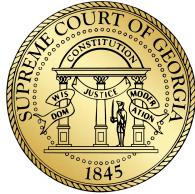


## **APPENDIX A**

Order of Supreme Court of Georgia Denying Certificate of  
Probable Cause to Appeal Denial of Habeas Relief

April 29, 2019



SUPREME COURT OF GEORGIA  
Case No. S19H0103

Atlanta, April 29, 2019

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

**MARCUS JACKSON v. VANCE LAUGHLIN, WARDEN et al.**

**From the Superior Court of Wheeler County.**

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

Trial Court Case No. 17-CV-082

**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.

*Suzi C. Fulton*, Chief Deputy Clerk

## **APPENDIX B**

Final Order of Superior Court of Wheeler County, Georgia

Denying Petition for Writ of Habeas Corpus

July 26, 2018

IN THE SUPERIOR COURT OF WHEELER COUNTY  
STATE OF GEORGIA

2018 JUL 26 AM 10:05

*Carol L. Bragg*  
CLERK SUPERIOR COURT

MARCUS JACKSON, )  
Petitioner, )  
GDC No. 100015912, )  
v. ) Habeas Action  
VANCE LAUGHLIN, Warden, and ) File No. 17CV082  
HOMER BRYSON, Commissioner, )  
Georgia Department of Corrections, )  
Respondents. )  
)

**FINAL ORDER**

Petitioner, MARCUS JACKSON, filed this Application for Writ of Habeas Corpus on September 22, 2017 challenging the validity of his April 16, 2009 Fulton County conviction for murder, felony murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a crime. An evidentiary hearing occurred on April 9, 2018. After reviewing the Petition, the entire record of the case, and applicable law, the Court makes the following findings:

**PROCEDURAL HISTORY**

Petitioner was indicted by the Fulton County grand jury on November 16, 2007 of murder, felony murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony. (HT 156-158). A jury convicted Petitioner on all counts. (HT 403, 405). Petitioner filed a Motion for New Trial on April 20, 2009 alleging:

1. The verdict is contrary to the evidence, and without evidence to support it;
2. The verdict is decidedly and strongly against the weight of the evidence;
3. The verdict is contrary to the law and principles of justice and equity;

4. Whether or not the State proved the defendant's guilt beyond a reasonable doubt, the evidence was nevertheless sufficiently close so as to warrant the Court to exercise its discretion to grant a new trial; and
5. The Court committed error of law warranting the grant of a new trial.

(HT 413-414). Following the appointment of appellate counsel to his case, Petitioner filed an Amendment to Motion for New Trial on September 1, 2011 to include the following grounds:

1. The trial court erred in denying defendant's motion in arrest of judgment for a new trial, due to the fact the jury found the defendant guilty of mutually exclusive verdicts: murder, felony murder, aggravated assault, involuntary manslaughter, and reckless conduct;
2. Defendant's counsel at trial was ineffective in not seeking a curative instruction after Detective Israel testified that the defendant "never talked;"
3. The trial court erred by denying defendant's motion for a mistrial after Detective Israel testified that the defendant "never talked," a point which the court indicated was "certainly a ground for a new trial;"
4. The trial court erred in denying defendant's motion for a directed verdict; and
5. The trial court erred in admitting state's evidence, marked no. 41, 42, 43, and 44.

(HT 420-421). On September 14, 2012, Petitioner filed his Second Amended Motion for New Trial alleging:

1. The State failed to present sufficient evidence to support the verdict in this case. Jackson v. Virginia, 443 U.S. 307 (1979).

(HT 425). On November 7, 2012, the trial court granted Petitioner's motion for new trial and found that the State failed to present sufficient evidence to support the verdict. (HT 430). The trial court subsequently issued an amended order granting Petitioner's motion for new trial. (HT 431). Petitioner moved for a plea in bar based on former jeopardy to dismiss the charges against

Petitioner. (HT 428-429). The State filed a Notice of Appeal on November 14, 2012. (HT 154-155). Petitioner moved to dismiss the Notice of Appeal but the motion to dismiss was denied. (HT 449-450).

On appeal, the State alleged that the trial court erred when it determined that there was no evidence that Petitioner intentionally helped in the commission of the crimes charged because Petitioner had a dispute with the victim. The Supreme Court of Georgia reversed the trial court's grant of Petitioner's motion for new trial, and Petitioner's convictions were affirmed by the Supreme Court of Georgia on September 23, 2013. State v. Jackson, 294 Ga. 9 (2013).

Following this reversal by the Supreme Court of Georgia, Petitioner filed a motion for reconsideration in which he argued that the trial court's order granting the motion for new trial should be vacated rather than reversed and the case remanded to permit the trial court to review the case under the thirteenth juror standard. State v. Jackson, 295 Ga. 825 (2014). The Georgia Supreme Court denied the motion for reconsideration and issued a remittitur to the trial court filed on November 12, 2013. Id. Petitioner filed a "Motion for Ruling Pursuant to O.C.G.A. § 5-5-20 and 5-5-21." Id. The newly assigned judge to the case entered an order filed on November 20, 2013 adopting the judgment of the Supreme Court of Georgia. Id. Nevertheless, the judge who presided over the trial also entered an order dated December 6, 2013 purporting to grant Petitioner's motion for new trial pursuant to O.C.G.A. § 5-5-20 and § 5-5-21. (HT 35-39).

The State appealed from this second purported grant of new trial and the Supreme Court of Georgia reversed. State v. Jackson, 295 Ga. 825. The Supreme Court held that, post-remittitur, Petitioner could not secure a new trial on grounds that were not preserved in the motion subject of the original appeal. Id. The Supreme Court ruled that the trial court was only authorized to adopt the Supreme Court's judgment and to enter an order denying Petitioner's motion for new trial. Id.

Petitioner filed the instant Application for Writ of Habeas Corpus on September 22, 2017 alleging:

1. Appellate counsel rendered ineffective assistance by failing to timely challenge the verdicts of guilty in Petitioner's case on "thirteenth juror" grounds.

The Court held an evidentiary hearing on April 9, 2018 in which appellate counsel testified and was subject to cross-examination.

### **GROUND ONE**

In Ground One, Petitioner alleges that he received ineffective assistance of appellate counsel when appellate counsel failed to timely challenge the verdicts of guilty in Petitioner's case on "thirteenth juror" grounds. Specifically, appellate counsel waived the thirteenth juror claim in favor of the single claim of insufficiency of the evidence under Virginia.

Petitioner was represented by Alixe Steinmetz during his motion for new trial and appeal. (HT 7). Appellate counsel graduated from Duke University and Vanderbilt Law School. (HT 20). She gained admission to the Georgia Bar in 2007. She worked as a public defender in South Carolina and worked in private criminal defense in Georgia for over year before transitioning into the Atlanta Circuit's public defender office. (HT 20).

In the initial motion for new trial, both insufficiency of the evidence and thirteenth juror claims were raised. However, counsel expressly waived and abandoned all other grounds in favor of the insufficiency of the evidence claim. (HT 8-10). Counsel explained that she was under the impression that a sufficiency of the evidence ruling could not be appealed by the State and would result in a final determination of his case whereas the thirteenth juror determination would have been appealable and not a final determination. (HT 10-11, 20-21). Counsel acknowledged that had she known the insufficiency of the evidence claim could be appealed, she would have maintained the thirteenth juror argument. (HT 15). However, appellate counsel testified that she raised the single issue that she believed had the greatest likelihood of resulting in the reversal of Petitioner's conviction. (HT 21).

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the Strickland two-prong test, Petitioner must show that (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment and (2) that this

deficient performance prejudiced the defense thereby depriving Petitioner of a fair trial with a reliable result. To establish that an appellate attorney was ineffective, Petitioner must show that his appellate counsel's decision not to raise a particular issue was an unreasonable decision which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002).

The instant case fails on the first prong of the Strickland analysis. Petitioner has failed to show that appellate counsel's performance was deficient. The determination that counsel rendered ineffective assistance requires that appellate counsel's decision not to raise a particular issue was an unreasonable decision which only an incompetent attorney would make. Petitioner alleges that appellate counsel was ineffective in not pursuing the thirteenth juror issue. Appellate counsel testified at the hearing that she raised insufficiency of the evidence as the single issue that she believed had the greatest likelihood of resulting in the reversal of Petitioner's conviction. (HT 21). However, appellate counsel acknowledged that she pursued this ground in the mistaken belief that the State could not appeal the trial court's grant of a new trial on an insufficiency of the evidence basis. (HT 10-11, 20-21). In fact, the State did appeal the decision and the Georgia Supreme Court reversed.

There is a "strong presumption that counsel's conduct falls within the broad range of reasonable professional conduct" and "hindsight has no place in an assessment of the performance of [...] counsel and a lawyer second-guessing his own performance with the benefit of hindsight has no significance for an ineffective assistance of counsel claim." Green v. State, 291 Ga. 579 (2012); Simpson v. State, 298 Ga. 314 (2016) (even where counsel rejected characterization of his performance as strategic, examination of his entire testimony shows his decisions were, in fact, strategic). Counsel's subjective assessment or explanation for her conduct is not determinative of the issue of the reasonableness of an attorney's 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, n. 7 (2013); Hughley v. State, 330 Ga. App. 786 (2015); *see also*, Harrington v. Richter, 562 U.S. 86

(2011)(finding that objective reasonableness determines the effectiveness of counsel rather than counsel's subjective state of mind); Hartsfield v. State, 294 Ga. 883 (2014).

Here, the Georgia Supreme Court has found that it was a reasonable strategy for Petitioner to only move forward on the single ground of insufficiency of the evidence stating that

Jackson's 'thirteenth juror' theory of relief was initially advanced in his motion for new trial, but relief on that claim would only have gained Petitioner a new trial. It is apparent that Jackson made a strategic choice to waive all other grounds for new trial in favor of advancing only an assertion of legal sufficiency of the evidence because, if that gamble was ultimately successful, his conviction would be reversed and he would not be subject to retrial.

Jackson v. State, 295 Ga. 825 (2014). Appellate counsel testified that her strategy in pursuing the sole issue of insufficiency of the evidence was to obtain a final determination of the case. While she was mistaken in her belief that the issue was not directly appealable by the State, counsel affirmed that she strategically chose to advance Petitioner's strongest claim that would not subject Petitioner to retrial. Rather than pursue multiple grounds which, while potentially successful, would have subjected Petitioner to a retrial, appellate counsel chose to advance the sole issue which, if affirmed on appeal, would have been a final determination of the case. While appellate counsel further testified that she should have pursued the thirteenth juror issue, pursuing the sole insufficiency of the evidence issue was not an unreasonable decision that only an incompetent attorney would make.

The decision to go forward with the single sufficiency of the evidence claim was an objectively reasonable strategy. This is true even if the reason appellate counsel gave for her conduct does not match the reasoning given by the Supreme Court's analysis as to why this constituted reasonable strategy. Petitioner has thus failed to show any error of counsel and is unable to prove the first prong of the Strickland test. In the absence of error by counsel, the Court need not consider Strickland's second prong.

Accordingly, this ground provides no basis for relief.

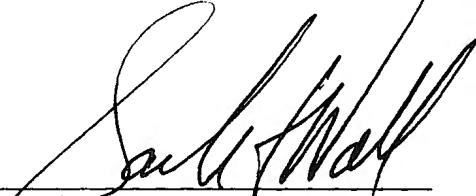
## **CONCLUSION**

WHEREFORE, the instant Petition for Writ of Habeas Corpus **DENIED**.

If Petitioner desires to appeal this Order, Petitioner must file a written application for certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within thirty (30) days from the date of this Order. Petitioner must also file a Notice of Appeal with the Clerk of the Superior Court of Wheeler County within the same thirty (30) day period.

**The Clerk of the Superior Court of Wheeler County is hereby DIRECTED to mail a copy of this Order to Petitioner, Petitioner's Attorney of Record, Respondent, and Special Assistant Attorney General Daniel M. King, Jr.**

SO ORDERED, this 20 day of July, 2018.



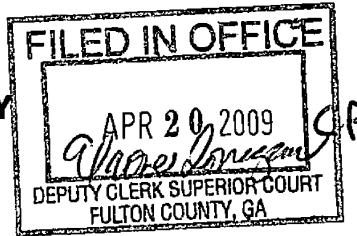
Sarah F. Wall, Chief Judge  
Wheeler County Superior Court

## **APPENDIX C**

Motion for New Trial and Amendments Thereto  
in Trial Court, Superior Court of Fulton County, Georgia

SFO

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA



STATE OF GEORGIA, }  
Plaintiff, }  
v. } Case No.: 07-SC-62498  
MARCUS JACKSON, }  
Defendant, }

**MOTION FOR NEW TRIAL**

Defendant being dissatisfied with the verdict and judgment entered in this case and hereby moves, within 30 days from the entry of judgment that this Court grant him a new trial on, but not limited to, the following grounds:

1.

The verdict is contrary to the evidence, and without evidence to support it.

2.

The verdict is decidedly and strongly against the weight of the evidence.

3.

The verdict is contrary to the law and principles of justice and equity.

4.

Whether or not the State proved the defendant's guilt beyond a reasonable doubt, the evidence was nevertheless sufficiently close so as to warrant the Court to exercise its discretion to grant a new trial.

5.

The Court committed error of law warranting the grant of a new trial.

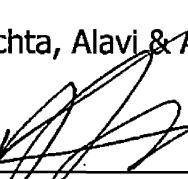
Defendant requests that he be allowed to amend this Motion after the transcript has been prepared, and counsel has had reasonable time to review it.

Defendant further requests that a hearing be held concerning this Motion for New Trial after counsel has had reasonable time to amend it with additional grounds.

Wherefore, Defendant prays this Court inquire as to all grounds asserted in support of this Motion, and to grant the Motion.

Respectfully submitted this 17 day of April, 2009.

Plichta, Alavi & Associates

By: 

Romlin V. Alavi  
For the Firm  
Georgia Bar No. 007182  
Attorney for Defendant

**Plichta, Alavi & Associates  
171 Village Parkway  
Building 8A  
Marietta, Georgia 30067  
770-951-2000  
770-956-0519**

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

STATE OF GEORGIA

v.

Marcus Jackson

\*

\*

\*

\*

\*

INDICTMENT NO.

07SC62498

Judge Shoob

FILED IN OFFICE

SEP 01 2011

DEPUTY CLERK SUPERIOR COURT  
FULTON COUNTY, GA

**AMENDMENT TO MOTION FOR NEW TRIAL**

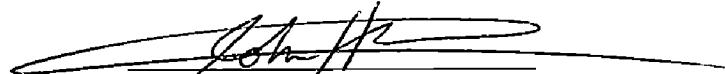
COMES NOW the Defendant, through undersigned counsel, and amends his Motion for New Trial to include the following grounds:

1. Because the trial court erred in denying defendant's motion in arrest of judgment for a new trial, due to the fact the jury found the defendant guilty of mutually exclusive verdicts: murder, felony murder, aggravated assault, involuntary manslaughter, and reckless conduct;
2. Because defendant's counsel at trial was ineffective in not seeking a curative instruction after Detective Israel testified that the defendant "never talked";
3. Because the trial court erred by denying defendant's motion for a mistrial after Detective Israel testified that the defendant "never talked," a point which the court indicated was "certainly a ground for a new trial";
4. Because the trial court erred in denying defendant's motion for a directed verdict;
5. Because the trial court erred in admitting state's evidence, marked no. 41, 42, 43, and 44;

WHEREFORE the Defendant prays that these grounds be inquired of by the Court and that a new trial be granted.

This the 1<sup>st</sup> day of September, 2011.

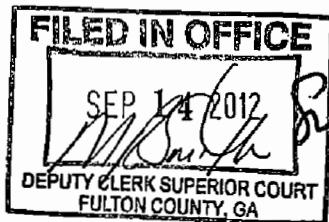
RESPECTFULLY SUBMITTED,



JOHN HABIB, 558832  
Attorney for Defendant

55 Park Place, Suite 1600  
Atlanta, GA 30303  
(404) 612-6914

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA



STATE OF GEORGIA

VS.

Marcus Jackson,  
Defendant

)  
)  
)  
)  
)

INDICTMENT NO. 07SC62498

Judge: Wendy L. Shoob  
ADA: Marc A. Mallon

**SECOND AMENDED MOTION FOR NEW TRIAL**

COMES NOW the Defendant, by and through undersigned counsel, and moves this Court to grant him a new trial in the above-styled case and submits this, his Second Amended Motion for New Trial, and alleges the following:

1.

The State failed to present sufficient evidence to support the verdict in this case.

*Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

WHEREFORE, the Defendant prays that this Honorable Court hold a hearing where he may present argument in support of his motion for new trial, and that after receiving said argument, that this Honorable Court grant him a new trial.

Respectfully submitted this 14<sup>th</sup> day of September, 2012.



Alix E. Steinmetz  
Attorney for Defendant  
Georgia Bar No. 612460

Office of the Public Defender  
Atlanta Judicial Circuit  
55 Park Place NE, Suite 1600  
Atlanta, GA. 30303  
404- 612-7967

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## **APPENDIX D**

Opinion of Supreme Court of Georgia

*State v. Jackson*, 748 S.E.2d 902 (Ga. 2013)

294 Ga. 9  
Supreme Court of Georgia.

[2]

The STATE  
v.  
JACKSON.

No. S13A1213 (A3-030). | Sept. 23, 2013. |  
Reconsideration Denied Nov. 4, 2013.

### Synopsis

**Background:** After jury verdict convicting defendant of murder and related charges, the Superior Court, Fulton County, **Shoob**, J., granted defendant's motion for new trial. State appealed.

**[Holding:]** The Supreme Court, **Benham**, J., held that evidence was sufficient to support murder conviction arising out of shooting, even though defendant was not person who shot victim.

Reversed.

West Headnotes (4)

[1] **Criminal Law**

- ↳ Construction of Evidence
- ↳ **Criminal Law**
- ↳ Reasonable doubt
- ↳ **Criminal Law**
- ↳ Credibility of Witnesses

When evaluating the sufficiency of evidence as a matter of law, the proper standard for review is whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt; the evidence is reviewed in the light most favorable to the verdict, giving deference to the jury's determination on the proper weight and credibility to be given the evidence.

2 Cases that cite this headnote

**Homicide**

- ↳ Parties to offense

Evidence was sufficient to support murder conviction arising out of shooting, even though defendant was not person who shot victim, where witnesses testified that defendant had a dispute with the victim, that defendant had third party drive him to where victim was located, with intent to confront victim, that defendant brought the gun used to kill victim and cocked gun while riding in vehicle to victim's location, defendant pistol-whipped victim with gun, and after victim was shot defendant stood over victim at close range, made statement indicating approval of shooting, and fled from scene. West's [Ga.Code Ann. §§ 16-2-20, 16-2-21](#).

Cases that cite this headnote

[3]

**Criminal Law**

- ↳ Principals, Aiders, Abettors, and Accomplices in General

A person who does not directly commit a crime may be convicted upon proof that the crime was committed and that person was a party to it. West's [Ga.Code Ann. §§ 16-2-20, 16-2-21](#).

Cases that cite this headnote

[4]

**Criminal Law**

- ↳ Intent

Criminal intent may be inferred from a party's presence, companionship, and conduct before and after an offense.

Cases that cite this headnote

## Attorneys and Law Firms

\*\*902 Patricia B. Attaway Burton, Deputy Atty. Gen., Paula Khristian Smith, Sr. Asst. Atty. Gen., [Samuel S. Olens](#), Atty. Gen., [Paul L. Howard, Jr.](#), Dist. Atty., Marc A. Mallon, \*\*903 Christopher Michael Quinn, [Paige Reese Whitaker](#), Asst. Dist. Attys., for appellant.

[Alix Elisabeth Steinmetz](#), Atlanta, for appellee.

## Opinion

[BENHAM](#), Justice.

[<sup>1</sup>] \*9 The State brought this appeal pursuant to [OCGA § 5-7-1\(a\) \(8\)](#), seeking this Court's review of the trial court's grant of a motion for new trial on the ground that the evidence was legally insufficient for the jury to convict appellee Marcus Jackson of murder and related charges for the death of the victim Brandon Horton.<sup>1</sup> Because the \*10 trial court was reviewing the legal sufficiency of the evidence pursuant to [Jackson v. Virginia](#), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and not pursuant to [OCGA § 5-5-21](#), the trial court was not acting as the "thirteenth juror"<sup>2</sup> and could not weigh the evidence or otherwise exercise its own discretion. Rather,

[w]hen evaluating the sufficiency of evidence [as a matter of law], the proper standard for review is whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.... [T]he evidence [is reviewed] in the light most favorable to the verdict, giving deference to the jury's determination on the proper weight and credibility to be given the evidence.

[Manuel v. State](#), 289 Ga. 383, 384(1), 711 S.E.2d 676 (2011) (citation and punctuation omitted). On appeal, this Court applies the same standard of review. See [Colzie v. State](#), 289 Ga. 120, 121–122(1), 710 S.E.2d 115 (2011). Applying this standard, we now reverse.

[<sup>2</sup>] Construed in a light most favorable to the verdict, the evidence shows on August 8, 2007, appellee, who was a high school student, was at a social gathering in Union City. Appellee's cousin alerted appellee that the victim was playing basketball near the cousin's house in Fairburn. Appellee decided he wanted to confront the victim whom appellee believed had been "badmouthing" him and so appellee asked Eskie Christmas, who was in his thirties, to drive him to Fairburn. Christmas agreed and drove appellee and five other people from the social gathering to the Fairburn neighborhood where the victim was playing basketball with three other teenagers. One of

the passengers in Christmas's vehicle testified that during the ride from Union City to Fairburn, appellee pulled out a gun and cocked it. As soon as Christmas parked his SUV, witnesses testified appellee got out of the vehicle, walked over to the victim, and hit the victim with the gun, causing the victim to fall to the ground. Appellee then started beating the unarmed victim. Meanwhile, some of the other people in the SUV exited and commenced scuffling with the victim's friends. Appellee dropped the gun and one of the victim's friends said he tried to recover it but was unable to do so because one of the people from the SUV was holding him back. Ultimately, Christmas picked up the gun and a shot was fired. After firing the gun, witnesses said Christmas threw the gun into a nearby driveway. As the victim lay bleeding to death with a gunshot [wound](#) to the back of the head, a \*11 witness stated appellee said "[N-word], you're done." Appellee, Christmas, and the others returned to the SUV and left the scene. Once back in the vehicle, appellee asked where his gun was and called his cousin and asked him to retrieve the gun. A witness testified that Christmas made a statement to everyone riding in the SUV that he would hurt anyone who talked about the shooting.

At trial, the medical examiner testified the cause of the victim's death was a gunshot to the head. He stated there was stippling on \*\*904 the victim's scalp around the gunshot [wound](#), a finding which indicated the gun was six to twelve inches away from the victim when fired. The firearms expert testified that the gun, despite having been dropped, was in working order. Although the magazine had fallen out of the gun when appellee dropped it, the gun still had a round in its chamber which caused the fatal shot. The firearms expert also said the gun had a heavy trigger pull.<sup>3</sup>

[<sup>3</sup>] [<sup>4</sup>] In its order granting appellee's motion for new trial, the trial court stated, "... there was no evidence that [appellee] directly committed or intentionally helped in the commission of the crimes charged." We disagree with the trial court's conclusion. "A person who does not directly commit a crime may be convicted upon proof that the crime was committed and that person was a party to it." [Powell v. State](#), 291 Ga. 743, 744(1), 733 S.E.2d 294 (2012) (citation and punctuation omitted). See also [OCGA §§ 16-2-20 and 16-2-21](#). Criminal intent may be inferred from a party's "presence, companionship, and conduct before and after the offense...." [Powell](#), at 744–745, 733 S.E.2d 294 (citation omitted). See also [Williams v. State](#), 291 Ga. 501(1)(c), 732 S.E.2d 47 (2012); [Teasley v. State](#), 288 Ga. 468, 469–470, 704 S.E.2d 800 (2011); [Allen v. State](#), 288 Ga. 263(1), 702 S.E.2d 869 (2010); [Cook v. State](#), 314 Ga.App. 289, 290–291, 723 S.E.2d 709 (2012). In this case, the

following conduct by appellee was sufficient for a rational trier of fact to find beyond a reasonable doubt that appellee was a party to the crimes for which he was charged: appellee had a dispute with the victim; appellee had Christmas drive him to where the victim was located with the intent to confront the victim; appellee brought the gun used to kill the victim and cocked the gun while in the vehicle driven by Christmas; appellee pistol-whipped the victim; appellee stood over the victim after Christmas shot him at close range and made a statement indicating his approval of the shooting; and appellee fled from the scene with Christmas, leaving the victim for dead. See *Burgess v. State*, 292 Ga. 821(1), 742 S.E.2d 464 (2013). The \*12 trial court erred when it determined there was no evidence appellee "intentionally helped in the commission of the crimes charged."

#### Footnotes

- <sup>1</sup> The crimes occurred on August 8, 2007. On November 16, 2007, appellee and his co-defendant Eskie Christmas were indicted by a Fulton County grand jury on charges of malice murder, felony murder (aggravated assault), aggravated assault with a deadly weapon, and possession of a firearm during the commission of a crime. Appellee and Christmas were tried together on April 6 through April 9, 2009, and a jury convicted them both on all counts. The trial court denied both of appellee's motions for a directed verdict. After his conviction, appellee moved for a new trial on April 20, 2009, and amended the motion on September 1, 2011, and on September 14, 2012. The trial court conducted a hearing on the motion for new trial, as amended, on September 14 and granted the motion on November 9, 2012, holding there was insufficient evidence as a matter of law to support the verdict.
- <sup>2</sup> See *Ricketts v. Williams*, 242 Ga. 303, 304, 248 S.E.2d 673 (1978).
- <sup>3</sup> Specifically, the firearms expert stated that an average of eleven and a quarter pounds of force was required to be exerted on the trigger to cause the gun to fire.

## **APPENDIX E**

Opinion of Supreme Court of Georgia

*State v. Jackson*, 764 S.E.2d 395 (Ga. 2014)

295 Ga. 825  
Supreme Court of Georgia.

The STATE

v.

JACKSON.

No. S14Ao890.

|

Oct. 6, 2014.

**Synopsis**

**Background:** After defendant was convicted in a jury trial of murder and related charges, the Superior Court, Fulton County, [Wendy Lee Shoob](#), J., granted defendant's motion for new trial. [State appealed. The Supreme Court, 294 Ga. 9, 748 S.E.2d 902](#), reversed. On remand, the Superior Court, granted defendant's motion for a new trial. State appealed.

**[Holding:]** The Supreme Court, [Benham](#), J., held that trial court was not authorized on remand to grant motion for new trial following Supreme Court's reversal of previous grant of new trial.

Reversed.

West Headnotes (4)

**[1] Criminal Law**

 [Mandate and proceedings in lower court](#)

Trial court lacked authority on remand to grant murder defendant's motion for a new trial following Supreme Court's reversal of trial court's previous grant of defendant's motion for new trial; Supreme Court had reversed the trial court's previous order granting a new trial on the sole ground ultimately pursued by the defendant, defendant had expressly waived and abandoned all other grounds for new trial that were initially raised in his motion, and Supreme Court's decision contained no

language directing trial court to take any further action. West's [Ga. Code Ann. § 5-6-10](#).

[Cases that cite this headnote](#)

**[2]**

**Criminal Law**

 [Finality of determination in general](#)

A criminal defendant may not attack his conviction piecemeal by filing successive appeals from the conviction.

[Cases that cite this headnote](#)

**[3]**

**Criminal Law**

 [Successive applications for new trial](#)

A defendant may not file successive motions for new trial on grounds not previously raised where the trial court's grant of his motion for new trial was reversed, thus making the conviction a final judgment.

[Cases that cite this headnote](#)

**[4]**

**Criminal Law**

 [Mandate and proceedings in lower court](#)

For an appellate court opinion to authorize further action by the trial court requires a clear direction, whether express or by necessary implication.

[Cases that cite this headnote](#)

**Attorneys and Law Firms**

**\*\*396** [Paige Reese Whitaker](#), Asst. Dist. Atty., [Paul L. Howard Jr.](#), Dist. Atty., Atlanta, for appellant.

[Alix Elisabeth Steinmetz](#), Atlanta, for appellee.

**Opinion**

[BENHAM](#), Justice.

**\*825** This is the second appearance of this case before this Court. A jury convicted Marcus Jackson on murder and related charges, after which the trial court granted defendant's motion for new trial. This Court reversed, noting that the order granting new trial was entered solely

on the ground of the legal insufficiency of the evidence, and not pursuant to [OCGA § 5–5–21](#) with the trial court acting as the “thirteenth juror.”<sup>1</sup> *State v. Jackson*, 294 Ga. 9, 748 S.E.2d 902 (2013). Jackson filed a motion for reconsideration in which he raised, as one of three grounds for reconsideration, the argument that the trial court’s order should be vacated (not reversed) and the case remanded to allow the trial court to review the case under the thirteenth juror standard. This Court denied the motion for reconsideration and the [\\*826](#) remittitur was filed in the trial court November 12, 2013. Two days later, Jackson filed a “Motion for Ruling Pursuant to [OCGA Sections 5–5–20](#) and [5–5–21](#),” which was submitted to the predecessor trial judge, Fulton County Superior Court Judge Wendy L. Shoob. Apparently Judge Shoob was no longer the assigned judge in the case.<sup>2</sup> Judge Gail S. Tusan, to whom the case appears to have been assigned at least by the time this Court’s earlier judgment was remitted to the trial court, entered an order that the judgment of this Court be made the judgment of the trial court, and that order was filed on November 20, 2013. Nevertheless, Judge Shoob entered an order dated December 6, 2013, purporting to grant Jackson a new trial pursuant to [OCGA §§ 5–5–20](#)<sup>3</sup> and [5–5–21](#). The State filed this appeal. We reverse, finding that jurisdiction was [\\*\\*397](#) lacking for the entry of the post-remittitur order purporting to grant a new trial.

The record reflects that Jackson’s initial motion for new trial was amended to assert five grounds of legal error. On the day of the hearing, however, Jackson filed a second amended motion asserting as its sole ground the sufficiency of the evidence to support the verdict. At the hearing, Jackson confirmed his strategic choice to proceed solely on the claim of legal insufficiency of the evidence, with Jackson’s trial counsel stating he had discussed the motion at length with Jackson and that he and his client were in agreement to go forward “only on [the] sufficiency argument raised in the second amended motion.” Later in the hearing, counsel reiterated the express waiver and abandonment of all other grounds for rehearing. Upon reversing the order granting Jackson’s motion for new trial, this Court entered an order remitting the case to the trial court and directing that the trial court judgment granting the motion for new trial be reversed.

[1] Upon remittitur of an appellate court decision to the trial court, “[t]he decision and direction shall be respected

and carried into full effect in good faith by the court below.” [OCGA § 5–6–10](#). That statutory requirement was honored by the trial court’s November 20, 2013, order making the judgment of this Court the judgment of the trial court. By reversing the trial court’s order granting new trial on the [\\*827](#) sole ground ultimately pursued by Jackson, this Court’s previous opinion effectively held that the trial court should have denied the motion for new trial. All pending issues were thereby resolved and no further disposition of the case by the trial court was authorized.<sup>4</sup> Upon remittitur, the disposition of Jackson’s motion for new trial was final and this Court’s order became the law of the case. See *Shepherd v. Shepherd*, 243 Ga. 253, 253 S.E.2d 696 (1979) (reversing the trial court’s order that effectively reinstated its previous order which had been reversed by this Court in a previous appeal of the case; when the trial court’s decision is reversed without direction, the judgment of the appellate court is final and the trial court has no authority to allow a party to amend a motion, the grant of which was reversed by the appellate court’s previous ruling). Afterwards, the lower court had no jurisdiction to entertain a newly filed motion for new trial seeking to assert grounds that Jackson had affirmatively waived and abandoned.<sup>5</sup> “The only action which that court had authority or power to take was to make the judgment of this [Court] the judgment of the trial court and to enter an order [denying the motion for new trial.]” *Id.* at 254, 253 S.E.2d 696. This is because the judgment of this Court in the earlier appeal “is conclusive of all matters in issue or that might legally have been put in issue.” (Citation and punctuation omitted.) *Akins v. State*, 237 Ga. 826, 827, 229 S.E.2d 645 (1976).

[2] [3] It was too late, post-remittitur, for Jackson to secure a new trial on grounds that were not preserved in the motion that was the subject of the earlier appeal. Just as a criminal defendant may not attack his conviction piecemeal by filing successive appeals from the conviction (see *Grant v. State*, 159 Ga.App. 2, 3, 282 S.E.2d 668 (1981)), likewise, a defendant may not file successive motions for new trial on grounds not previously raised where, as here, the trial court’s grant of his motion for new trial was reversed, thus making the conviction a final judgment. Jackson’s “thirteenth juror” theory of relief was initially advanced in his motion for new trial, but relief on that claim would only have gained Jackson a new trial. It is apparent that Jackson made a strategic choice to waive all other grounds for new trial in favor of advancing only an assertion of legal sufficiency of the [\\*828](#) evidence

because, if that gamble **\*\*398** was ultimately successful, his conviction would be reversed and he would not be subject to retrial. The trial court erred in granting a successive motion for new trial in this case.<sup>6</sup>

[4] For an appellate court opinion to authorize further action by the trial court requires a clear direction, whether express or by necessary implication. See *Schley v. Schofield & Son*, 61 Ga. 528, 532 (1878). As there was no further language in this Court's previous opinion directing the trial court to take further action in this case, it was

authorized only to reverse its grant of Jackson's motion for new trial, thus leaving the conviction intact.

*Judgment reversed.*

All the Justices concur.

**All Citations**

295 Ga. 825, 764 S.E.2d 395

**Footnotes**

- 1 Pursuant to [OCGA § 5-5-21](#): "The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding."
- 2 Although the record does not contain an order reassigning the case, an order executed by the Fulton County Superior Court Magistrate dated October 14, 2013, setting a hearing date for Jackson's request for a bench warrant first appearance hearing, notes that Judge Tusan is the judge to whom the case is assigned. Further, it was Judge Tusan who entered the order dated November 18, 2013, making the judgment of the this Court the judgment of trial court after this Court's remittitur order was filed in the trial court.
- 3 Pursuant to [OCGA § 5-5-20](#): "In any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury."
- 4 Because Jackson expressly waived and abandoned all other grounds for new trial that were initially raised in his motion, this is not a case in which the trial court ruled on only one, but not all, of the grounds asserted in the defendant's motion for new trial so that additional issues raised in the motion remained to be addressed upon reversal and remand of the case. Compare, e.g., *State v. James*, 292 Ga. 440, 442, 738 S.E.2d 601 (2013); *State v. Kelly*, 290 Ga. 29, 34-35(3), 718 S.E.2d 232 (2011).
- 5 Further, assuming this case was officially reassigned to Judge Tusan, Judge Shoob lacked authority to rule on this motion. See [Uniform Superior Court Rule 3.3](#); *Horn v. Shepherd*, 294 Ga. 468(2)(b), 754 S.E.2d 367 (2014).
- 6 The trial court, in support of its conclusion that this Court's reversal of its previous grant of new trial permitted it to consider Jackson's post-remittitur motion, quoted and relied upon the following language from *Strickland & Smith, Inc. v. Williamson*, 281 Ga.App. 784, 785, 637 S.E.2d 170 (2006): "When an appellate court reverses a judgment, the effect is to nullify the judgment below and place the parties in the same position in which they were before judgment." (Citation and punctuation omitted.) *Strickland & Smith* involved a civil case in which the trial court *denied* the defendant's motion for new trial on the issue of damages for lost profits, which ruling was reversed on appeal and the judgment in favor of the plaintiff was set aside. *Id.* On remand, the trial court entered judgment denying plaintiff's claim, and upon a second appeal of the case, this time by the plaintiff, the Court of Appeals again reversed and ruled that because the only relief sought by the defendant was a new trial, upon remand of the case after the first appeal, the posture of the case required the trial court to conduct a new trial.

Likewise, the trial court incorrectly relied upon and misapplied the following language from this Court's opinion in *Wilson v. Wilson*, 279 Ga. 302, 303, 612 S.E.2d 797 (2005): "As a general rule, where there is a judgment of reversal but no express direction of this Court to the lower court, the case stands as reversed, and a new trial must be had on the issues therein raised." In *Wilson*, a divorce case, this Court ruled that its previous opinion holding that the Superior Court of Spalding County committed reversible error in refusing to allow wife's counsel to make a closing argument required, by necessity, a retrial on all issues in the case. Therefore, in an action to modify custody filed in Fulton County Superior Court while the initial appeal was still pending, we reversed that trial court's refusal to dismiss the modification petition even after this Court reversed the final judgment of the Spalding County Superior Court. We held that, even in the absence of specific direction by this Court, the reversal of the Spalding County judgment required retrial on all issues, including the award of child custody. Moreover, we note that the original opinion reversing the Spalding County

court's judgment in the divorce case flagged several issues that would need to be addressed on retrial, thus effectively directing retrial of the case. *Wilson v. Wilson*, 277 Ga. 801(2), (3), and (4), 596 S.E.2d 392 (2004).

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