person

who came up and shot Mr. Curry had "plats" or "dreads" hairstyle. (TVol. 9, pg. 1375)

Based upon Ms. Feggins inconceivable testimony, the State impeached their own witness the following Monday with the testimony of Ms. Quarticia Snow ("Ms. Snow") Ms. Snow is the cousin of Ms. Feggins and testified about an incident where Ms. Feggins pulled a gun on her and told her she would shoot up her house. (TVol. 10, pg. 1469-70)

Mr. Emmanuel Smith ("Mr. Smith") was called by Def. Prickett and observed Mr. Curry and Def. Prickett fighting over a gun. (TVol. 10, pg. 1480) Mr. Smith saw Def. Prickett flee after the initials shot went off. (TVol. 10, pg. 1483) Mr. Smith never saw Def. Reed on the scene on the day of the incident. (TVol. 10, pg. 1487)

Def. Reed called a number of witnesses in their case in chief. Ms. Vickei Denise Reed testified that Def. Reed is her grandchild and Def. Reed has never had any twists or dreads as a hairstyle. (TVol. 10, pg. 1507) Ms. Ashley Perry ("Ms. Perry") is the daughter of Mr. Wilson. (TVol. 10, pg. 1514) Ms. Perry testified that her father was upset with Def. Reed, because she became pregnant with Mr. Reed's child. (TVol. 10, pg. 1515) Ms. Perry also testified that her father has a reputation for untruthfulness. (TVol. 10, pg. 1517) Ms. Perry stated she came to court to let the jury know that her father, Mr. Wilson, is a compulsive liar. (TVol. 10, pg. 1520)

There was no physical evidence, video or audio evidence, DNA or any other type of evidence that corroborated the witnesses' testimony or placed Def. Reed on the scene during the incident. Additionally, the State introduces State's Exhibit 65, which is jail phone calls of Def. Prickett. (TVol. 10, pg. 1474) In the jail phone call, Def. Prickett makes the statement that his family has already spoken to the witnesses and he will be okay, but Def. Reed will not be. (TVol. 10, pg.1436)

Ultimately, the entire State's case concerning Def. Reed rested upon the testimony of Mr. Wilson and Ms. Feggins. Mr. Wilson acknowledged he was upset with Def. Reed for dating his daughter and that Def. Reed would come up missing. Additionally, Mr. Wilson wanted to collect the reward money. As to Ms. Feggins, the State impeached their own witness, because they found her testimony lacking trustworthiness. The State went on to explain during closing arguments that the jury should not use Ms. Feggins' testimony when deciding whether Mr. Reed is guilty or not, because the State is not here to get a conviction based upon lies. (TVol. 11, pg. 1674)

PART 2:

Enumerations of Errors

(1) The verdict of the jury is contrary to the evidence and the principles of justice and equity, O.C.G.A. §5-5-20; the verdict is decidedly and

strongly against the weight of the evidence, O.C.G.A. §5-5-21; and a new trial should be granted for other grounds not otherwise provided for in statute, according to the provisions of the common law and practice of the courts, O.C.G.A. §5-5-25.

(2) Appellant was denied due process in his ability to appeal his conviction because there was an inordinate delay in the appellate process, which has denied Appellant the right to a speedy appeal;

(3) The trial court improperly denied Appellant his right to be present at every critical stage of his trial, when the trial court conferred with Appellant's counsel and codefendant's counsel outside his presence;

(4) The Fulton County District Attorney's Office should have been disqualified, due to Appellant's attorney of record was currently working for the Fulton County District Attorney's Office, which is the same entity that was prosecuting Appellant;

(5) Appellant was denied due process, when the State failed to preserve a true and correct copy of the trial transcript, which has denied Appellant the ability to properly appeal his convictions;

(6) Appellant was denied the right to effectively confront his accusers, when the State failed in their duty to turn over exculpatory evidence contained in CrimeStoppers reports in violation of Brady v. Maryland, 373 U.S. 83 (1963);

(7) The trial court committed reversible error by refusing Appellant's request for a continuance to allow Appellant time to investigate a State's surprise witness, Harriet Feggins;

(8) Appellant was denied his right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Strickland v. Washington, 486 U.S. 668 (1984). Prior trial counsel's performance was both deficient and prejudicial in the following respects:

a. Prior trial counsel failed to object to Appellant's absence of 26 bench conferences, in violation of Appellant's right to be present at all critical stages of his trial;

b. Prior trial counsel failed to ensure a complete recordation of Appellant's trial, in particular the 26 unrecorded bench conferences in violation of O.C.G.A. §5-6-41(d);

c. Prior trial counsel did not object to the "presumption of truthfulness" pattern jury charge that had previously been disapproved by this Court 15 years prior to Appellant's trial in Noggle v. State, 256 Ga. 383 (1986); and

(9) Trial Court improperly sentenced Appellant to both counts one and two (malice murder and felony murder respectively), when count two (felony murder) should have been vacated by operation of law.

Statement of Jurisdiction

As this is an appeal of a criminal conviction of murder, appellate jurisdiction resides in the Supreme Court of Georgia. *See* Ga. Const. of 1983, Art. VI, Sec. VI, Par. III(8); *see* State v. Thornton, 253 Ga. 524 (1984) (policy directive); *see also* Neal v. State, 290 Ga. 563 (2012) (concurrence of Hunstein, C.J.; all justices concurring).

PART 3:

Argument and Citation of Authority

Enumeration of Error 1: The verdict of the jury is contrary to the evidence and the principles of justice and equity, O.C.G.A. §5-5-20; the verdict is decidedly and strongly against the weight of the evidence, O.C.G.A. §5-5-21; and a new trial should be granted for other grounds not otherwise provided for in statute, according to the provisions of the common law and practice of the courts, O.C.G.A. §5-5-25.

"When a criminal defendant challenges the sufficiency of the evidence supporting his or her conviction, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt.'" Williams v. State, 295 Ga. App. 9, (1) 9-10 (2008), *citing* Jackson v. Virginia, 443 U.S. 307, 319 (III) (B) (1979) (citation omitted; emphasis in original). The Jackson standard of review is applied so that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." 443 U.S. at 316 (III) (B).

It is the State's burden to introduce sufficient evidence to avoid a violation of the Fourteenth Amendment's Due Process clause. Jackson, 443 U.S. at 307. The evidence must be sufficient to allow "a rational trier of fact to find the defendant guilty of the charged offense beyond a reasonable doubt." Id. at 319.

Appellant should be acquitted and discharged of all of the charges brought against him since insufficient evidence was introduced at trial by the State to warrant a conviction and the jury verdict is unsupportable as a matter of law. Thomas v. State, 168 Ga. App. 53 (1983). In addition, the State failed to prove Appellant's guilt beyond a reasonable doubt since, viewing the evidence in the light most favorable to the State, no rational trier of fact could have found Appellant guilty beyond a reasonable doubt. Barels v. State, 271 Ga. 169 (1999); Jackson v. Virginia, 443 U.S. 307 (1979).

Appellant incorporates the above "*Statement of Relevant Facts*" into this section and shows the evidence was insufficient to support Appellant's conviction. To emphasize, the State's evidence in regard to Appellant rested upon the testimony of Mr. Wilson and Ms. Feggins. Neither witness made an initial statement implicating Appellant once the investigators arrived on the scene. Mr. Wilson acknowledged he was upset because Appellant was dating his daughter and stated Appellant would end up missing. (TVol. 7, pg. 754) As to Ms. Feggins, the State never gave her testimony any credibility and in fact impeached their own witness with the testimony of Ms. Snow. There was no other evidence presented during the course of the trial that implicated Appellant as participating in any way in the death of Mr. Curry. Since the State failed to provide sufficient evidence at Appellant's trial to establish his guilt beyond a reasonable doubt, Appellant's convictions should be deemed improper and unconstitutional.

Enumeration of Error 2: Appellant was denied due process in his ability to appeal his conviction because there was an inordinate delay in the appellate process, which has denied Appellant the right to a speedy appeal.

"[S]ubstantial delays experienced during the criminal appellate process implicate due process rights." Chatman v. Mancill, 280 Ga. 253, 256 (2) (a), 626

S.E.2d 102 (2006). And, speedy appeal claims are assessed by balancing the same four factors applicable to speedy trial claims as articulated in Barker v. Wingo, 407 U. S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). See Chatman , supra, 280 Ga. at 257 (2) (a), 626 S.E.2d 102. These factors include "[1] the length of the delay, [2] the reason for the delay, [3] the defendant's assertion of his right, and [4] the resulting prejudice to the defendant." (Punctuation omitted.) Id. at 256 (2) (a), 626 S.E.2d 102 (quoting Barker , supra, 407 U.S. at 530, 92 S.Ct. 2182).

a) *Length of Delay:*

The length of delay that will provoke a constitutional inquiry is necessarily dependent upon the peculiar circumstances of the case. Chapman, 280 Ga. at 257. However, the Georgia Supreme Court has found a minimal eight-year delay was excessive. *See* Loadbold v. State, 286 Ga. 402, 406 (2010) (nine-year delay was excessive); Chatman, supra, 280 Ga. at 257 (eight-year delay was excessive).

In the case at bar, Appellant was sentenced to life in prison on May 11, 2011. On May 13, 2011, prior trial counsel timely filed a preliminary motion for new trial. Thus, it has been over a 10-year delay in Appellant's direct appeal. As such, this factor should weigh heavily in favor of Def. Reed that the delay was excessive.

b) *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." Barker, supra, 407 U.S. at 531. *See also*, De La Cruz v. State, 303 Ga. 24, 30 (2018); Owens v. State, 286 Ga. 821 (2010) (the State bears the ultimate responsibility for the efficient management of court dockets).

The court reporter filed the transcripts in this case on May 27, 2015. Thus, there has been a six-year delay in this matter since the transcripts were filed. Undersigned counsel currently does not know the cause for such a substantial delay in the proceedings. However, Appellant has had appellate counsel throughout this process. Appellant has never requested a continuance in this matter. So this factor should be weighed against the State, as it is their burden to ensure the timeliness of an appeal is afforded to the defendant.

It is acknowledged on May 14, 2019, codefendant Prickett filed a "Motion for Continuance", however, this should not be weighed against whether Appellant should have been afforded a speedy appeal. On December 16, 2019, the State filed a "Motion for Continuance" because the assistant district attorney, Juliana Sleeper, had recently just filed an entry of appearance into

the case. Appellant's attorney at that time, Hon. Lauren Shubow, did not raise any objections to this continuance. Even if Appellant was aware of this stipulation, merely not objecting to the State's request should not be weighed against the Appellant when analyzing whether Appellant's due process rights were denied.

The State even acknowledges as early as January 28, 2015 that Appellant's right to a timely appeal is placed in jeopardy should any further delay continue in this matter. In the "*State's Motion for a Status conference and/or Scheduling Order Concerning the defendant's Motion for New Trial*" the State explained, "Our Georgia Supreme Court has recently reiterated that it is the duty of tall those involved in the criminal justice system, including trial courts and prosecutors as well as defense counsel and defendants, to ensure that the appropriate post-conviction motions are filed, litigated, and decided without unnecessary delay." (R: 589-92) (*See Also*, Defense Exhibit 2 submitted at the Motion for New Trial, pages 319-21)

At the time of the State's filing, there had already been four year delay in Appellant's direct appeal, yet there would be another six years delay in this process. As such, this factor should also be weighed in favor of Appellant.

c) *Defendant's Assertion of His Right to Appeal:*

The third factor of the *Barker-Wingo Test* is whether Appellant made any demand or assertion to proceed with his appeal and let the Court know his desire to move his case along. "The strength of [appellant's] efforts will be affected by the length of the delay [among other things]…The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy [appeal] right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Barker, supra, 407 U.S. at 531-532.

As early as February 26, 2013, Appellant wrote to the Court requesting his transcripts in efforts to proceed with his appellate process. (R: 573-75) On December 23, 2015 (filed on January 20, 2016), Appellant wrote to this court requesting status hearing and a scheduling order, so that his appellate case would proceed. (R: 593-98) On August 28, 2020, Appellant again wrote the Trial Court indicating he is still awaiting his new trial hearing and he is desperate to get a resolution so that he can get home to be with his daughter, whom he really misses dearly. (R: 715-17)

It was not until after almost 10-years of waiting for his appeal process to progress that Appellant retained undersigned counsel in hopes that he will finally be heard as to why he deserves a new trial. He wrote numerous letters to the Trial Court over this time span and attempted to file what he thought

was necessary to handle the case pro se, if that would move the case along. However, each time, Appellant was notified that because he had appointed counsel, he was not entitled to transcripts or his file.

Appellant testified at his Motion for New Trial Hearing. He testified that he reached out to his original appellate attorney, Kenneth Kondritzer ("Driggs"), on numerous occasions to get progress updates on his case. (TVol. 16, pg. 2194) On March 14, 2013, Appellant wrote to the court asking for updates, because his attorney Mr. Kondritzer would not respond to his requests. (R: 576-78) Appellant was eventually appointed new appellate counsel. However, even during this interim, Appellant was always demanding his appeal proceed and wanted a resolution sooner than later. All in hopes he could get home to his daughter.

Because Appellant has been requesting his appeal to proceed for at a minimum 8-years, this factor should weigh heavily in favor of the Appellant.

d) *Prejudice to Defendant:*

"The prejudice necessary to establish a due process violation based on post-conviction direct appeal delay is prejudice to the ability of the defendant to assert his arguments on appeal and, should it be established that the appeal was prejudiced, whether the delay prejudiced the defendant's defenses in the event of retrial or resentencing." Chatman, supra 280 Ga. at 260. "In

determining whether an appellate delay violates due process, prejudice, unlike in the speedy trial context, is not presumed but must be shown." Veal, supari, 301 Ga. at 168.

Appellant has been prejudiced in a couple of ways. First, during the interim of this delay, prior trial counsel, Ms. Tasha Rodney, has moved to Jamaica. She did testify at the Motion for New Trial, but she testified that due to the length of the delay in the proceedings, that she could not really remember what occurred either prior to or during the trial. (TVol. 16, pg. 2103) She further indicated that even if given the transcript of the trial, she would not be able to remember what occurred at bench conferences or why she would have or not objected to issues. Id. So this Court is prevented from properly analyzing any claim for ineffective assistance of counsel, because it is impossible to determine whether the lack of objections was based upon trial strategy or just deficient performance.

Secondly, as outlined below, there are 26 bench conferences that are missing from the transcripts. The Trial Court and the State have acknowledged that these bench conferences cannot be recreated. (R: 815) Due to the passage of time from the trial, nobody (Court, State, or defense counsel) are able to remember what transpired during these bench conferences.

This fourth and final factor should also be weighed in favor of Appellant, due to the length of delay has precluded him from properly preserving issues

for appellate review and this Court has been precluded from a rational review of the issues before it.

Based upon all four of these factors being weighed in favor Appellant, he should be afforded a new trial, because he has been denied his rights afforded upon him through the U.S. and Georgia State Constitutions.

Enumeration of Error 3: The trial court improperly denied Appellant his right to be present at every critical stage of his trial, when the trial court conferred with Appellant's counsel and codefendant's counsel outside his presence during 26 bench conferences.

The Georgia Supreme Court recently addressed this matter in Champ v. State, 310 Ga. 832, S20A1552 (decided February 15, 2021). This Court in *Champ* addressed whether a defendant voluntarily or acquiesced to not being present at bench conferences by remaining silent. Id. The Court explained the right to be present at all stages of the proceedings "may be violated when a defendant is excluded from conferences held at the bench between the trial court and the lawyers for the parties, because while the defendant may be present in open court and thus able to see such bench conferences, he presumably cannot *hear* what is discussed (as preventing jurors and others in the courtroom from hearing such conferences is their very purpose). Id. The

Court ultimately remanded the case back to the Trial Court, so that both sides could expand the record about whether the defendant acquiesced to being absent from the bench conferences. Id.

Justice McMillian explained in the concurrence, trial counsel should make clear for the record what occurs at the bench conferences or place on the record that the defendant was waiving his right to be present. Champ, (concurrence of Justice McMillian). The concurrence goes on to state, "we have encouraged the trial court and prosecutors to put on the record what occurred at bench conferences or confirm that the defendant waived the right to be present." Id. *citing* Sammons v. State, 279 Ga. 386, 388 (2005).

It must also be pointed out that Appellant was only 17 years of age at the time of his arrest and 18 years of age during the jury trial. Appellant had limited high school education and no legal experience. Appellant is not someone who had multiple felony arrests, where he would be familiar with the proceedings of the court room. It is inconceivable that the burden would lie with Appellant to know he has the ability to overrule his trial attorney and demand to be present at the bench conferences.

What this sets up: a child, with no legal experience is supposed to know that he can stand up during the bench conferences and express his desire to attend. In essence voice an objection over his attorney to be present.

In Moore v. State, 290 Ga. 805 (2012), the Supreme Court remanded a murder conviction due to the trial court's failure to hold a pretrial hearing on the admissibility of similar transaction evidence. Three dissenting Justices believed that the similar transaction evidence was properly admitted, but that the hearing was improper due to the absence of the defendant. The majority did not address the presence issue, finding that it was not raised on appeal. Justice Hunstein's dissent, however, presents a very detailed outline of the history and scope of a defendant's right to be present at critical stages of a trial.

The Georgia Constitution guarantees a criminal defendant the right to be personally present at every stage of the proceedings against him. 1983 Ga. Const., Art. I, Sec. I, Par. XII; Tiller v. State, 96 Ga. 430 (1) (23 SE 825) (1895). This right is based on due process of law and attaches at every critical stage of a criminal trial where the defendant's presence is necessary to contribute to the fairness of the proceedings. See Huffv v. State, 274 Ga. 110 (2) (549 SE2d 370) (2001). Unless the defendant waives his right to be present or acquiesces to his absence, Brooks v. State, 271 Ga. 456, 457 (2) (519 SE2d 907) (1999), we have consistently found that the claim is not subject to a harmless error analysis on direct appeal. Holsey v. State, 271 Ga. 856, 860-861 (5) & n. 11 (524 SE2d 473) (1999).

We have determined that a "critical stage" in a criminal proceeding is one in which the "'defendant's rights may be lost, defenses waived, privileges

claimed or waived,'" or the outcome of the case may be substantially affected. Huff v. State, 274 Ga. at 111 (quoting Ballard v. Smith, 225 Ga. 416, 418 (2) (169 SE2d 329 (1969)). Thus, we have concluded that the defendant's right to be present attaches to the following critical stages of a trial: jury selection, presentation of evidence, hearing on a motion to disqualify defense counsel, closing arguments, substantive communications with jurors, and re-sentencing. See, e.g., Fair v. State, 288 Ga. 244 (3) (702 SE2d 420) (2010) (evidentiary hearing on motion to disqualify co-defendant's attorneys); Dawson v. State, 283 Ga. 315 (5) (658 SE2d 755) (2008) (presentation of testimony to the jury); Shaheed v. State. 274 Ga. 716 (559 SE2d 466) (2002) (amendment of sentence imposing harsher punishment); Brooks, 271 Ga. at 456-457 (striking of jurors); Hanifa v. State, 269 Ga. 797 (6) (505 SE2d 731) (1998) (colloquy between the trial judge and jury); Wilson v. State, 212 Ga. 73, 75-78 (90 SE2d 557) (1955) (solicitor-general's argument to the jury).

In Dunn v. State, 308 Ga. App. 103, 107 (2011), the Court of Appeals noted that ... "[a] colloquy between the trial judge and the jury is a part of the proceedings to which the defendant and counsel are entitled to be present." (Citation omitted.) Hanifa v. State, 269 Ga. 797,807 (6) (505 SE2d 731) (1998). Thus, "the appellate courts of this state have emphasized the importance of trial courts not engaging in any type of ex-parte communications with jurors." (Citations omitted.) Payne v. State, 290 Ga. App. at 592 (4).

The Dunn Court further noted that a defendant's right to be present is guaranteed by the state constitution and the state constitutional right is not subject to harmless error .

. . . [the defendant's right] to be to be present at all proceedings against him is an important right guaranteed by our State Constitution, and if a defendant is denied the right to be present at a critical stage, prejudice is presumed and a new trial is mandated." (Citations omitted.) Payne v. State, 290 Ga. App. at 591-592 (4). See Peterson v. State, 284 Ga. 275,279 (663 SE2d 164) (2008) (Unlike a violation of the federal constitutional right of a criminal defendant to be present at all critical stages of the proceedings against him, a violation of the corresponding right under the Georgia Constitution is not subject to a harmless error review on appeal. Instead, absent a valid waiver of the right to be present by the defendant, a violation of the right requires reversal and remand for a new trial whenever the issue is properly raised on direct appeal.).

A violation of the Georgia Constitution's right to be present is presumed to prejudicial. Thus, absent a valid waiver by the defendant, a violation of the right to be present enshrined in the Georgia Constitution triggers reversal and remand for a new trial whenever the issue is properly raised on direct appeal. Peterson v. State, 284 Ga. 275, 279 (663 S.E.2d 164) (2008).

There are thus just two questions at issue here. Was there "a violation of the right to be present"? And was there "a valid waiver by the defendant"?

1. Appellant's right to be present was violated. Bench Conferences are a critical stage at which the defendant is entitled to be present.

"It is the legal right of a person accused of crime in this State to be present at all stages of his trial ... This principle has been recognized since the establishment of this court." Wilson v. State, 212 Ga. 73, 74 (90 S.E.2d 557) (1955). "The rule is well established in this state, that the defendant on trial must be present when the court takes any action materially affecting his case." Locklin v. State, 228 Ga. App. 696, 697(2) (492 S.E.2d 712) (1997).

The accused and his counsel have the right to be present at every stage of the proceedings and personally see and know what is being done in the case. To say that no injury results when it appears that what occurred in their absence was regular and legal would, in effect, practically do away with this great and important right, one element of which is to see to it that what does take place is in accord with law and good practice. Goodroe v. State, 224 Ga. App. 378, 380(1) (480 S.E.2d 378) (1997).

2. There was no valid waiver, whether by trial counsel or by Appellant.

The right to be present belongs to the defendant and the defendant is free to relinquish that right if he or she so chooses. The right to be present is waived if [1] the defendant personally waives it in court; [2] if counsel waives it at the defendant's express direction; [3] if counsel waives it in open court while the defendant is present; or [4] if counsel waives it and the defendant subsequently acquiesces in the waiver. Ward v. State, 288 Ga. 641, 646(4) (706 S.E.2d 430) (2011).

The burden is on the State to establish waiver. Where there is no evidence in the record of a valid waiver or subsequent acquiescence, any conviction obtained as a result of a violation of this right must be reversed. Locklin, 228 Ga. App. at 698(2) ("Nothing in the record shows Locklin acquiesced in the waiver or gave his attorney permission to waive his presence ... Therefore ... we must reverse the conviction."); Goodroe, 224 Ga. App. at 381 (1) ("There is nothing, however, in the present record showing a waiver").

None of the four methods in *Ward* occurred here. Appellant did not 1) personally waive it in court; 2) Counsel did not waive it at the defendant's express direction; 3) Counsel likewise did not waive it in open court while the defendant was present; And 4) counsel did not waive it and the Appellant never subsequently acquiesced in the waiver. In fact, counsel cannot waive Appellant's rights without his express direction. Ward v. State, 288 Ga. at 646.

But what of acquiescence?

"Acquiescing" in such a waiver necessarily implies that one knows of the right one is consenting to relinquish. A waiver is an intentional relinquishment or abandonment of a known right or privilege. One cannot acquiesce in a wrong while ignorant that it has been committed. To determine whether Appellant acquiesced, we must therefore first determine whether Appellant knew that he had the right to be present ... We cannot assume such knowledge. Russell v. State, 236 Ga. App. 645, 648(2) (512 S.E.2d 913) (1999) (internal citations and quotation marks omitted, emphasis added).

Ward is peculiarly instructive on this point. There, a juror was struck outside the defendant's presence. The lawyers did not object. And the juror was not just on the venire panel - the juror was a member of the trial jury, which made his sudden absence more obvious. The *Ward* problem "took place at the conclusion of closing arguments for the defense." 288 Ga. at 644(4). By the time counsel learned of the problem, the juror "had already left the courthouse and was no longer available." Id. at 645(4). So how could Mr. Ward not have been aware that this juror had been struck? After all, the jury that was deciding his fate – the jury that sat through the state's closing argument and the jury instructions – was suddenly smaller. And since Mr. Ward had not been present for the striking, he must have likewise been aware that any striking could only have occurred outside his presence.

Yet his mere knowledge that this juror had been struck outside his presence was not sufficient. Waiver required a finding that the "appellants knowingly acquiesced in a waiver on the part of their attorneys." Id. at 646. "Acquiescence may arise where a person who knows that he is entitled to ... enforce a right, neglects to do so." Id. (internal quotation marks omitted).

So, the question of acquiescence turns on what is acquiesced to. Appellant did not know what had been presented to the court during these bench conferences, nor was he brought up during the conferences to have meaningful participation. Appellant's trial counsel testified that she has never had a conversation with any of clients about being present for bench conferences and it was just her standard practice to exclude her clients from the bench conferences. (TVol. 16, pg. 2156-57). Appellant was not aware of any questions posed to the trial court and was not informed that a question had been posed to the trial court in which to raise an objection. Appellant most likely didn't know that he had a voice in the decisions. And more particularly, this does not mean that Appellant knew that he could be a part of discussions in his absence.

There has not even been a showing that he learned at any point during the trial that he had a right to be present during the bench conferences. "One cannot acquiesce in a wrong while ignorant that it has been committed, and the knowledge must be of facts." Ward, 288 Ga. at 646(4). Compare Regjster v.

State, 229 Ga. App. 648, 650(2) (494 S.E.2d 555) (1997) (finding acquiescence "[b]y remaining silent when his attorney acknowledged in open court that he had waived Register's right to be present during a portion of voir dire"). Appellant certainly did not knowingly acquiesce to either his absence from the proceedings or to abdicating his constitutional role. This Court should reverse Appellant's conviction.

Enumeration of Error 4: The Fulton County District Attorney's Office should have been disqualified, due to Appellant's attorney of record was currently working for the Fulton County District Attorney's Office, which is the same entity that was prosecuting Appellant.

Former Trial Counsel, Mr. Edward Chase, filed an entry and election to opt-in to discovery on July 02, 2010, as appointed counsel for Appellant. Mr. Chase then interviewed Appellant, discussed the details of this case, received reciprocal discovery, represented Def. Reed at arraignment and bond hearings, and agreed to a special set date for the trial itself. During the pendency of that representation, Mr. Chase sought employment at the Fulton County District Attorney's Office. The same office that was prosecuting Appellant. Mr. Chase then eventually took a position at the Fulton County District Attorney's Office *at the same time he was counsel of record for Appellant.*

Mr. Chase never formally moved this Court to withdraw from representation. For over two months, Mr. Chase represented both the prosecution and the Defendant. Mr. Chase applied for employment on December 10, 2010 and started the job on February 02, 2011. Ms. Rodney began receiving discovery from the State on April 02, 2011. As previously mentioned, Mr. Chase never formally moved to withdraw as counsel of record. The Trial Court never signed an Order allowing his removal and Ms. Rodney never filed a notice of substitution of counsel.

It does not appear that Mr. Chase ever executed a GA Bar Rule 1.7 waiver of conflict with the client. Appellant was never formally told that Mr. Chase had switched sides, and was now employed with the Fulton County District Attorney's Office, who was actively attempting to prosecute him for murder. It appears that all the parties, except Appellant, were fully aware of this conflict and that no one, neither the District Attorney's Office, Appellant's new trial attorney, nor the Trial Court attempted to address this conflict, which was in violation of Appellant's rights.

It is well-established Georgia law, "[a] formal withdrawal of counsel cannot be accomplished until after the trial court issues an order permitting the withdrawal. Until such an order properly is made and entered, no formal withdrawal can occur, and counsel remains counsel of record." Tolbert v. Toole, 296 Ga. 357, 362 (2014); *see* White v. State, 302 Ga. 315, 319 (2017) ("[L]egal

representation continues – unless interrupted by entry of an order allowing counsel to withdraw or compliance with the requirements for substitution of counsel, see USCR 4.3(1)-(3) – through the end of the term at which a trial court enters a judgment of conviction and sentence on a guilty plea").

Because Mr. Chase never formally withdrew, the Court never entered an Order allowing withdrawal, and Ms. Rodney never filed a substitution of counsel, Mr. Chase was the attorney of record for Appellant at the time of trial. Mr. Chase also currently worked for the Fulton County District Attorney's Office. As such, Appellant was denied due process in having an attorney free of conflicts represent his best interests at trial. Accordingly, Appellant should be afforded a new trial, that is free of conflicts or the appearance of conflicts

Enumeration of Error 5: Appellant was denied due process, when the State failed to preserve a true and correct copy of the trial transcript, which has denied Appellant the ability to properly appeal his convictions.

There is no dispute in this case that portions of the transcript are unavailable through no fault of the Appellant. There is no way a verbatim transcript can be completed of the 26 bench conferences over 7 days from 10 years ago. While there are transcripts of the trial as made a part of the record,

parts of the trial were not recorded and as such it does not allow Appellant to prepare a proper appeal.

The re-creation of missing portions of a transcript is handled by O.C.G.A. § 5-6-41. That code section contains provisions about what happens when the parties do not agree as to the contents of a re-created portion of a transcript.

The Court has recently examined the issue of re-created transcripts and has found the provisions of O.C.G.A. § 5-6-41 sufficient to deal with most issues. See Mosley v. State, 201 7 Ga. Lexis 46 (2017). However, this case is distinguishable from cases like *Mosley* that merely looks at O.C.G.A. § 5-6-41. This requires more review due to the harm done to Appellant by the loss of the portions of his trial transcript.

In Mosley, there were several portions of the original trial transcript available such that only a portion of the transcript needed to be re-created. The original trial counsel for the defendant and the state were able to examine and cross-examine the original witnesses when they were called to re-testify in accordance with their original testimony. This re-taking of the evidence occurred shortly after the trial.

In Appellant's case, neither Appellant's nor the state's counsel are the original trial counselors. The fact that 26 Bench Conferences have not been recreated, can't be recreated according to the State, were crucial parts of the trial, and transpired 10 years ago. All these factors, when taken together,

remove this case from a mere review of O.C.G.A. § 5-6-41, and requires a more thorough analysis, as was done by this Court in the Sheard v. State, 300 Ga. 117 (2016); .Johnson v. State, 302 Ga. 188, 805 S.E.2d 890 (2017).

In Sheard, a portion of the trial transcript was missing, and attempts were made to locate those parts. While some parts were found, the entire transcript was never located. While the Court did have some of the transcript to review, it did not contain a specific section that contained the closing arguments or the jury charge. The Court found that because of the missing portions, for various reasons, the appellant was entitled to a new trial.

There is no dispute here that the Appellant has a right to appeal his case, and that he is entitled to a transcript of the proceeding. "Such transcript is to be true, complete and correct." Wilson v. State, 246 Ga. 675 (273 SE2d 9) (1980).

The mere fact that a portion of a transcript is missing does not automatically entitle a defendant to a new trial. "Such omissions 'cannot be reversible error absent an allegation of harm resulting from the deletion.'" Buffin v. State, 283 Ga. 87 (6) (656 SE2d 140) (2008); Smith v. State, 251 Ga. 229 (2) (304 SE2d 716) (1983). However, where the missing transcript prevents adequate review of the trial below, a new trial is warranted. See, e.g., Wade, 231 Ga. at 133; Montford, 164 Ga. App. at 628.

The Court in Sheard, was concerned with the missing portions of the transcript and looked at three issues when determining a new trial was warranted in that case: (1) the length of time that had occurred between the trial and the appeal; (2) the lack of the jury instructions for the court to review; and (3) appellate counsel was not involved in the jury trial.

As to the length of time between trial and appeal, the Court, citing Glover v. State, 291 Ga. 152 (3) (2012), said it was concerned with due process issues. In Sheard, the case dragged on for sixteen years. The Court looked at several events that had occurred in that time that led it to believe a new trial was warranted. These events included the death of the original court reporter, the involvement of multiple appellate counsels, faded memories, and the trial court's findings made without the benefit of trial notes.

In Appellant's case, there has been 10 years between trial and appeal. The transcript of the trial proceedings had been completed as of May 2015. However, none of the Bench Conferences were recorded and therefore not transcribed. Appellant counsel is not aware of any notes or records concerning the Bench Conferences and has not been provided any assistance as to the recreation of the trial transcript. Similar to *Sheard*, there were several appellate attorneys, and none of them were provided any of this information concerning the 26 bench conferences. While certain portions of a trial ... need not be transcribed in non-death cases, objections and motions are a crucial part

of the record for review. The Appellant cannot, due to the incompleteness presented, review, research, preserve, investigate, or present any kind of appellate issue on the incomplete information presented. As to appellate counsel not being involved in the trial, The Court in Sheard was concerned that "forcing appellate counsel - who was not involved in the original trial - to divine error without the aid of a transcript is not only fruitless but also hinders counsel's ability to adequately and zealously represent his client on appeal." (Compare to United States v Selva, 559 F2d 1303 (II), (5th Cir. 1977).

There is no record of the objections made nor for the reasons of the trial court's rulings on those objections. Without anyone who can remember with any specificity what was said during the 26 bench conferences, it prohibits the creation of a "true, complete, and correct" transcript. The state has conceded that they are not able to recreate the 26 Bench Conferences that occurred during this 7-day trial. (R: 815) (*See* Stipulation Regarding Defendants Motion to Recreate the Record).

We know from the record that at least one of the Bench Conferences (TVol. 10, pg. 1665) was vital to the Appellants ability to raise an error.

Without a full transcript, however, the harmlessness of any error cannot be ascertained. "It is true that where the transcript itself shows error is harmless, it may be so declared ... however, the transcript omission precludes us from ascertaining if errors were made, and if so, whether they were

harmless. Montford v. State, 164 Ga. App. 627, 629 (1982); The State nor the Appellant's attorney were able to recreate the record as none of the attorneys who tried the case remember what occurred almost 9 years ago. The Court is therefore precluded from ascertaining if any error was or was not harmless.

Additionally, the Appellant cannot review objections or motions made during the course of the presentation of evidence, the trial court's rulings on any objections or motions. There are numerous instances where it is possible for any trial (because of mistakes, oversights, inattentiveness, or misconduct) to become a fundamentally unfair trial. Appellate counsel has no way of reviewing the Appellant's case for such issues. The result is that the Appellant and Appellant Counsel have been completely barred from ascertaining whether any errors occurred at trial, effectively denying the Appellant his right present errors to this Court for review. The only remedy remotely adequate under the circumstances is the reversal of the Appellant's convictions and the grant of a new trial.

Enumeration of Error 6: Appellant was denied the right to effectively confront his accusers, when the State failed in their duty to turn over exculpatory evidence contained in CrimeStoppers reports in violation of Brady v. Maryland, 373 U.S. 83 (1963).

Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87.

The prosecution must disclose evidence in its possession that is favorable to the defendant because the *Brady Rule* is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel but is required to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. McClendon v. State, 347 Ga. App. 542, 546 (2018).

Impeachment evidence falls within the *Brady Rule*, and includes evidence of "any deals or agreements between the State and [a] witness." Schofield v. Palmer, 279 Ga. 848, 851-852 (2005). *See* United States v. Bagley, 473 U.S. 667, 676 (1985) (Brady extends not only to exculpatory evidence but also to "evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest").

In *Giglio*, the Supreme Court ordered a new trial after the prosecution failed to inform the defense about the defense about its agreement with a

witness who testified in exchange for promise from the government that he would not be prosecuted. Giglio v. United States, 405 U.S. 150, 154-155 (1972).

The Court found that where "the Government's case depended almost entirely' on that witness, the prosecution was required to inform the defense about its agreement with the witness because "evidence of any understanding or agreement as to a future prosecution would be relevant to [the witness's] credibility and the jury was entitled to know of it." Id. at 154-155.

To prevail on *Brady* claim, the defendant must show that:

The State 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) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial would have been different. *See* McClendon v. State, 347 Ga. App. 542, 547-48 (2018) citing Schofield, 279 Ga. at 852.

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." Strikler v. Greene, 527 U.S. 263, 289 (1999).

For purposes of determining reasonable probability, "[t]he question is not whether the defendant would more likely than not have received a different

verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995). See also Turner v. United States, 137 S.Ct. 1885 (2017) ("[a] reasonable probability of a different result is one in which the suppressed evidence undermines confidence in the outcome of the trial") (citation and punctuation omitted).

In *Schofield*, under factually similar circumstances, our Supreme Court affirmed vacation of the defendant's murder convictions due to *Brady* error, finding that a $500 payment made by the Georgia Bureau of investigation to a confidential informant who implicated the defendant in the murders was material. Schofield, 279 Ga. at 851.

The Court noted that although there is considerable amount of evidence incriminating [defendant] in the murders apart from [the confidential informant]'s testimony, we affirm the habeas court's finding of materiality and its granting of the writ due to *Brady* error. We cannot countenance the deliberate suppression by the State of payment to a key witness, and its attendant corruption of the truth-seeking process, in any case, and especially in a death penalty case. Id. at 853. Citing *Kyles*, supra the *Schofield Court* recognized that a defendant "does not have to show that he would have been acquitted if he had been able to impeach [the witness] with his financial motive for testifying against him; he simply must show that the State's evidentiary

suppression undermines confidence in the outcome of the trial." Schofield, 279 Ga. at 852-853; McClendon v. State, 347 Ga. App. 542, 547-48 (2018).

The testimony of Mr. Wilson, Mr. Burns, and Ms. Smith were likely influenced by any monies they believed they could receive for giving information to the police. The State did not disclose that any of these witnesses were given reward money and hid the guise that "crime stoppers" was anonymous and therefore they did not have to disclose information they did not have. However, the State was well aware that Det. Quinn held a news conference and asked for information to help solve this crime and that Crime Stoppers would give a reward.

Based upon the foregoing argument, Appellant asserts the State violated the provisions of *Brady* and its progeny. As a result, Def. Reed requests this Honorable Court to reverse his convictions and grant him a new trial.

Enumeration of Error 7: The trial court committed reversible error by refusing Appellant's request for a continuance to allow Appellant time to investigate a State's surprise witness, Ms. Harriet Feggins.

The purpose of the Criminal Discovery Act is to promote fairness and efficiency in criminal proceedings, and to prevent surprise and trial by ambush. State v. Brown, 333 Ga. App. 643, 651 (2015); White v. State, 271 Ga. 130, 130

(1999). "Our legal system is not simply an elaborate game of 'Gotcha!'…The object of all legal investigation is the truth, and procedural rules are in place to further such goal in an orderly fashion." Jones v. State, 276 Ga. 171, 174 (2003). Thus, the Act functions to "maximize the presentation of reliable evidence, minimize the risk that a judgment will be predicated incomplete or misleading evidence, and foster fairness and efficiency in criminal proceedings." State v. Dickerson, 273 Ga. 408, 410 (2001).

In the case at bar, Appellant requested the trial court to preclude Ms. Feggins' testimony or in the alternative, requested a continuance in order to fully investigate Ms. Feggins, who was a surprise witness. (TVol. 9, pg. 1127) Prior trial counsel acknowledged they did not have any contact information for Ms. Feggins and they did not even have a date of birth of the witness. (TVol. 9, pg. 1062) The Trial Court ultimately denied defense request and held that Defense could have access to Ms. Feggins' GCIC and could interview her prior to her testimony, but the court was not going to allow for a continuance. (TVol. 9, pg. 1129)

The State called Ms. Feggins as a State's witness. (TVol. 9, pg. 1339) During the weekend after Ms. Feggins' testimony, the State located a rebuttal witness, Ms. Snow. (TVol. 10, pg. 1404) The State ultimately impeached their own witness with the testimony of Ms. Snow. (TVol. 10, pg. 1466-70) The problem, this created, is you cannot unring the bell, once the testimony is

presented. So even though the State was explaining to the jury during State's Closing Argument, that Ms. Feggins should not be believed, because her testimony is so incredible, the jury had already heard Ms. Feggins' testimony. The harm had already occurred.

Had Appellant been able to properly investigate this witness, Appellant could have immediately impeached Ms. Feggins in efforts to show she cannot believed. This way, the jury is not sitting all weekend, believing her testimony is truthful.

As a result, the trial court erred in preventing Appellant from properly investigating a surprise witness that was made known to defendant during the onset of the trial. Because the trial court denied Appellant's request for a continuance, Appellant was denied due process and a fair trial. Accordingly, Appellant requests this court to grant him a new trial.

Enumeration of Error 8: Appellant was denied his right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Strickland v. Washington, 486 U.S. 668 (1984). Prior trial counsel's performance was both deficient and prejudicial in the following respects:

a. Prior trial counsel failed to object to Appellant's absence of 26 bench conferences, in violation of Appellant's right to be present at all critical stages of his trial;

b. Prior trial counsel failed to ensure a complete recordation of Appellant's trial, in particular the 26 unrecorded bench conferences in violation of O.C.G.A. §5-6-41(d);

c. Prior trial counsel did not object to the "presumption of truthfulness" pattern jury charge that had previously been disapproved by this Court 15 years prior to Appellant's trial in Noggle v. State, 256 Ga. 383 (1986).

"To prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that counsel's performance was deficient and that the deficiency so prejudiced defendant that there is a reasonable likelihood that, but for counsel's errors, the outcome of trial would have been different." Domingues v. State, 277 Ga. 373 (2003), citing Strickland v. Washington, 466 U.S. 668 (1984).

a. Prior trial counsel failed to object to Appellant's absence of 26 bench conferences, in violation of Appellant's right to be present at all critical stages of his trial.

Appellant testified at the motion for new trial hearing that his prior trial counsel had only met one time prior to his trial. During this interaction, Appellant was never notified about his right to be present at all stages of the trial, which includes bench trials. Appellant was an 18 year old young man with limited education at the time of his trial. It was beholden upon his prior trial counsel to ensure all his rights are preserved. Given Ms. Rodney failed to object to her client's presence at all stages of the trial and further failed to ensure the record contained all essential aspects of the trial, Ms. Rodney provided Appellant ineffective assistance of counsel.

b. Prior trial counsel failed to ensure a complete recordation of Appellant's trial, in particular the 26 unrecorded bench conferences in violation of O.C.G.A. §5-6-41(d).

Likewise to the above enumeration of error, it was the responsibility of trial counsel, the State and the Trial Court to ensure there was a complete recordation of all aspects of the trial. It is impossible to obtain appellate review when essential parts of the transcripts are missing or unrecorded. Thus, prior trial counsel, Ms. Rodney, has provided deficient performance, which has precluded Appellant a meaningful review of the record for his direct appeal.

c. Prior trial counsel did not object to the "presumption of truthfulness" pattern jury charge that had previously been disapproved by this Court 15 years prior to Appellant's trial in *Noggle v. State*, 256 Ga. 383 (1986).

The Trial Court gave the following jury charge regarding the "Presumption of Truthfulness":

> 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**. If you cannot do so, then you should believe that witness or those witnesses whom you think are most - - whom you think are best entitled to belief. You must determine what testimony you will believe and what testimony you will not believe.

(TVol. 7, pg.s 1622-23) (emphasis added)

This language in essence instructs the jury that they should believe a witness unless it was proven they were not worthy of belief. This ultimately shifts the burden upon the defendant to discredit a witness. The Court in *Noggle* has stated, this "presumption-of-truthfulness charge can be misleading and is of little positive value, we recommend that its use be discontinued." Noggle, 256 Ga. at 383.

It is unknown why prior trial counsel would not object to this language, given the appellate courts have disfavored this language for 25 years prior.

Enumeration of Error 9: Trial Court improperly sentenced Appellant to both counts one and two (malice murder and felony murder respectively), when count two (felony murder) should have been vacated by operation of law.

The jury convicted Appellant of both Count 1, malice murder, and Count 2, felony murder. (R: 547-49) The Trial Court ultimately sentenced Appellant to life in prison as to both murder counts. (R: 539-42) The following comes from Graves v. State, 298 Ga. 551 (2016), in which the Supreme Court concluded that merger was improper under similar circumstances, and described what should have happened.

> The felony murder counts did not merge with the malice murder count, but instead, they were vacated by operation of law because they involved the same victim as the malice murder count. See Cowart v. State, 294 Ga. 333 (2013); McClellan v. State, 274 Ga. 819 (2002). Accordingly, while aggravated assault properly merged with malice murder as a matter of fact, see Culpepper v. State, 289 Ga. 736, 738 (2011), there were no felony murder counts into which the two independent felonies could merge as a matter of law. Malcolm v. State, 263 Ga. 369 (1993)

As such, Count 2, the felony murder charge should have been vacated by operation. Count 3, the aggravated assault charge was properly merged into

Count 1, the malice murder. Appellant therefore requests that this Honorable Court remand the case to the Trial Court to correct an erroneous sentence.

Part 4: CONCLUSION

WHEREFORE APPELLANT JAQUAVIOUS REED humbly prays for the reasons set forth in this brief that this Honorable Court will reverse and vacate his convictions, will reverse his convictions and remand the case for a new trial, and grant him any and all other relief which is just and proper in this case.

Respectfully submitted this **19th** day of **January 2022**.

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IN THE SUPREME COURT OF THE STATE OF GEORGIA

JAQUAVIOUS REED,	)	
	)	
APPELLANT,	)	SUPREME COURT OF GEORGIA
	)	CASE NUMBER: **S22A0530**
	)	
VERSUS	)	
	)	ON APPEAL FROM THE SUPERIOR COURT OF
	)	FULTON COUNTY CASE: 10SC92080
	)	
STATE,	)	
	)	CHARGE: MALICE MURDER
APPELLEE.	)	

CERTIFICATE OF SERVICE

I hereby certify that on the **19th** day of **January 2022**, I served a true copy of this "Brief of Appellant" and enumerations of errors in compliance with Rule 14 by certified mail upon:

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